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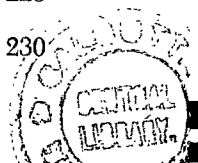
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# THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: THE EIGHTH SESSION (1979)

By Bernard H. Oxman \*

## I. INTRODUCTION

The eighth session of the Third United Nations Conference on the Law of the Sea met in Geneva from March 19 to April 27, 1979. It resumed in New York from July 16 to August 24, 1979, with the first three days devoted to informal consultations.<sup>1</sup>

Intensive substantive work on major outstanding issues began on the first day and continued, almost without interruption, throughout both parts of the session. The fruits of these labors are recorded in a revision of the Informal Composite Negotiating Text (ICNT/Rev.1) issued following the last plenary meeting in Geneva,<sup>2</sup> and in texts contained in reports of the relevant chairmen presented at the close of the session in New York.<sup>3</sup> At

\* Associate Professor of Law, University of Miami School of Law. United States Representative and Vice Chairman of the U.S. delegation, and Chairman of the English Language Group of the Drafting Committee, at the eighth session of the Law of the Sea Conference. The views expressed herein are those of the author and do not necessarily represent the views of the Department of State, the U.S. Government, or the English Language Group or Drafting Committee of the conference.

<sup>1</sup> This article is a sequel to Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1 (1974); *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AJIL 1 (1975);—*The 1975 Geneva Session*, 69 AJIL 763 (1975); and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Session*, 71 AJIL 247 (1977);—*The 1977 New York Sessions*, 72 AJIL 57 (1978);—*The Seventh Session* (1978), 73 AJIL 1 (1979).

<sup>2</sup> UN Doc. A/CONF.62/WP.10/Rev.1 (April 28, 1979), reprinted in 18 ILM 686 (1979). For discussions of the regime of straits under the revised ICNT, see the articles by W. Michael Reisman and John Norton Moore, *infra* at pp. 48 and 77, respectively. Professor Moore's analysis is consistent with the author's recollections and previous articles, and should put the matter to rest.

<sup>3</sup> The *Official Records* of the conference (hereinafter cited as OFF. REC.) for the eighth session were not available at the time of preparation of this article. Reports to the Plenary of the Conference, UN DOC. A/CONF.62/91 (Sept. 19, 1979) and Corr.1 (Oct. 15, 1979), includes all of the following: Report of the General Committee as approved by the Conference, UN Doc. A/CONF.62/88 (Aug. 24, 1979) at 3; Report to the Plenary by the Chairman of the First Committee, UN Doc. A/CONF.62/L.43 (Aug. 29, 1979) at 8; Report on Negotiations held by the Chairman and the Co-ordinators of the Working Group of 21, UN Doc. A/CONF.62/C.1/L.26 (Aug. 21, 1979) at 16 [hereinafter cited as WG21 report] (the chairman and coordinators are respectively the chairman of the First Committee and the chairmen of Negotiating Groups 1 and 2; the Report of the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI is included in App. B at 64); Report to the Plenary Conference by the Chairman of the Second Committee, UN Doc. A/CONF.62/L.42 (Aug. 24, 1979) at 70, including a summary of his report on Negotiating Group 6, Conf. Doc. NG6/19 (Aug. 22, 1979); Report of the Chairman of Negotiating Group 7, Conf. Doc. NG7/45 (Aug.

that time the conference adopted a work plan for the ninth session which anticipates completing the informal proceedings, adopting a formal text, and concluding formal proceedings on that text.<sup>4</sup> The session is scheduled to meet in the spring and summer of 1980.

The difficult, at times painful, and frequently thankless task of confronting and resolving outstanding issues in detail, one by one, in myriad groups, has advanced to a degree not fully appreciated. A "package" that emerges in this way stirs little drama, at least until the combined impact is suddenly perceived, as happened in the closing hours at Geneva when the conference debated the revisions to the ICNT presented by the chairmen. Yet the determination to succeed evident in this work, more than any rhetorical manifestation of that determination, provides the substantive foundation for the optimistic timetable adopted for the ninth session.

The work of the conference has, of course, been cumulative. The eighth session in particular is best understood by reference to the organization of work of the preceding session,<sup>5</sup> where seven negotiating groups on outstanding hardcore issues were appointed.<sup>6</sup> At the seventh session the conference decided that revisions in the Informal Composite Negotiating Text (ICNT)<sup>7</sup>

should not be introduced on the initiative of any single person . . . unless presented to the Plenary and found, from the widespread and substantial support prevailing in Plenary, to offer a substantially improved prospect of a consensus. The revision . . . should be the collective responsibility of the President and the Chairmen of the main committees, acting together as a team headed by the President. The Chairman of the Drafting Committee and the Rapporteur-General should be associated with the team. . . .<sup>8</sup>

While the ICNT was not revised at the seventh session, new texts were presented in reports by the chairmen of the main committees and negotiating groups.<sup>9</sup> Moreover, most of the substantive articles that were not assigned

22, 1979) at 116; Report by the Chairman of the Third Committee, UN Doc. A/CONF.62/L.41 (Aug. 23, 1979) at 75; Report of the President of the Conference on the Work of the Informal Plenary on Final Clauses, UN Doc. A/CONF.62/L.44 (Aug. 27, 1979) at 125; Report by the Chairman of the Group of Legal Experts on Final Clauses, Conf. Doc. FC/16 (Aug. 23, 1979) at 121; Report of the President of the Conference on the Work of the Informal Plenary on the Settlement of Disputes, UN Doc. A/CONF.62/L.45 (Aug. 29, 1979); Report to the Plenary by the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.40 (Aug. 22, 1979) at 81. The documents of the eighth session are reproduced in English in *DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—GENÈVE SESSION 1979* (ed. Platzöder, Munich: Stiftung Wissenschaft und Politik, June 1979, 3 vols., SWP-M212E/I-III),—*NEW YORKER SESSION 1979* (Oct. 1979, 2 vols., SWP-M2291/I-II).

<sup>4</sup> Report of the General Committee, note 3 *supra*, at 3.

<sup>5</sup> UN Doc. A/CONF.62/62 (April 13, 1978), 10 OFF. REC. 6 (1978); see Oxman, *The Seventh Session*, note 1 *supra*, at 3-5.

<sup>6</sup> Text of para. II(5) of UN Doc. A/CONF.62/62, note 5 *supra*, reproduced in 73 AJIL 5 n.14 (1979).

<sup>7</sup> UN Doc. A/CONF.62/WP.10 (July 15, 1977) and Add.1 (July 22, 1977), 8 OFF. REC. 1 (1978), reprinted in 16 ILM 1108 (1977).

<sup>8</sup> UN Doc. A/CONF.62/62, note 5 *supra*, pt. II, paras. 10 and 11.

<sup>9</sup> UN Doc. A/CONF.62/RCNG/1 and 2, 10 OFF. REC. 13, 126 (1978); see Oxman, *The Seventh Session*, note 1 *supra*, 73 AJIL 1 (1979) *passim*.

to negotiating groups were subjected to, and survived, an article-by-article review in the Second Committee.

The eighth session began where the seventh left off, with the benefit of additional reflection and discussion during the intervening period. It based its work on the procedures already agreed, together with additional procedural innovations on matters dealt with by the First Committee. Substantive matters tentatively agreed at the seventh session or before were largely left alone. On deep seabed mining in particular, the conference faced up to, and in effect rejected, attempts either to reopen issues long since settled or to revert to the kind of ideological debate characteristic of its early sessions. This attitude is significant evidence of a desire to do the work necessary to conclude the negotiations, particularly because there were new members on some delegations who might have been sympathetic to reopening issues on which they had not worked themselves.

### *Results of the Session*

The substantive results of the eighth session can be divided into four categories.

First, those texts substantially completed and submitted in the chairmen's reports at the seventh session were incorporated into the ICNT/Rev.1. Thus, the ICNT/Rev.1 generally records the completion of informal negotiations on these matters, subject of course to discussion of drafting questions, including problems of conformity of texts.

This category includes the texts prepared in Negotiating Group 4 on access of landlocked states and "states with special geographical characteristics" to surplus fisheries of the economic zones of their neighbors,<sup>10</sup> the amendments prepared in Negotiating Group 5 on settlement of disputes with respect to fisheries,<sup>11</sup> an amendment on anadromous species prepared by the Second Committee,<sup>12</sup> the substantial amendments prepared by the Third Committee on protection and preservation of the marine environment,<sup>13</sup> and its amendments to Part XIV, "Development and Transfer of Marine Technology,"<sup>14</sup> and a drafting correction proposed by Nego-

<sup>10</sup> ICNT/Rev.1, Arts. 62, 69, and 70. Negotiating Group 4 Reports at 10 OFF. REC. 88-95, 166-67 are discussed by the author in 73 AJIL at pp. 16-18.

<sup>11</sup> ICNT/Rev.1, Arts. 296(1) and (3) and 297. Negotiating Group 5 Reports at 10 OFF. REC. 117-23, 168-69 are discussed by the author in 73 AJIL at pp. 18-19.

<sup>12</sup> ICNT/Rev.1, Art. 66. Second Committee Report, para. 13, 10 OFF. REC. 85-86.

<sup>13</sup> ICNT/Rev.1, Arts. 1(5), 194(5), 210(5), 211(1), (3), (4) and (7), 212(1), 220(2), (5) and (6), 221, 226, 230, and 235. The last of these was prepared at the eighth session. Third Committee Reports on part XII at 10 OFF. REC. 96-115, 173-97 are discussed by the author in 73 AJIL at pp. 24-27.

<sup>14</sup> In his report at the end of the eighth session, the chairman of the Third Committee repeats the conclusion that "the substantive negotiations on Part XII (Protection and Preservation of the Marine Environment) and Part XIV (Development and Transfer of Marine Technology) could be considered as completed." UN Doc. A/CONF.62/L.41, note 3 *supra*. The use of the term "substantive negotiations" presumably reflects the fact that these texts will need to be harmonized with relevant First Committee and

tiating Group 7 regarding delimitation of the territorial sea between states with opposite or adjacent coasts.<sup>15</sup> Internal cross-references in the ICNT/Rev.1 are based on the relevant discussions of the Drafting Committee, which reflect a general trend toward simplicity (e.g., use of "this Convention" rather than "the present Convention").<sup>16</sup>

Second, the ICNT/Rev.1 contains new texts prepared at the eighth session, although based in part on the work of the seventh session. The new texts, while presenting some problems that remain to be addressed, in effect either reflect agreements reached or provide a substantially advanced basis for agreement. This category includes the precise definition of the limits of the continental shelf<sup>17</sup> and new rates of revenue sharing from the continental shelf where it extends beyond 200 miles,<sup>18</sup> as well as the many new provisions in part XI on deep seabed mining beyond the limits of the continental shelf. The acceptability of these texts depends to some extent on additional work on related matters.

Third, the reports issued at the end of the eighth session contain texts that substantially resolve or provide the basis for resolving a number of issues that remain in the ICNT/Rev.1. The most comprehensive is the report dealing with deep seabed mining issues.<sup>19</sup> It includes proposed amendments to the ICNT/Rev.1 on the system of exploration and exploitation, the financial arrangements, the Assembly and Council of the Seabed Authority, and the settlement of disputes. With some important exceptions such as voting in the Council, the new texts mark a substantial advance toward final agreement on deep seabed mining.

The report of the chairman of the Third Committee<sup>20</sup> on marine scientific research also falls in this category. It contains amendments to the ICNT/Rev.1 that resulted from intensive negotiations. While some drafting work remains, issuance of these texts largely brings the difficult substantive negotiations on this matter to a close.

While the report of the Second Committee<sup>21</sup> is cautious, two matters referred to in it belong in the third category. In New York, the committee accepted an amendment negotiated among concerned delegations that was designed to eliminate a problem created by the introduction of an amendment into the ICNT/Rev.1 regarding suspension of innocent passage.<sup>22</sup> An amendment on protection of marine mammals also nego-

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Second Committee texts and perhaps redrafted in some respects by the Drafting Committee, which may not undertake substantive negotiations. Rules of Procedure, rule 53, UN Doc. A/CONF.62/30/Rev.2.

<sup>15</sup> ICNT/Rev.1, Art. 15. See Negotiating Group 7 Report at 10 OFF. REC. 124.

<sup>16</sup> Drafting Committee Informal Paper 1/Rev.1/Add.2 (Aug. 31, 1979); see Report by the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.39 (June 15, 1979), 10 OFF. REC. 199, and ICNT/Rev.1 (explanatory memorandum).

<sup>17</sup> ICNT/Rev.1, Art. 76.

<sup>18</sup> *Id.*, Art. 82(2).

<sup>19</sup> WG21 report, note 3 *supra*.

<sup>20</sup> Note 3 *supra*.

<sup>21</sup> *Ibid.*

<sup>22</sup> ICNT/Rev.1, Art. 25, pursuant to a Belgian proposal designed to deal with artillery exercises of the coastal state, added protection for the safety of ships as a permissible basis for coastal state suspension of innocent passage. The vagueness of this



tiated among concerned delegations would seem to provide a basis for a final draft.<sup>23</sup> Similarly, Negotiating Group 7 reports substantial, albeit conditional, agreement on a text dealing with provisional arrangements and self-restraint pending delimitation of the economic zone or continental shelf between states with opposite or adjacent coasts.<sup>24</sup>

The most speculative use of the word "results" characterizes the fourth, and final, category. With respect to deep seabed mining, negotiations on the interim production limitation continued until the last day. The "results," while not included in a report, would seem to provide a basis for successful completion of consultations among the principal consumers and producers of the metals involved. There was widespread support in the Informal Plenary on Final Clauses for the establishment of a preparatory commission to prepare necessary rules and regulations for deep seabed mining, and to undertake other preparations for the Seabed Authority, perhaps including arrangements for training. With respect to settlement of disputes regarding delimitation between states with opposite or adjacent coasts, the view is now widely held that compulsory conciliation on

language proved objectionable. Previous texts provided for coastal state suspension only where "essential for the protection of its security," based on the rule in the Convention on the Territorial Sea and the Contiguous Zone, 1958, Art. 16, para. 3, 15 UST 1606, TIAS No. 5639, 516 UNTS 205, *reprinted in* 52 AJIL 834 (1958). As a result of consultations, the addition in the ICNT/Rev.1 would be replaced by adding the words "including weapons exercises" of the coastal state after the reference to "its security."

<sup>23</sup> The main purposes of the amendment are to avoid a possible misreading of the text by making clear that Article 65 was never intended to permit *less* restrictive limitation or regulation of the exploitation of marine mammals than would be required by the convention if there were no such article, and to direct particular attention to the need for appropriate organizational arrangements for the protection of cetaceans. Article 65 appears in Part V, "Exclusive Economic Zone," and is incorporated by reference by Article 120 into Part VII, Section 2, "Management and Conservation of the Living Resources of the High Seas." An examination of the amendment, superimposed on the ICNT text of Article 65 by italicizing the additions and adding square brackets around deletions, might prove illuminating in this context:

Nothing in this Part [Convention] restricts the right of a coastal State or *the competence of an international organization*, as appropriate, to prohibit, *limit or regulate* [regulate and limit] the exploitation of marine mammals *more strictly than provided for in this Part*. In this connexion, States shall cooperate [either directly or through appropriate international organizations] with a view to the *conservation* [protection and management] of marine mammals *and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study*.

The main question raised relates to the words, "In this connexion."

It should also be noted that the chairman of the Third Committee reported a consensus on the understanding that the term "marine environment" includes marine life. 10 OFF. REC. 97 (1978). ICNT/Rev.1, Article 192 provides, "States have the obligation to protect and preserve the marine environment."

<sup>24</sup> Note 3 *supra*. The amended text of Articles 74, paragraph 3 and 83, paragraph 3 would read:

Pending agreement as provided for in paragraph 1 the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

some aspects, rather than arbitration or complete elimination of compulsory third-party procedures on all aspects, represents the basis for accommodation both on the merits and because the negotiations on substantive delimitation principles are unlikely to yield a precise, definitive rule.

### *Outstanding Issues*

As a result of these accomplishments, for the first time it is possible to risk suggesting a list of major outstanding substantive issues for the ninth session that is at once precise and comprehensive. Any such list proceeds from the assumption that the hundreds of issues regarded as settled will not be reopened, particularly during formal proceedings, and that remaining "drafting" or "technical" problems—especially on deep seabed mining, marine mammals, and marine scientific research—may take a little time to resolve but will not become major issues. This being said, the list can be divided into groups of issues as follows.

*Deep Seabed Mining.* The United States delegation, in its report on the resumed eighth session, identified the following 13 items as the most important problems remaining in the deep seabed mining provisions:

(1) Article 140: sharing of benefits with "peoples who have not attained full independence or other self-governing status";

(2) Article 150: making clear that the provisions on policies relating to activities in the Area shall be implemented as specifically provided in this part;

(3) Article 151: agreement on the numbers in the production ceiling;

(4) Article 155, paragraph 6: the moratorium;

(5) Article 161: voting in the Council (including Article 162, paragraph 2(j));

(6) Article 188: providing access to commercial arbitration for contractual disputes;

(7) Annex II, Article 4: sponsorship where nationality and control are separated;

(8) Annex II, Article 5 on technology transfer: the Brazil clause,<sup>25</sup> time limits, dispute settlement recourse for third-party owners, and avoidance of warranty implications;

(9) Annex II, Article 7 on selection of applicants: the priority accorded the Enterprise by paragraph 4;

(10) Annex II, Article 10 on joint arrangements: the failure to make clear that they have the same security of tenure as other contracts;

(11) Annex II, Articles 10 or 11 on payments by the Enterprise: the failure to state that the Enterprise is liable for the same payments as the contractors, at least with respect to activities in nonreserved sites;

<sup>25</sup> Annex II, Art. 5, para. 1(e) imposes the same obligation to transfer technology to a developing country applying for a mining contract as the obligation to transfer technology to the Enterprise.

(12) Annex III, Article 10 on financing the Enterprise: the failure to require that payments and guaranties be in convertible currencies; and

(13) Annex III, Article 12: tax immunity for the Enterprise.<sup>26</sup>

*The Continental Shelf.* The remaining issues, while technical, are important to some of those principally concerned with the continental shelf where it extends seaward of 200 miles from the coast:

(1) ridges;

(2) Sri Lanka's proposal for a special approach to determining the extent of its continental margin;

(3) the composition, functions, and procedures of the proposed Commission on Limits of the Continental Shelf, including arrangements in the event the coastal state has difficulty accepting the commission's initial reactions to coastal state charts; and

(4) the exemption of developing coastal state importers from the obligation to contribute revenues derived from continental shelf mineral exploitation beyond 200 miles.

*Delimitation of the Economic Zone and Continental Shelf Between States with Opposite or Adjacent Coasts.* The major issues in this category are:

(1) the substantive principles governing delimitation, including related matters such as the question of the right of a state to file a definitive declaration of interpretation of these principles; and

(2) the scope of compulsory conciliation of delimitation disputes.

In addition to these items, the conference will now focus increasingly on matters customarily left until the end, such as final clauses and drafting, on which problems of substantive and political importance have already arisen. At the eighth session, intensive work on final clauses was undertaken for the first time. It is still too soon to tell how difficult the problems identified by the Informal Plenary on Final Clauses will prove, but some are troublesome and could preclude agreement. They will be addressed later in this article.

The Drafting Committee intensified its labors at the eighth session; it issued its first set of recommendations on harmonization of texts<sup>27</sup> and is preparing a second.<sup>28</sup> The article-by-article review facing the Drafting Committee and its Language Groups is an awesome task that will require a great deal of time and effort, primarily because the provisions of the ICNT were drafted by different people at different times using different models

<sup>26</sup> U.S. Delegation Report, Resumed Eighth Session of the Third United Nations Conference on the Law of the Sea, New York, July 16-August 24, 1979 (unpublished). Other delegations, of course, might add some items to this list of deep seabed mining issues. The French delegation, for example, is unhappy with the text of the so-called antimonopoly clause (Annex I, Art. 6, para. 3(d)). Nevertheless, the U.S. delegation's list is indicative of the nature and extent of the remaining problems.

<sup>27</sup> Note 3 *supra*.

<sup>28</sup> It deals with Drafting Committee Informal Paper 2/Add.1.

under different circumstances. They enjoyed neither the stable and limited composition nor the traditional use of a special rapporteur that characterize the International Law Commission (though at times they copied texts from the 1958 conventions). The most controversial and important provisions were frequently "frozen" the moment even tentative agreement emerged, on the oft-repeated assurance that drafting problems would be handled later.

These problems will be resolved as the conference faces its last and perhaps most severe test: to convert the final informal text to a draft convention and move it through formal debate and formal procedures to final adoption.

To be sure, the eighth session had its diversions. They might usefully be described before the detailed discussion of its substantive work.

### *Deep Seabed Mining Legislation*

On the first day in Geneva and the last day in New York, the chairman of the Group of 77 made a statement that challenged the legality of national legislation authorizing deep seabed mining and argued that its enactment would violate the rule of good faith in negotiations and have an impact beyond the sphere of the conference on economic cooperation between developing and developed countries. The U.S. and other delegations reiterated that the contemplated legislation is consistent with existing international law and compatible with their commitment to the conclusion at the earliest possible time of a generally acceptable law of the sea convention. The arguments were substantially the same as those made during the seventh session.<sup>29</sup>

<sup>29</sup> See Letter of April 25, 1979 prepared by Group of 77's Group of Legal Experts on Legislation, UN Doc. A/CONF.62/77; letter of Aug. 23, 1979 from Chairman of Group of 77, UN Doc. A/CONF.62/89; statement by the Vice Chairman of the U.S. delegation in response, UN Doc. A/CONF.62/93 (Oct. 1, 1979); Oxman, *The Seventh Session*, note 1 *supra*, at 30-38.

The Ministers of Foreign Affairs of the states members of the Group of 77, meeting in New York a month after the end of the 8th session, adopted on September 29 a resolution in which they:

#### 1. *Declare that:*

(a) Any unilateral measures, legislation or agreement restricted to a limited number of States on sea-bed mining are unlawful and violate well-established and imperative rules of international law;

(b) Such unilateral acts will not be recognized by the international community, and that, these acts, being unlawful, will entail international responsibility on the part of States who commit them, and an investor will not have legal security for his investments in activities in pursuance of such acts;

2. *Urge* all States to refrain from taking any unilateral action on sea-bed mining and appeals to them to bring the Third United Nations Conference on the Law of the Sea to a successful and early conclusion.

UN Docs. A/34/611 (Oct. 23, 1979), A/CONF.62/94 (Oct. 19, 1979).

On December 14, 1979, the U.S. Senate passed, and sent to the House of Representatives, a bill regarding deep seabed mining that would not, however, allow commercial recovery to commence before 1982. S. 493 (amendment No. 540), 96th Cong., 1st Sess. (1979), 125 CONG. REC. S18554 (1979). In the 95th Congress, deep seabed

A new element was the all but explicit attitude of some developing country leaders working the hardest to promote an accommodation on deep seabed mining issues that enactment of legislation at this time would be insensitive and could compromise their efforts. On the other hand, withdrawal of support for legislation could be misinterpreted as a lack of determination and could lead to serious miscalculations by others. Failure to deal properly with these competing considerations could cause disruption and delay.

### *Exercise of Rights*

During the meeting in New York, there were news reports that the United States had instructed its forces to exercise the freedoms of the high seas beyond the 3-mile limit of the territorial sea currently recognized by the United States.<sup>30</sup> Various foreign ministries requested immediate clarification, some issuing statements that such a policy was illegal and would violate their sovereignty in broader territorial seas.<sup>31</sup> The Group of Coastal States at the conference—largely dormant since the completion of negotiations on access to fisheries of the economic zone—met on several occasions to consider its response.<sup>32</sup>

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mining legislation was passed by the House of Representatives but was not voted upon by the Senate before adjournment. H.R. 3350, 95th Cong., 2d Sess. (1978), 124 CONG. REC. H7341, H7382 (1978).

<sup>30</sup> See N.Y. Times, Aug. 10, 1979, §A, at 1. Responses of the U.S. Government to inquiries, based on guidance made available to the author, were generally as follows:

Early last year, the Administration undertook a review of international maritime claims and their possible effects on U.S. interests, particularly our interest in maintaining freedom of navigation and overflight. As you know, the United States recognizes only a three-mile territorial sea established from the coast within which any nation may exercise the right of innocent passage. Beyond three miles, we believe that all nations have the right to freely navigate or overfly these high seas. Our review concluded that U.S. interests, and the interests of the international community, are best served by maintaining our long-standing position. It was also recognized that a proliferation of maritime claims which purported to control navigation and overflight beyond three miles might endanger U.S. interests.

The study was concluded in March of this year. Acting on the conclusions of the study, the Departments of State and Defense were directed to insure that U.S. activities on the high seas were fully consistent with our long-standing policy. The Department of Defense was directed to insure that in normal operations they did not operate in a manner which might be construed as an acquiescence in a claim which we do not recognize. They were not, however, ordered to challenge, in an aggressive way, such claims.

The United States has indicated that it could accept a twelve-mile territorial sea, as part of a comprehensive agreement in the Law of the Sea Conference. Our recognition of such a limit is, however, contingent upon acceptance by other nations of the other provisions of the current LOS text relating to the freedoms of navigation and overflight, particularly transit through straits.

<sup>31</sup> See Declarations of Aug. 18, 1979 by the Foreign Ministers of Colombia, Ecuador, Chile and Peru, UN Doc. A/CONF.62/85 (Aug. 22, 1979).

<sup>32</sup> Chaired by Mexico, the Group of Coastal States includes most of the delegations of major coastal states except, in general, those that are major maritime powers or members of the Group of Landlocked and Geographically Disadvantaged States. As with similar groups, the criteria for membership are flexible, participation in meetings varies, and no attempt is made to discipline members.

During the last week of the session, the Group of Coastal States declared, in part:

The Group of Coastal States noted with surprise and concern recent media reports that the Government of the United States of America had "ordered its Navy and Air Force to undertake a policy of deliberately sending ships and planes into or over the disputed waters of nations that claim a territorial limit of more than three miles."

In the view of the Group of Coastal States such a policy, which in its essentials has been confirmed by officials of the United States Government, is highly regrettable and unacceptable being contrary to customary international law, whereby a great majority of States exercise full sovereignty in their territorial seas up to a limit of 12 nautical miles, subject to the right of innocent passage. That policy is also inconsistent with the prevailing understanding at the United Nations Conference on the Law of the Sea which has recognized the validity of such a practice.

The Group has taken note of the clarification which was later made by officials of the United States Government to the effect that there has been no order to challenge in an aggressive way the claims of other nations. However, the Group of Coastal States considers the statement that the regime of high seas commences beyond three miles is clearly an anachronism.

The Group reaffirms its determination to continue working towards the early adoption of a generally acceptable comprehensive Convention on the Law of the Sea and, in the meantime, expresses its hope that every State will refrain from undertaking any actions that may adversely affect its relations with other States or the success of the conference.<sup>33</sup>

The United States made the following response:

It is both surprising and distressing that distorted press reports should have caused such a stir at the Law of the Sea Conference, where the views of the United States with respect to navigation and overflight have long been well known to all participants. Press reports notwithstanding, those views have not changed. Activities in the oceans by the United States are fully in keeping with its long-standing policy and with international law, which recognizes that rights which are not consistently maintained will ultimately be lost.

At the same time, it remains the firm position of the United States that a comprehensive Law of the Sea Treaty offers by far the best, and perhaps the last, opportunity to establish a universally agreed and conflict-free regime governing all uses of the world's oceans and their resources. We have indicated that, as part of such an agreement, we could accept a 12-mile territorial sea coupled with transit passage of straits used for international navigation, all within the context of the overall package deal. In this regard, we note that the Group of Coastal States reaffirms its determination to continue working towards the early adoption of a generally accepted comprehensive Convention on the Law of the Sea.

<sup>33</sup> UN Docs. A/CONF.62/90, A/CONF.62/SR.118 (provisional) (Aug. 30, 1979), at 3.

Let us not be diverted from our shared goal by debate over the very differences in national regimes that compelled our governments to enter into negotiations in the first place.<sup>34</sup>

Statements criticizing the U.S. position were made by Angola, Argentina, Brazil, China, Colombia, Costa Rica, Ecuador, El Salvador, Peru, the Philippines, Romania, and Vietnam.<sup>35</sup> The USSR said the Group of Coastal States was "justified in its anxiety, to which the Soviet delegation was sympathetic," but distinguished between 12-mile and 200-mile claims.<sup>36</sup> The Soviet expression of regret that the United States had not refuted or denied the press reports<sup>37</sup> illustrates the extent to which political temptations may compromise substantive positions. Along with the other statements, it should be a warning to those who, in preference to a treaty, would rely on the major powers to make and enforce the law.

## II. DEEP SEABED MINING

One of the procedural innovations at the eighth session was the attempt to form a small working group to negotiate on various outstanding deep seabed mining matters. As has so often happened, what was supposed to be a "small" group of 21, composed of ten developing countries, ten industrialized states, and China, was soon expanded to include alternates and attracted large numbers of observers. Accordingly, by the time of the New York meeting, the Working Group of 21 (WG21) had evolved into a general coordinating mechanism in which the chairman of the First Committee was associated with the chairmen of Negotiating Groups 1 and 2, and which also included the Group of Legal Experts on Settlement of (seabed) Disputes. In addition, having successfully completed his work as chairman of Negotiating Group 4, Ambassador Nandan of Fiji was requested to chair a group of consumers and land-based producers working on the question of production limitations.

It may be helpful to view many of the new texts on deep seabed mining as dealing with three types of problems:

(1) the need for considerable specificity in order to allay fears that the Seabed Authority, intentionally or otherwise, may use its discretion in ways that are discriminatory, that discourage mining by states or their nationals (or for that matter by the Enterprise), or that otherwise prejudice consumer interests (or land-based producer interests);

(2) the need to ensure that specific treaty provisions establish requirements that do not discourage seabed mining (or mining on land) and are accordingly based on reasonable projections of alternative economic possibilities; and

(3) the need to ensure that the powers of the Seabed Authority are exercised in a manner that reflects the desires not only of the majority but of the major economic interests at stake, particularly those of consumers, seabed producers, and land-based producers.

<sup>34</sup> UN Docs. A/CONF.62/92 (Oct. 1, 1979), A/CONF.62/SR.118 (provisional) (Aug. 30, 1979), at 4.

<sup>35</sup> UN Doc. A/CONF.62/SR.118 (provisional) (Aug. 30, 1979), at 5-8.

<sup>36</sup> *Id.* at 6-7.

<sup>37</sup> *Ibid.*

*Mining Conditions*

To deal with the first problem, both the procedural and substantive requirements for obtaining a mining contract and operating under it must be specified precisely or within precise limits, or in some cases on the basis of reasonably precise criteria. One aspect of the need for precision is perhaps best understood by noting that if the relevant requirement is a prerequisite to mining, voting power alone cannot solve the problem. Major consumers and seabed producers can hope to have no greater assured voting power in the Authority than the reasonable prospect of preventing adverse decisions. They will be unable to impose positive decisions. The solution to the risk of inaction or deadlock is to establish the precise conditions for mining in advance: in the treaty and in the initial rules and regulations to be drafted by the preparatory commission.

The very nature of the problem of specificity made necessary a painstaking review of every provision of part XI and Annexes II and III. It accounts for most of the changes made in the ICNT/Rev. 1 and proposed in the report of the Working Group of 21.<sup>38</sup>

Those changes would be capped by the text suggested for Article 6, paragraph 3 of Annex II in the WG21 report. Under this provision, proposed plans of work of prospective miners are dealt with in the order in which they are received, and are subject to inquiry as to their compliance with terms of the convention and the rules, regulations, and procedures of the Authority. As soon as the inquiry is completed, "the Authority shall approve such plans of work, provided that they conform to the uniform and nondiscriminatory requirements established by the rules, regulations and procedures of the Authority," subject only to itemized exceptions. This provision applies to all organs of the Authority, including the Council. The itemized exceptions relate to specific limitations in the convention: namely, when the proposed area is included in a previously submitted plan of work, when the proposed area has been disapproved for exploitation on the grounds of serious harm to a unique environment, when selection among different applicants will be necessary because approval of all plans of work submitted during the particular period would exceed the production limitation, or when the proposed plan of work has been submitted or sponsored by a state that would thereby exceed the specified antimonopoly limits. While factual evaluation may be necessary to ascertain compliance with the specified requirements, the act of approving a plan of work is not discretionary.

The need for specificity also accounts in part for the second problem enumerated above. To the extent that quantitative standards and limitations are made specific, there must be reasonable assurance that they are consistent with alternative economic projections of reasonable probability. These requirements explain the prodigious detail of the texts on financial obligations of miners and the complexity of the interim production limitation. Preparation of these provisions poses a substantial, if not unique,

<sup>38</sup> Note 3 *supra*.



TABLE I

## RATES OF PAYMENT FOR DEEP-SEABED MINING OPERATIONS

Return on Investment	First Period of Commercial Production	Second Period of Commercial Production
Rates of Payment		
Greater than 0%, but less than 10%	35 %	40%
Equal to or greater than 10%, but less than 20%	42.5%	50%
Equal to or greater than 20%	50 %	70%

challenge to unite the disciplines of diplomacy, law, and economics in a group expert enough, small enough, but representative enough to negotiate results that can survive scrutiny by the conference.

#### *Financial Arrangements*

The texts contained in the WG21 report<sup>39</sup> would permit a contractor to choose a mixed system under which he would make both payments proportional to production<sup>40</sup> and payments proportional to profits, at rates adjusted to reflect alternative hypotheses of low, average, and high profitability. Relying generally on the ratio of the miner's development costs in the mining sector to his total development costs, the texts attribute to deep seabed operations a minimum of 25 percent of the net proceeds of a fully integrated three-metal project (nickel, copper, and cobalt). They establish two rates of payment for each incremental part of the attributable net proceeds, as shown in table I.

The second period begins when the contractor recovers his total development costs as "cash surplus," including interest at 10 percent per annum on that portion of his development costs not recovered by his cash surplus.

Thus, the Authority would share very handsomely in the proceeds of a highly efficient and profitable operation—a factor that should help alleviate concerns of both developing and industrialized countries. Estimated payments from a mine site over 20 years range from \$258 million to \$1,964 million.<sup>41</sup> While many variables are involved, the differences in practice may still be substantial enough to persuade developing countries in the Authority

<sup>39</sup> WG21 report, note 3 *supra*, App. A, text of Ann. II, Art. 12.

<sup>40</sup> The production charge would be 2% per annum, but would rise to 4% in any year in the second period of commercial production in which the return on investment is at least 15%. The contractor would pay either the production charge or an annual fixed fee of \$1 million, whichever is greater.

<sup>41</sup> WG21 report, note 3 *supra*, at 22 (added by UN Doc. A/CONF.62/C.1/L.26/Corr.1 (Aug. 22, 1979)).

of the desirability of promoting the efficiency of seabed miners and avoiding regulations that discourage or restrain efficiency. Even if they are only partly persuaded, this could be the incentive for a more general interest in promoting economic efficiency by representatives of developing countries whose interests as consumers alone have proved to be insufficient incentive. The economic importance of such an evolution, of course, transcends deep seabed mining alone. Other things being equal, an experiment on a relatively modest scale that gives developing countries a direct financial stake in the profits derived from efficiency may have much to commend it at this time.

These are, however, considerations for the future. The reluctance of developing countries to accept lower financial obligations for miners, particularly in early or less profitable years, was related directly to the developing countries' desire to ensure that the Enterprise has enough money to commence mining quickly, either on its own or as a substantial joint venture partner. The more apparent the desires of industrial states to avoid a heavy "front-end load" on the financial obligations of miners and to insulate their right to obtain a contract from vague requirements of support for the Enterprise, the greater the concerns expressed by developing countries about the financial capacity of the Enterprise to go into business.

Thus, the text proposed in the WG21 report<sup>42</sup> would require that the Enterprise be assured of the funds necessary to explore and exploit one mine site and to transport, process, and market the metals recovered from that site. The amount in question would be determined by the Assembly on the recommendation of the Council, which, in turn, would be advised by the Governing Board of the Enterprise.<sup>43</sup> States parties would be required to make available to the Enterprise one-half of the sum in the form of long-term, interest-free loans. The other half would be borrowed by the Enterprise on commercial markets, but the loans would be guaranteed by the states parties. While repayment of the commercial loans would take priority over repayment of the government loans, the text does not spell out details of the latter, merely specifying that a schedule of repayment shall be adopted by the Assembly on the recommendation of the Governing Board of the Enterprise.

Current estimates of the cost of developing a mine site vary from \$750 million to over \$1,100 million. The obligations of states parties would be apportioned among them in accordance with the normal United Nations scale of assessments. For example, under the current level of assessments the United States would be expected to provide 25 percent of the government loans and to guarantee 25 percent of the commercial loans. Since the main creditor states will be a small group, it is appropriate that a balanced organ of the Authority responsive to their interests, as well as to the interests of the debtor, deal with such matters. The Council of the Au-

<sup>42</sup> WG21 report, note 3 *supra*, App. A, amendments to Ann. III, Art. 10.

<sup>43</sup> Under ICNT/Rev.1, Annex III, Article 5, the Governing Board of the Enterprise would consist of "15 qualified members" elected by the Assembly of the Authority "based on the principle of equitable geographical representation."

thority might satisfy this need, while the Assembly and the Governing Board of the Enterprise would not. Accordingly, further work on these problems can be anticipated.

### *The Assembly and the Council*

The third problem, namely, the need to ensure protection for the major economic interests at stake, was the subject of particularly intensive consideration in New York after the issuance of the ICNT/Rev.1. The negotiations have generally proceeded on the assumption that such protection would be afforded in a Council of limited size whose composition and voting patterns were designed to balance and reflect the various interests. This approach, however, raises questions about the allocation of powers and functions to other organs of the Authority where such protection is not afforded, in particular the Assembly.

The texts in the WG21 report reflect substantial progress on these questions. They avoid any implication of broad implied powers in any organ by specifying that the powers and functions of the Authority are those "expressly conferred upon it by" the convention and only include "such incidental powers, consistent with the provisions of this Convention, as are implicit in and necessary for the performance of these powers and functions with respect to activities in the Area."<sup>44</sup> In addition, a new provision requires each principal organ of the Authority, in exercising its powers and functions, to "avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ."<sup>45</sup> While the developing countries refused to eliminate the term "supreme organ," it was possible to elaborate on its use by changing the provision in question to read, the "Assembly, as the sole organ of the Authority consisting of all the members, shall be considered the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided in this Part."<sup>46</sup>

In a similar vein, the text proposed by the chairman of the Group of Legal Experts on settlement of disputes would provide for selection of the 11 members of the Seabed Disputes Chamber by the Law of the Sea Tribunal itself, rather than by the Assembly of the Seabed Authority. The Assembly could make recommendations of a general character with regard to criteria for selection, it being understood that these would be guidelines only and would not relate to specific membership.<sup>47</sup>

One problem regarding the relationship between the Council and the Assembly is that the confusion in the provisions concerning the adoption of rules, regulations, and procedures has not been eliminated. There are several different provisions on this matter that could usefully be united.<sup>48</sup>

<sup>44</sup> WG21 report, note 3 *supra*, App. A, Art. 157.

<sup>45</sup> *Id.*, Art. 158.

<sup>46</sup> *Id.*, Art. 160.

<sup>47</sup> *Id.*, amendment to Ann. V, Art. 36.

<sup>48</sup> ICNT/Rev.1, Art. 160(2)(f), (j), and (n) and Art. 162(2)(n) and (p).

The most precise of them (Article 160, paragraph 2(n) and Article 162, paragraph 2(n)), refer to each other and would provide a sound basis for consolidation.<sup>49</sup>

Discussion of the voting question centered on a so-called "two-tier" approach to substantive issues in the Council. With respect to specified issues for which the special interests at stake need relatively less protection, a decision would require a two-thirds majority of those present and voting, including an absolute majority of the members of the Council. With respect to all other substantive matters, the requisite vote would be a two-thirds majority of those present and voting, but only if a fixed number of negative votes were not cast. Although this proposal is contained in the WG21 report,<sup>50</sup> the United States and other Western delegations had already indicated that they could not support it in the absence of a satisfactory blocking number. They could accept the number 5 for this purpose, while developing countries' "compromise" suggestions generally ranged from 7 to 9. Meanwhile, the Soviet delegation continued to support the voting approach contained in the ICNT, ignoring the fact that it had already been completely rejected as a basis for agreement. Therefore, as a practical matter, a basis for consensus on the key problem of voting has thus far eluded the conference.

In connection with agreement on a satisfactory blocking number, the voting proposal in WG21 would eliminate the provision in the ICNT/Rev.1 that a plan of work would be deemed to be approved by the Council unless disapproved within 60 days of its submission by the Technical Commission.<sup>51</sup> The new text<sup>52</sup> would require the Council to act on a plan of work within 60 days of its submission. The plan would be deemed to be approved unless a proposal for its approval or disapproval had been voted upon within that 60-day period. Developing countries, in pressing for this change, argued that the ICNT rule could result in the approval of a plan of work even if the commission's recommendation and a majority vote of the Council were opposed to it. The proposed change in the text, however, goes much further than is necessary to deal with this point, particularly since the approval of a plan of work is not a discretionary function.<sup>53</sup>

<sup>49</sup> Given the technical and legally binding character of the rules, regulations, and procedures, the author would note his long-held preference for their submission by the Council to governments, coupled with a time limit for disapproval by a specified number of parties, as in the ICAO and 1973 IMCO Conventions, rather than (or perhaps after) submission to the Assembly. An approach such as that taken in the 1973 Marine Pollution Convention, which provides special protection for interested states in the entry into force procedure for technical regulatory changes, could be a basis for helpful protections to supplement those provided by the composition and voting rules of the Council. Convention on International Civil Aviation, 1944, 61 Stat. 1180, TIAS No. 1591, 3 Bevans 944, 15 UNTS 295; International Convention for the Prevention of Pollution from Ships, 1973, IMCO Doc. MP/CONF.WP.35, *reprinted in* 12 ILM 1319 (1973).

<sup>50</sup> WG21 report, note 3 *supra*, App. A, amendments to Art. 161.

<sup>51</sup> Art. 162(2)(j).

<sup>52</sup> WG21 report, note 3 *supra*, App. A, amendment to Art. 162(2)(j).

<sup>53</sup> Of course, the substantive provisions regarding approval of contracts that have already been discussed, including Annex II, Article 6, are also relevant to this problem,

The question of voting is also related to the question of composition of the Council. A variety of proposals on the matter will have to be considered at the next session, including one by the United States that the overall membership of the Council represent at least 50 percent of world production and 50 percent of world consumption of the categories of minerals that are produced from the deep seabeds.<sup>54</sup>

### *Settlement of Disputes*

The work done by the Group of Legal Experts on Settlement of Disputes regarding the deep seabeds is reflected both in the ICNT/Rev.1 and in the WG21 report. Among the interesting new provisions are amendments to Article 168 that provide for redress, including the possibility of dismissal, against staff members of the Authority who disclose any proprietary data or confidential information of commercial value. The Authority is required, at the request of an affected party, to submit the complaint against the staff member concerned "to an appropriate tribunal," which presumably could include a special administrative tribunal established by the Authority. The Secretary-General of the Authority is required to dismiss the staff member concerned if the tribunal so recommends.<sup>55</sup>

The Group of Legal Experts devoted a great deal of time to the question of jurisdiction of the Seabed Disputes Chamber. The ICNT/Rev.1 reflects the view that a contractor may elect commercial arbitration rather than the Seabed Disputes Chamber for disputes arising under a contract, but the provision requires clarification.<sup>56</sup>

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as are important dispute settlement questions such as the nature of the tribunal and the scope of review.

<sup>54</sup> While the effect of an existing proposal in Articles 161(1)(a) and (b) of the ICNT/Rev.1 that amounts to a guaranteed seat for the Soviet Union and a Soviet ally among the largest seabed mining countries and consumers is mainly psychological, and by no means unflattering to Western technology, the provision is politically unpopular and might become an issue.

<sup>55</sup> While the problem of protecting the confidentiality of commercial information is dealt with in the same provision as problems of misconduct generally, its purpose is at least as much the direct protection of state and private property as protection of the Authority or its internal administration. Dismissal may be an inadequate deterrent, for example, when the employee is planning to leave or has left. The provision does not deal with the allocation of criminal or civil jurisdiction among the states concerned. Short of universal jurisdiction, jurisdiction to try or hear a case against the staff member for unlawful disclosure might exist in the state of his nationality, in the state affected by the violation, or in the state in which the violation occurred. This jurisdictional approach is consistent with that of the ICNT/Rev.1 to questions such as pirate broadcasting and pollution. See Arts. 109, 142, 216, 217, 218, 220, and 221. A violation of the confidentiality requirements of the convention by a staff member might not be an act performed in the exercise of his functions for the purpose of immunity from legal process under Article 181. Even if it were such an act, the substance of the new provision in the WG21 report would seem to preclude a claim of immunity or require its waiver in appropriate cases. Moreover, the WG21 report's amendment to Annex II, Article 21 makes clear that the Authority would be liable for violation of the confidentiality requirement by the Secretary-General and the staff.

<sup>56</sup> ICNT/Rev.1, Art. 188. This clarification might perhaps include harmonization with the special provision on arbitration regarding financial terms of a contract found

The question whether disputes over deep seabed mining involving, or at least between, states parties should be subject to the mandatory jurisdiction of the Seabed Disputes Chamber, or to the same choice of procedures (including arbitration) enjoyed with respect to other disputes under the convention,<sup>57</sup> is approaching resolution on the basis of permitting the formation of a special chamber of the Law of the Sea Tribunal or an ad hoc chamber of the Seabed Disputes Chamber.<sup>58</sup>

One of the most important issues relating to the proposed Seabed Authority concerns fears that its organs may exceed or misuse their powers in violation of the convention. This issue poses classic questions of judicial review dealt with in the constitutional and administrative law of many countries. There were few problems with the principle of judicial review of administrative acts, as such review is common in municipal law. The difficulty arose over the exercise of discretionary powers to adopt rules, regulations, and procedures regarding activities in the Area, the essence of the regulatory or quasi-legislative functions of the Authority. These decisions require the concurrence of both the Council and the Assembly.

The solution proposed is to prohibit the tribunal from substituting its own discretion for that of the Authority, and from making any general pronouncement on the validity of a rule, regulation, or procedure or on its conformity with the convention. On the other hand, it can determine that the application of a rule, regulation, or procedure in a particular case would conflict with the obligations of one of the parties (*e.g.*, the Authority) under the convention or a contract, and it can consider claims concerning lack of competence or misuse of power, as well as claims for damages or other remedies for failure to comply with the convention or a contractual obligation.<sup>59</sup>

Article 295 repeats the traditional rule in the Statute of the International Court of Justice that a decision has no binding force except between the

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in Annex II, Article 12, paragraph 15. It should also be noted that Annex II, Article 5, paragraph 2 contains elaborate conciliation and arbitration provisions regarding the miner's contractual undertaking to make technology available to the Enterprise "on fair and reasonable commercial terms and conditions." The specificity of the contract, coupled with its required guarantee of "security of tenure" (Art. 156, para. 6 and Ann. II, Art. 15), supply the legal foundation for arbitral protection of contractual expectations against "public law" intrusions. See arbitral award between Texaco Overseas Petroleum Co./California Asiatic Oil Co. and Libya, *reprinted in* 17 ILM 3 (1978) and discussed generally *infra* at p. 134.

<sup>57</sup> See ICNT/Rev.1, Art. 287.

<sup>58</sup> WG21 report, note 3 *supra*, App. A, Art. 188. The underlying concept is that the selection by the parties of 3 judges from a larger number approximates, or at least accommodates, the views of those favoring arbitration. Submission of the dispute to the special chamber of the Law of the Sea Tribunal would require the assent of both parties, while submission to the ad hoc chamber of the Seabed Disputes Chamber would be mandatory if any party requests it. Only the former could include nationals of the parties. Compare ICNT/Rev.1, Ann. V, Arts. 15 and 17 with the proposed Ann. V, Art. 36 bis in the WG21 report, App. A.

<sup>59</sup> ICNT/Rev.1, Art. 190.

parties and in respect to that particular dispute.<sup>60</sup> In this light, the distinction between jurisdiction to declare a regulation invalid and jurisdiction to declare its application in that case unlawful might withstand scrutiny, if Article 295 applies to decisions against the Authority at all. What must be noted is that under Article 152, the Authority is required to avoid discrimination in the exercise of its powers and functions.

A general substantive prohibition on discrimination among members would seem to be implicit in the law governing regulatory actions of international organizations and is explicit in the proposed law of the sea convention. When the Authority loses a case, it must adjust its subsequent treatment of similarly situated entities in order to avoid discrimination. Moreover, a court will not wish to render inconsistent decisions if it thereby puts itself in the position of requiring the Authority either to violate its nondiscrimination obligation or to readjust its regulations frequently.<sup>61</sup>

### III. THE CONTINENTAL SHELF

At the end of the seventh session, two competing formulas for defining the outer limit of the continental shelf where it extends beyond 200 miles from the coast were under consideration.<sup>62</sup> The so-called Irish formula provided for alternative criteria of distance from the foot of the continental slope or thickness of sediment in relation to the distance from the foot of the continental slope.<sup>63</sup> The Soviet formula provided for a fixed distance from shore of 300 miles from the coast (baseline) as the maximum permissible limit for the continental margin where it extends beyond 200 miles.<sup>64</sup> In addition, at least some Arab countries maintained a formal reservation regarding any coastal state jurisdiction over the continental shelf beyond 200 miles.<sup>65</sup>

#### *The Outer Limit*

The idea of combining the Irish and Soviet formulas occurred naturally enough. The basis for any such combination would be the following points:

<sup>60</sup> Art. 59, Statute of the ICJ.

<sup>61</sup> This would be true whether or not *res judicata* and collateral estoppel are technically available. The technical point would be one of offensive use of collateral estoppel by a stranger to the earlier case against the party defeated in the earlier case. This practice recently received the qualified approval of the Supreme Court of the United States, despite the absence of "mutuality" (i.e., the party asserting collateral estoppel would not have been bound or estopped by the earlier judgment). *Parklane Hosiery Co. v. Shore*, 99 S.Ct. 645 (1979). As to the offensive use of collateral estoppel on a question of law, it might be observed that the jurisprudence of common law jurisdictions would tend to be colored by the doctrine of *stare decisis*, while the jurisprudence of many administrative courts in civil law jurisdictions (among others) in analogous situations would tend to be colored by their power to address questions of validity of regulations directly.

<sup>62</sup> These are discussed by the author in 73 AJIL (1979) at pp. 19-22.

<sup>63</sup> Conf. Doc. NG6/1 (1978), reproduced in part in 73 AJIL 19 n.59.

<sup>64</sup> C.2/Informal Meeting/14 (1978), reproduced in part in 73 AJIL 20 n.61.

<sup>65</sup> Conf. Doc. NG6/2 (1978).

(1) The continental shelf extends to a defined outer edge of the continental margin or, irrespective of the geological nature of the seabed, to 200 miles from the coast (baseline).

(2) The continental margin is the natural prolongation of the land territory of the coastal state; it consists of the seabed and subsoil of the shelf, the slope, and the rise, and does not include the deep ocean floor or its subsoil.

(3) The Irish formula is a reasonable means for avoiding a "last grain of sand" misinterpretation of what is meant by the continental rise. It defines the outer edge of the continental margin by joining fixed points where the thickness of sedimentary rock is at least 1 percent of the shortest distance from such points to the foot of the continental slope or, alternatively, by joining fixed points that are not more than 60 miles from the foot of the continental slope.

(4) Notwithstanding the criteria of the Irish formula, there would be a maximum limit for the continental shelf applicable only where the outer edge of the continental margin, as determined under the Irish formula, would otherwise extend beyond that limit.

The problem in dealing with the last point is that any cut-off expressed solely in terms of distance from the shore would have to be considerably greater than the 300 miles originally proposed by the Soviet Union in order to include certain areas important to some broad-margin states. Accordingly, the idea emerged of alternative criteria for the cut-off, one expressed in terms of distance from the coast, and the other expressed in terms of distance from a readily identifiable seabed feature, in this case a specified isobath (depth contour).<sup>66</sup>

On the basis of broad negotiations along these lines, the chairman of the Second Committee and Negotiating Group 6 proposed a text that became Article 76 of the ICNT/Rev.1. For determining the cut-off, the chairman selected alternative criteria of 350 nautical miles from the coast (baseline) or 100 nautical miles from the 2,500-meter isobath, whichever is further seaward. Thus, the outer *limit* of the continental *shelf* (the area of the seabed and subsoil over which the coastal state exercises sovereign rights for the purpose of exploration and exploitation of natural resources) is the outer *edge* of the continental *margin* as defined under the Irish formula, except that:

(1) the continental shelf extends up to a distance of 200 nautical miles from the coast (baseline), even if the outer edge of the continental margin is at a lesser distance from the coast; and

(2) the fixed points defining the outer limit of the continental shelf may not exceed 350 nautical miles from the coast (baseline) or 100 nautical miles from the 2,500-meter isobath, whichever is further seaward.

<sup>66</sup> So stylized was the relationship between the opposing sides that for a considerable period, to symbolize its emergence from the center of the table rather than from any delegation, and perhaps to suggest a customary affection for tea among the original chefs, the proposal was called the "biscuit."



*Ridges*

The provision that the continental margin "does not include the deep ocean floor or the subsoil thereof" contains a footnote recording a general understanding that a mutually acceptable formulation will be drawn up "on the question of underwater oceanic ridges."<sup>67</sup> This wording correctly suggests that ridges that partake of the same qualities as the deep ocean floor or the subsoil thereof are not part of the continental margin, a conclusion that would seem apparent from the chairman's use of "underwater oceanic ridges"<sup>68</sup> since the word "oceanic" in the context of this phrase cannot be construed simply to mean "underwater."

The Irish formula is a means for establishing the "outer edge" of the continental margin. The continental margin remains the seabed and subsoil of the shelf, the slope, and the rise. By no stretch of the imagination can oceanic ridges such as the Mid-Atlantic Ridge properly be regarded as falling within this definition of the continental margin, nor can the sides of these great mountain chains be regarded as the foot of the continental slope for purposes of applying the Irish formula. The fact that a 2,500-meter isobath may surround a ridge is irrelevant. There is no basis for any other conclusion in the conference records, the informal debates, the intent of the lawyers and geologists working on the problem in the so-called Margineers Group, or the Secretariat study and maps illustrating various formulas for the definition of the continental shelf.<sup>69</sup>

The complication that arises because portions of the continental rise overlie the deep ocean floor should be resolved in the same way, whether the ocean floor is regular or irregular at that point. The statement, already contained in the text, that the continental margin "does not include the deep ocean floor" is properly construed to be consistent with the inclusion within the continental margin of those portions of the continental rise that overlie oceanic crust (and satisfy the criteria of the Irish formula); it would not seem logically necessary to do more in the text than clarify that this exclusion of the deep ocean floor from the definition of the continental margin applies, with the same effect, to the ridges of the deep ocean floor.<sup>70</sup>

<sup>67</sup> ICNT/Rev.1, Art. 76, para. 3 and note 1.

<sup>68</sup> Emphasis added.

<sup>69</sup> UN Doc. A/CONF.62/C.2/L.98 and Add. 1 & 2; R. Platzöder, note 3 *supra*, 3 GEFER SESSION 1978, at 871 (Add. 1 maps not reproduced).

<sup>70</sup> Objections to this approach by some broad-margin states seem to contradict the underlying interpretation of the article as a whole. It may be desirable, but it should be unnecessary to insist on, the introduction of a term such as "oceanic crust" for the first time and solely in connection with ridges. Conversely, insistence on exclusion of such a term is difficult to understand. Language similar to that used by the chairman of the committee in his footnote might be suitable. Nevertheless, legal and geological experts were drawn into complex discussions and drafting exercises about ridges of continental formation, plateaux, oceanic crust, and so on. See Report of Negotiating Group 6, note 3 *supra*. To this observer, at times it seemed a final, sentimental replay of discussions regarding the nature of the continental margin that dominated earlier stages of the conference.

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The 2500-meter isobath may not be a particularly stringent limitation in areas where the seabed is highly irregular. To avoid unreasonable claims, the proposed Commission on the Limits of the Continental Shelf<sup>71</sup> should give careful scrutiny to the delimitation charts submitted by the coastal state for such areas.<sup>72</sup>

In this connection, it could be important to correct paragraph 7 of Article 76 along the lines suggested by Singapore and other delegations.<sup>73</sup> The current text reads, "The limits of the [continental] shelf established by a coastal State taking into account these recommendations [of the Commission] shall be final and binding."<sup>74</sup> That sentence cannot conceivably mean what it seems to say, namely, that the coastal state can establish final limits binding on the rest of the world simply by "taking into account," but possibly in significant respects rejecting, the Commission's recommendations. It is reasonable to suggest that if the coastal state chooses to implement the Commission's recommendations, the limit should be final and binding. In other cases, there should be a procedure for dealing with the matter.

#### *Sri Lanka Proposal*

The chairman of the Second Committee and Negotiating Group 6 stated in another footnote that there was widespread sympathy for Sri Lanka because of the difficulty of applying the Irish formula to the geological and geomorphological conditions off its coast. Sri Lanka points out that the foot of the continental slope and the 2,500-meter isobath are very close to its coast, while there is an exceedingly broad continental rise that extends many hundreds of miles from the coast. Sri Lanka argues that this rise qualifies under the general principle that the continental margin consists of the shelf, the slope, and the rise but is excluded by the more detailed rules for defining the outer limit of the continental shelf and continental margin. Notwithstanding the genuine sympathy for Sri Lanka, there is opposition to relaxing the requirements of Article 76, particularly if relaxation would have the effect of broadening the limits of the continental shelf off other states as well.<sup>75</sup>

<sup>71</sup> The text of the informal Canadian paper on the organization and functions of the commission appears in 73 AJIL 20 n.32. Informal consultations were held on the basis of this paper; agreement seems imminent.

<sup>72</sup> It might be noted that the "rule of thumb" regarding the location of the foot of the continental slope (the point of maximum change in gradient at its base) applies only "in the absence of evidence to the contrary." More important, as noted before, the Irish formula deals with the location of the outer edge of the continental margin. It provides no justification for placing that outer edge in an area that is beyond the continental margin itself, that is, beyond the shelf, slope, and rise. These and other factors would presumably be considered by the commission in reviewing the submissions of the coastal state.

<sup>73</sup> See Report of Negotiating Group 6, note 3 *supra*, item (d).

<sup>74</sup> Bracketed words added.

<sup>75</sup> The conference has become increasingly sensitive to permitting generalized extensions of the continental shelf to vast distances from the coast. It seems (with

*Revenue Sharing*

The general approach of the ICNT to the sharing by the coastal state of revenues from mineral exploitation of the continental shelf beyond 200 miles was retained.<sup>76</sup> While the revision of the ICNT maintains the 1 percent annual increments in payment to commence after 5 years, it increases the maximum rate of payment by the coastal state to 7 percent of the value of production reached in the 12th year of commercial production at the site, rather than the previous 5 percent reached in the 10th year.<sup>77</sup> Proposals were made to shift this formula to a more complex one based on net profits, but they had little support.

A related question was raised about the exclusion of any developing country from the revenue-sharing obligation for a mineral resource produced from its continental shelf when the country is a net importer of that resource.<sup>78</sup> Since it is likely, particularly in the early years, that only very large potential oil and gas fields will be developed in most areas where the continental shelf extends beyond 200 miles from the coast, a coastal state capable of consuming all that oil and gas and still needing to import more may well be considerably more advanced than many other developing countries.

The U.S. delegation proposed alternative means of dealing with this question that would apply to all developing coastal states, not merely net importers. A developing coastal state would have two options. It could choose to remain in the system, making the payments required of it. In that case, in calculating its benefits, an adjustment would be made in order to produce an equitable result. Alternatively, the developing coastal state could opt out altogether for a fixed period of years. In that case, it would neither make payments nor receive benefits under the system.<sup>79</sup>

exceptions, of course) to feel occasional remorse about the extent of the limits already reached. In particular, proposals that would breach both cut-offs (350 nautical miles from the coast or 100 nautical miles seaward of the 2500-meter isobath) seem to arouse concern.

<sup>76</sup> See Stevenson & Oxman, *The 1975 Geneva Session*, note 1 *supra*, at p. 782 & n.43; Oxman, *The 1977 New York Session*, note 1 *supra*, at pp. 80-81.

<sup>77</sup> ICNT/Rev.1, Art. 82, para. 2.

<sup>78</sup> ICNT/Rev.1, Art. 82, para. 3.

<sup>79</sup> Before leaving the seabeds, it might be noted that in case the conference is in need of additional complexity and controversy, it can find it in new excursions into the arcane interstices of the law of salvage. Two proposals have been made that seem reasonably likely, once their texts are carefully scrutinized, to drive museum directors, anthropologists, archeologists, collectors, shipowners, ship charterers, cargo owners, artists, and adventurers to distraction. Their description in the Report of the Second Committee, note 3 *supra*, at 73, is repeated here without further comment:

*Article 77*

Informal suggestion by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia (Doc. C.2/Informal Meeting/43/Rev.1) to add a new paragraph 5 giving the coastal State sovereign rights over any object of an archaeological and historical nature on or under its continental shelf for the purpose of research, salvaging, protection and proper presentation. The State or country of origin, or the State of historical and archaeological origin, would have preferential rights

## IV. MARINE SCIENTIFIC RESEARCH

From a procedural standpoint, difficulties over the ICNT provisions on marine scientific research had their roots in the failure of the ICNT text to adhere to the provisions worked out earlier in the context of negotiations on the status of the economic zone.<sup>80</sup> Although largely tactical, the hesitation of coastal states to agree to alter the ICNT provisions to conform to those previously negotiated aggravated the negative reaction of the scientific community to the text. As a result, after carefully analyzing the various problems posed and reluctantly proceeding on the assumption that the overall structure agreed to in the context of the economic zone negotiations and largely reflected in the ICNT would have to be preserved in any agreement, the United States presented a series of technical amendments and adjustments.<sup>81</sup>

Constructive discussions were held by heads of delegation in Geneva on this matter. While these discussions led to a revision of the U.S. proposals, there was insufficient opportunity to ready them for incorporation into the revised Informal Composite Negotiating Text, in part because some of the same heads of delegation were preoccupied with the intense negotiations on the outer limit of the continental shelf.

The two issues were linked substantively. One of the proposed amendments eliminated the requirement that the coastal state consent to scientific research on the continental shelf where it extends beyond 200 miles from the coast. The relationship between these issues was expressly noted by the chairman of the Second Committee and Negotiating Group 6 in presenting the articles on the definition of the continental shelf, and it was stressed by the United States in its comments on those articles. The chairman of the Third Committee, with the support of numerous delegations, announced his intention to hold intensive negotiations on marine scientific research in New York.

The texts resulting from those negotiations are contained in the report of the chairman of the Third Committee submitted at the end of the New York meeting.<sup>82</sup> While noting the need for additional work, the chairman stated his assessment that the texts "have a considerable degree of support as to provide a reasonable prospect for consensus." They "could serve as a basis for subsequent agreement leading to the revision of the ICNT."

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over such objects in the case of sale or any other disposal, resulting in the removal of such objects out of the coastal State.

## Article 98

Informal suggestion by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, the German Democratic Republic, Hungary, Poland, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics (Doc. C.2/Informal Meeting/44) to add a paragraph 3 providing that, without prejudice to the provisions of the Convention and other universally recognized rules of international law, sunken ships and aircraft, as well as equipment and cargoes located on board them, may be salvaged only by the flag State or with its consent.

<sup>80</sup> These negotiations were discussed by the author in 72 AJIL (1978), at pp. 75-78.

<sup>81</sup> See 73 AJIL at pp. 27-30.

<sup>82</sup> Note 3 *supra*.

The basic structure of the marine scientific research regime for the economic zone and the continental shelf set forth in the ICNT/Rev.1 is as follows:

- (1) such research "shall be conducted with the consent of the coastal state";
- (2) coastal states "shall, in normal circumstances, grant their consent" for such research; and
- (3) coastal states "may however in their discretion withhold their consent" if a project falls within one of several categories, the most important being if a project "is of direct significance for the exploration and exploitation of natural resources, whether living or non-living."<sup>83</sup>

Six months' advance submission to the coastal state of a "full description" of the project is required.<sup>84</sup> The ICNT/Rev.1 also requires the researching state to comply with a number of obligations, such as ensuring the right of the coastal state to participate or be represented in the project, submitting final results and an assessment of those results to the coastal state, and providing access for the coastal state to all data and samples.<sup>85</sup>

#### *Normal Circumstances*

The elaborate specification of circumstances in which the coastal state may in its discretion deny consent logically proceeds on the expectation that in other cases the coastal state will grant consent. Thus, the approach of the ICNT is different from the approach of the Convention on the Continental Shelf, which merely requires that the coastal state shall not "normally" withhold its consent.<sup>86</sup> The use of the word "normally" was suggested at one point by the chairman of the Third Committee as pos-

<sup>83</sup> Art. 246. The other grounds for discretionary refusal of consent under paragraph 4 are:

- (1) The project involves the use of explosives or the introduction of harmful substances into the marine environment.
- (2) Information submitted to the coastal state regarding the nature and objectives of the project is "inaccurate." (This is the basic control over the bona fides of the project description.)
- (3) The researching state has outstanding obligations to the coastal state from a prior research project. (The obligation is, of course, not "outstanding" for these purposes if by its nature it cannot be fulfilled until after completion of the research cruise [e.g., preparation of reports] and good faith efforts are being made for its timely fulfillment.)
- (4) The project involves drilling into the continental shelf. (This simply repeats the requirement of consent for drilling in Article 81.)
- (5) The project involves the construction, operation, or use of artificial islands, installations, and structures as referred to in Articles 60 and 80. (This cross-references the requirements for consent under those articles.)

<sup>84</sup> ICNT/Rev. 1, Article 248 describes in detail the information to be included.

<sup>85</sup> *Id.*, Art. 249.

<sup>86</sup> Convention on the Continental Shelf, 1958, Art. 5, para. 8, 15 UST 471, TIAS No. 5578, 499 UNTS 311, reprinted in 52 AJIL 858 (1958).

sibly facilitating compromise, but was rejected in the course of the negotiations.<sup>87</sup>

The United States and others argued that given the careful elaboration of the discretionary exceptions, the coastal state should be obliged to grant its consent in all other cases. But this conclusion was found inappropriate for situations in which substantial hostility or tension between them made it "impossible" and "unrealistic" to expect the coastal state to consent to the presence of a scientific research vessel of the researching state off its coast. Some alluded to situations in which the two governments not only do not maintain diplomatic relations but do not even accord each other recognition. Others alluded to situations of intermittent armed conflict between the two states. The key point is that the abnormal circumstances that would justify a denial of consent were intended to refer to circumstances between the coastal state and the researching state characterized by hostility or tension of such a serious nature as rationally to preclude the granting of consent.<sup>88</sup>

Essentially, the problem was not so much to define "normal circumstances" as to elaborate on its meaning. Thus, the chairman's text provides that "the absence of diplomatic relations between the coastal state and the researching state does not necessarily mean that normal circumstances do not exist between them for purposes of applying" the requirement that consent be granted in normal circumstances.<sup>89</sup>

### *The Continental Shelf Beyond 200 Miles*

Application of the standard of "direct significance for the exploration and exploitation of natural resources" was the heart of the problem regarding marine scientific research on the continental shelf where it extends beyond 200 miles from the coast.

First, the language could be interpreted as affecting scientific research in the water column beyond the economic zone. The states with broad continental margins pointed out that this difficulty was merely one aspect of the general problem of the relationship between the rights of the coastal state over the continental shelf and high seas freedoms; which was being dealt with in the negotiations on the continental shelf in Negotiating Group 6.<sup>90</sup> As a result, language was added by the chairman of the Second Committee in the revision of the ICNT continental shelf articles that provides, "The exercise of the rights of the coastal State over the continental shelf must not infringe, or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention."<sup>91</sup> While this language is derived from Article 5 of the Convention on the Continental Shelf,<sup>92</sup> the words "must not infringe" and the general reference to "rights and freedoms of other States" are new.

<sup>87</sup> See 72 AJIL (1978), at pp. 76-77.

<sup>88</sup> *Ibid.*

<sup>89</sup> Report of the Chairman of the Third Committee, note 3 *supra*, Annex, Art. 246 bis.

<sup>90</sup> See 73 AJIL (1979), at p. 22.

<sup>91</sup> ICNT/Rev.1, Art. 78, para. 2.

<sup>92</sup> Note 86 *supra*.

The second problem with the "direct significance" standard derives from the difficulty of ascertaining, with respect to the vast areas of the continental shelf beyond the exclusive economic zone, when marine scientific research on the shelf has direct significance in any practical sense for the exploration and exploitation of its natural resources. Differences on the matter were narrowed to a single issue: the exercise of discretion to withhold consent on resource grounds in areas beyond 200 miles. Requirements for notification, obligations, consent, and the discretion to withhold consent for one of the other specified reasons<sup>93</sup> would not be changed. Differences were further narrowed when it was granted, on the one hand, that discretion to withhold consent on resource grounds would exist in areas where exploitation was occurring or about to occur, and, on the other hand, that it would not exist in areas where neither exploitation nor exploration was occurring or about to occur.

The issue was thus narrowed to exploration. The difficulty is that the term "exploration," when used in connection with the continental shelf, may mean a variety of things; it can include activities of a general nature covering very broad areas of the type referred to as "prospecting" in Annex II in connection with deep seabed mining.<sup>94</sup>

Consideration was given to adopting the distinction between prospecting and exploration elaborated in Annex II<sup>95</sup> for the purposes of applying discretion to withhold consent on resource grounds beyond 200 miles. However, some states noted that their mining systems would make this distinction difficult to apply. It was revealed in the course of examining these systems that exploratory drilling is a typical example of an activity associated with an advanced stage of intensive, localized exploration rather than a preliminary stage of general prospecting.<sup>96</sup> This observation laid the foundation for the compromise: discretion of the coastal state to withhold its consent on resource grounds "shall be deferred and its consent shall be implied" with respect to projects undertaken "outside specific areas of the continental shelf beyond 200 miles . . . which the coastal state has publicly designated as areas in which exploitation or exploratory operations, such as exploratory drilling are occurring or are about to occur."<sup>97</sup>

### *Publication of Results*

The desire of states to restrict premature distribution of information about their natural resources obviously runs directly counter to the principle that the results of scientific research should be made available to all. The treatment of this issue in the ICNT/Rev.1 was ambiguous and seemed to encourage restraints on publication of all research results.<sup>98</sup> The redraft

<sup>93</sup> See note 83 *supra*.

<sup>94</sup> ICNT/Rev.1, Annex II, Article 2 refers to the "broad areas in which prospecting is to take place."

<sup>95</sup> Compare Arts. 2 and 3 of Ann. II.

<sup>96</sup> This is generally the nature of the distinction made in Annex II and the national mining systems on which it is based.

<sup>97</sup> Report of the Chairman of the Third Committee, note 3 *supra*, Annex, Art. 246 bis.

<sup>98</sup> See ICNT/Rev.1, Art. 249, paras. 1(e) and 2.

makes clear that since the coastal state can in its discretion withhold consent for a project of direct significance for the exploration or exploitation of natural resources, it can require, as a condition for granting such consent, prior agreement on making the results internationally available.<sup>99</sup>

### *Settlement of Disputes*

Two similar provisions of the ICNT/Rev.1, Articles 264 and 296, paragraph 2, excluded from third-party adjudication or arbitration disputes arising out of the exercise by the coastal state of a right or discretion under Article 246 (the basic consent provision regarding the economic zone and the continental shelf) or a decision by the coastal state to terminate a research project under Article 253. Thus, a tribunal could not go beyond ascertaining the existence in that case of a right or discretion to withhold consent or a right to terminate a project.

The text in the chairman's report is designed to accommodate opponents of this exclusion by providing for compulsory conciliation of the question whether the coastal state is exercising these rights in a manner compatible with provisions of the convention, "provided that the conciliation commission shall not call in question the exercise of the discretion to withhold consent in accordance with article 246, paragraph 4."<sup>100</sup> This, of course, reflects the basic point that once it is established that the only issue relates to a decision of a coastal state to withhold consent in the exercise of the discretion conferred on it by the convention, there is no longer a substantive basis in the convention itself for review, since it specifies no criteria for the exercise of that discretion. On the other hand, termination of a research project is subject to such third-party review.

### *Additional Clarifications*

Several additional clarifications are included in the report. The coastal state's right to suspend or terminate a project already under way on grounds of variance from the project description is conditional on its not having secured compliance within a reasonable time.<sup>101</sup> The change attests to the fact that this power of the coastal state is considerably more onerous than the power to deny consent before a project begins. There is also an exhortation to facilitate access of marine scientific research vessels to harbors.<sup>102</sup>

Perhaps the most interesting addition is that in applying the scientific research provisions, and "without prejudice to the rights and duties of States" under the convention, a state "shall provide when appropriate other States with a reasonable opportunity to obtain from it, or with its co-operation, information necessary to prevent and control damage to the

<sup>99</sup> Report of the Chairman of the Third Committee, note 3 *supra*, Annex, Art. 249. Neither the ICNT nor the new text alters the obligations under sections 1 and 2 of part XIII, including Article 244.

<sup>100</sup> Report of the Chairman of the Third Committee, note 3 *supra*, Annex, Art. 264.

<sup>101</sup> *Id.*, Art. 253.

<sup>102</sup> *Id.*, Art. 255.



health and safety of persons and the environment.”<sup>103</sup> It is regrettably characteristic of the sense of international solidarity of some of those concerned with scientific research in this conference that an obligation to provide merely a “reasonable opportunity” to obtain “necessary” information already in existence, or by virtue of joint cooperation, and then without prejudice to any coastal state rights, should only exist “when appropriate.” Even if these last words are not clarified, they should be understood in context as reflecting the general concern about good faith and harassment that dominated all the science negotiations, that is, as requiring the coastal state to respond positively to good faith requests whose importance is commensurate with the difficulties of supplying the information. The words were not intended to nullify the entire article or duties implied by other legal principles, such as those regarding protection of health and the environment, to say nothing of the friendly relations of states.

#### V. DELIMITATION BETWEEN STATES WITH OPPOSITE OR ADJACENT COASTS

The function of the provisions on the exclusive economic zone and the continental shelf is to define the respective rights and duties of any coastal state and all other states as a class in the same area. This relationship is dealt with in considerable detail, constituting the essence of the so-called package deal in this regard.

The question of the substantive rules governing delimitation between states with opposite or adjacent coasts poses a different kind of issue.<sup>104</sup> To the extent that the law of the sea allocates geographic jurisdiction to the coastal state, how do neighboring coastal states divide areas of geographic jurisdiction?

There is a community interest in ensuring that they do so peacefully. Moreover, important interests of states other than the coastal state depend for their protection upon the exercise of the rights or fulfillment of the duties of the coastal state. Protecting these interests could be difficult in practice in areas where there is a dispute over which coastal state has the right and responsibility to act.

The substance of this division, however, is of no concern to the class of other states. No matter which area is assigned to which coastal state, the rights and duties of both in relation to the international community as a whole will be the same. In any given delimitation dispute between two coastal states, some third state may believe its interests will best be served

<sup>103</sup> *Id.*, Art. 242.

<sup>104</sup> The relevant ICNT/Rev.1 provisions, Article 74, paragraph 1 (economic zone) and Article 83, paragraph 1 (continental shelf), use the same language. Different language is used in ICNT/Rev.1, Article 15 regarding delimitation of the territorial sea: this provision, now agreed, is substantially the same as the provision in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone, note 22 *supra*. While the ICNT retains the concept of the contiguous zone in Article 33, it does not contain a delimitation provision that mentions the contiguous zone. Compare Art. 24, Convention on the Territorial Sea and the Contiguous Zone.

if a particular one of the two prevails, but this does not imply a substantive interest on the part of the class of other states in the nature of the delimitation.

The limits of coastal state jurisdiction specified by the convention with respect to the exclusive economic zone and the continental shelf<sup>105</sup> define the maximum scope for competing coastal state claims. The basis for the exercise of coastal state jurisdiction is the geographic relationship between an offshore area and the coast. A comparative inquiry into the merits of various claims, therefore, is focused on the nature of the geographic relationship to the coastlines of the respective coastal states.

When examined rigorously, all of the major positions on delimitation between states with opposite or adjacent coasts proceed on the basis of these premises.

Those who emphasize equidistance in effect wish to ensure not only that delimitation is based upon the geographic relationship between the offshore area in question and the respective coastlines, but that the most significant geographic relationship is proximity. They nevertheless grant that the equidistance method may not be applicable, for example, where there are "special circumstances."<sup>106</sup>

Those who emphasize equitable principles wish to see that all aspects of the geographic relationship between the area in question and the respective coastal states are weighed, including, but not limited to, proximity. The reference to equitable principles in the ICNT is understood to be a reference to the criteria elaborated by the International Court of Justice in the *North Sea Continental Shelf* cases.<sup>107</sup> Those criteria refer to the geographic relationship between the area in dispute and the respective coastal states.<sup>108</sup>

Needless to say, such nuances of emphasis bear little relationship to the practical matter of promoting agreement between the coastal states concerned. They are relevant, if at all, to formal adjudication or arbitration. It is reasonably clear, however, that the law of the sea convention will not generally require arbitration or adjudication of delimitation disputes. Moreover, the jurisprudence, scholarly writings, and state practice on offshore delimitation are growing rapidly. It is unlikely that a judge or arbitrator will be influenced more by the nuances of an inevitably flexible sentence in a law of the sea convention than by the detailed guidance afforded by learned jurists for analyzing the consequences of the specific geographic circumstances before him.

The only issue seriously at stake that pertains to the substantive delimitation provisions is the prospect for timely completion and widespread

<sup>105</sup> ICNT/Rev.1, Arts. 57 and 76, respectively.

<sup>106</sup> They apparently seek to place the burden of proof on the state opposing the application of equidistance. While they rely heavily on Article 6 of the 1958 Convention on the Continental Shelf (note 86 *supra*) in this regard, it is doubtful that that provision has this effect, since equidistance applies only "[i]n the absence of agreement, and unless another boundary line is justified by special circumstances."

<sup>107</sup> *North Sea Continental Shelf* cases, [1969] ICJ REP 3.

<sup>108</sup> *Id.*, Judgment, para. 101, at 54.

ratification of the convention on the law of the sea. No delimitation rule stated in the convention can be applied directly to a dispute between coastal states if one of them is not bound by the rule, either because it refuses to ratify the convention, or because it successfully insists on a right to reserve to the rule. Yet, experience with the Convention on the Continental Shelf suggests that even if a right to reserve is included, the substance of a delimitation provision may nevertheless discourage ratification by some states. It is particularly important that the conference try to avoid an approach to the delimitation problem that merely stimulates demands for reservations to the other clauses as well.

Since flexibility is common to all the proposals, and since the underlying differences relate to emphasis, there would seem to be little point in devoting much effort to a process that will inevitably result in the substitution of one flexible formula for another flexible formula. The purpose of including a substantive provision in the convention is to describe, and thereby to narrow, the range of choices available. Those who would emphasize equidistance are in effect arguing that the ICNT insufficiently narrows those choices. Their efforts may become self-defeating, however, if they press matters to the point where reservations become likely, since reservations not only broaden the choices of the reserving state but also make it less likely that a court will reach the conclusion that general international law imposes a narrow range of choices.

There was some discussion of means of indicating that the underlying question is essentially one of the relative emphasis to be accorded the various approaches to delimitation as they relate to particular circumstances and disputes. For example, a provision could be added to Articles 74 and 83 that expressly permits a state to file a formal declaration describing its position regarding the application of the principles referred to in paragraph 1 of those articles. Such a declaration would qualify the acceptance of those principles by a state, although it would not of course prejudice the position of any other state.

In his report, the chairman of Negotiating Group 7 also refers to the possibility of omitting any statement of the substantive rule and simply providing for delimitation in accordance with international law.<sup>109</sup> Like the reservation approach, this one does not bind the parties to a specific statement of the governing principles, but like the declaration approach, it constitutes a conventional affirmation that substantive rules of international law govern and restrain the claims available in delimitation.<sup>110</sup>

<sup>109</sup> Note 3 *supra*.

<sup>110</sup> The chairman of Negotiating Group 7 also refers to the fact that the idea of the "equality of states" has been introduced in private discussion. Proceeding on the assumption that this idea is suggested in connection with the existing ICNT text on delimitation, several questions were nevertheless posed regarding the meaning of such a reference. Clearly, it cannot mean that every state receives an economic zone or continental shelf that is equal in size or value to the economic zone or continental shelf of its neighbors. Coming, as it does, from equidistance advocates, it cannot mean that delimitation is to be effected on a basis other than the geography of the area in question. Sovereign equality of states and equidistance have nothing to do with each

It is regrettable that the conference is facing choices of this sort. The decision of the International Court of Justice in the *North Sea Continental Shelf* cases made it impractical to attempt to state the rule in the language of the Convention on the Continental Shelf. As is customary in the preparation of conventions of this sort, in drafting the basic rule for the original Single Negotiating Text, the chairman of the Second Committee (then Ambassador Galindo Pohl of El Salvador) looked to the language used by the International Court of Justice for guidance.<sup>111</sup> The initial attack on this approach was made by a very few advocates of equidistance, mainly states with small islands that were at that time uncertain of the eventual outcome of negotiations regarding the provision on islands.<sup>112</sup> That attack stimulated a measure of partisan enthusiasm for and hostility to the text that still plagues the conference but is in no sense merited by the substance of the language itself.

## VI. FINAL CLAUSES

For the first time, the conference engaged in intensive work on the final clauses of the convention. This work was concentrated in the Informal Plenary on Final Clauses chaired by the president of the conference.<sup>113</sup> In addition, the Informal Plenary established a Group of Legal Experts under the chairmanship of Ambassador Jens Evensen of Norway; it has referred issues to the group for drafting on which it has completed initial debate.<sup>114</sup> While the final clauses include provisions that are largely of a technical and essentially noncontroversial character,<sup>115</sup> they also deal with matters that can affect the substance of the convention and international law, as well as matters that are politically controversial.

The president of the conference identified seven controversial items: amendment or revision, reservations, relation to other conventions, entry

other. It would therefore seem, at least to this author, that the underlying purpose must be to stress once again the notion that delimitation is to be effected on the basis of principles of law, and not the relative military or economic power of the states concerned. If this is the case, such a change would not seem to be worth stimulating demands for reservations among supporters of the existing text.

<sup>111</sup> Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.3 (May 7, 1975), Arts. 61 and 70, reprinted in 14 ILM 682 (1975). *North Sea Continental Shelf* cases, note 107 *supra*, Judgment, para. 101, at 53. The reference to the use of the median or equidistance line was added in the ISNT to the language used by the Court at that point.

<sup>112</sup> The text of ICNT/Rev.1, Article 121 has remained the same since the original Single Negotiating Text. Opposition to the delimitation texts intensified after the requirement that the median or equidistance line should be applied provisionally was deleted in the Revised Single Negotiating Text (RSNT). Since the reason was that "the Conference may not adopt a compulsory jurisdictional procedure for the settlement of delimitation disputes" (RSNT, part II, Introductory Note, para. 12), it is not clear what role positions regarding dispute settlement played in this reaction.

<sup>113</sup> Alternative texts and notes prepared by the Secretariat in 1976 tended to focus discussion. 6 OFF. REC. 125 (1976).

<sup>114</sup> Conf. Doc. FC/2 (July 27, 1979).

<sup>115</sup> The Chairman of the Group of Legal Experts has submitted a text on these. Conf. Doc. FC/16 (Aug. 23, 1979).

into force (including consideration of a preparatory commission), transitional provision, denunciation, and participation in the convention.<sup>116</sup> He pointed out that the existing ICNT contains provisions addressed to only two of these issues, namely, entry into force<sup>117</sup> and the "transitional provision" that appears after the text.<sup>118</sup>

At the outset of the debate, the president stressed three objectives bearing on the preparation of final clauses:

Our prime concern is the establishment of a completely integrated legal order for the use of the oceans and its resources and potential. All else must be subordinated to and subserve this purpose. This is the function of the Preamble and the Final Clauses. They must not be allowed to create such contention as would obscure and obstruct the overriding objective, hamper the work of the Conference and imperil our chances of success.

We must seek to preserve intact, and protect, the efficacy and durability of the body of law which we are trying to create in the form of a Convention encompassing all issues and problems relating to the law of the sea as a package comprising certain elements that constitute a single and indivisible entity.

We must seek to attract the most extensive and representative degree of ratification and the earliest possible entry into force of the new Convention.

The second objective that I have specified here cannot be achieved if we expose the essential unity and coherence of the new body of law to the danger of impairment through the unrestricted exercise of the right of reservation.

We must seek to ensure for all States Parties to the Convention the highest attainable degree of clarity and certainty as to their rights and obligations under the Convention.

We must at the same time provide some measure of flexibility which would serve as an insurance against future erosion of the Convention and which would underpin rather than undermine the structure.<sup>119</sup>

While the Vienna Convention on the Law of Treaties<sup>120</sup> had not yet entered into force, and in any event had not been ratified by a large majority of the states participating in the conference, it did constitute the point of departure for discussion and analysis of various problems. The issue discussed in many cases was whether it was desirable to provide for a result different from, or with more specificity than, that produced by the rules of the Vienna Convention applicable to a treaty that is silent on the point. It was generally recognized that the comprehensive scope of the law of the sea convention, including its constitutive aspects, necessitated some special treatment of these matters.

<sup>116</sup> Conf. Doc. FC/1 (July 23, 1979). <sup>117</sup> ICNT/Rev.1, Art. 301.

<sup>118</sup> UN Doc. A/CONF.62/WP.10/Rev.1, at 139-40 (English).

<sup>119</sup> Conf. Doc. FC/1, note 116 *supra*.

<sup>120</sup> UN Doc. A/CONF.39/27 (1969), *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

### *Amendment or Revision*

The basic question posed on this subject was whether the convention should include procedures for amendment or a general review of its provisions, in addition to the review of the deep seabed mining regime contemplated in Article 155.<sup>121</sup> It was pointed out that as a legal matter, protocols to the convention could be agreed by the parties at any time, and that either the parties or the UN General Assembly could call a conference if necessary at any time.

The question of primary juridical significance about provisions on amendments is whether an amendment may enter into force before it has been ratified by all the states parties. Many of the constituent elements of the overall consensus were specifically designed to accommodate the priorities of various minorities of states. Thus, the underlying balance and complex structure of the overall "package deal" could be altered if any of these elements could be changed without the assent of the affected minorities. This problem gave rise to suggestions that one might distinguish between technical and other amendments (including the first of several references to an expanded concept of *jus cogens* that will be addressed later in this discussion). It also gave rise to proposals for qualified majorities for all amendments to enter into force, including acceptance by different groups for different parts of the convention.<sup>122</sup>

Of course, the possibility that an amendment might enter into force over the objection of a state party raises the fundamental question whether that state is bound by the amendment. There was support for the view that the amendment does not apply to that state's relations with other parties.<sup>123</sup> While a possible, if less than desirable, substantive result in some cases, this approach presents structural difficulties in connection with the Seabed Authority and other institutions such as the Law of the Sea Tribunal. It was recognized that to the extent that an amendment must bind all parties or none, the basic choices are either to preclude the amendment from entering into force in the event of an objection or to expect that the objecting state might exercise its right to withdraw.

### *Reservations*

The comments of the president of the conference<sup>124</sup> foreshadowed substantial concern among delegations about the effect of reservations on

<sup>121</sup> Conf. Doc. FC/4 (Aug. 1, 1979) contains the president's summary of the debate on amendment and revision.

<sup>122</sup> One interesting idea would avoid the difficulty of identifying substantive groups by precluding entry into force of an amendment if a state previously declared that its substantial interests were directly affected and that it could not ratify the amendment. Any party could invoke the dispute settlement procedures of the convention to challenge the conclusion of the state that its substantial interests were directly affected. Conf. Doc. GLE/FC/10 (Aug. 23, 1979).

<sup>123</sup> See Vienna Convention on the Law of Treaties, note 120 *supra*, Art. 30, para. 4(b) and Art. 40, para. 4.

<sup>124</sup> See text accompanying note 119 *supra*.

the integrity of the accommodations incorporated in the "package deal." There was no support for the idea that all articles of the convention should be subject to reservations. There also seemed to be little if any support for the option of remaining silent on the question of reservations.<sup>125</sup>

Even if it were agreed that the relevant rules of international law are those specified in the Vienna Convention on the Law of Treaties, the effect of omitting any clause on reservations would be unclear. The general rule in the Vienna Convention applicable to a treaty that does not deal with the issue is that a state may formulate a reservation unless that reservation "is incompatible with the object and purpose of the treaty."<sup>126</sup> To interpret and apply the "object and purpose" criterion in the case of any given article of the vast and complex law of the sea convention would be exceedingly difficult, if not impossible.

The number of issues covered by the convention is legion, the differing priorities attached to them by different states almost infinite, and the number of states participating in the negotiation greater than ever before in history. It would in one sense be difficult to maintain that any particular reservation to any particular subparagraph of any particular article is contrary to the object and purpose of a huge convention of over three hundred articles and several annexes covering many subjects. On the other hand, it is likely that any attempt to achieve a consensus at the conference on the object and purpose of the convention would end, after a long period of time, with the verbatim repetition of almost every provision.

While a few delegations that have never been sympathetic to the convention did argue for liberal rules regarding reservations, it seems likely that the basic choice facing the conference is between a prohibition on all reservations and a prohibition on almost all reservations. As one may rightly deduce from the remarks of the president and almost all delegations over the years, the underlying object and purpose of the convention is not so much its substance as widespread agreement on a comprehensive regime for the oceans embracing all interests at stake. With few exceptions, if any, it is difficult to conceive of reservations compatible with that object and purpose.<sup>127</sup>

<sup>125</sup> Conf. Doc. FC/6 (Aug. 7, 1979) contains the president's summary of the debate on reservations.

<sup>126</sup> Vienna Convention on the Law of Treaties, note 120 *supra*, Art. 19.

Reservations to the constituent instrument of an international organization require the acceptance of the competent organ of that organization. *Id.*, Art. 20. How much of parts XI (deep seabeds), XV (settlement of disputes), and related annexes are covered by this rule? In the case of the Seabed Authority, what is the competent organ?

<sup>127</sup> In some instances, the positive benefit of promoting widespread ratification outweighs the substantive cost of permitting a particular reservation. As already noted, this category may include the substantive provisions regarding delimitation of the economic zone and continental shelf between states with opposite or adjacent coasts.

### *Relation to Other Conventions*

The question of relation to other conventions<sup>128</sup> stirred some theoretical debate regarding the status of the 1958 conventions on the law of the sea after the entry into force of the new Law of the Sea Convention.<sup>129</sup> This debate implicitly concerned the value of the 1958 conventions as evidence of customary international law.<sup>130</sup>

Another interesting question is posed by the need to refer to the relevant rules and principles of the law of the sea in the course of applying general multilateral conventions on other subjects. There was no dissent from the point that the establishment of the economic zone does not alter or relieve flag states or coastal states of their obligations under existing conventions regulating navigation and overflight beyond the territorial sea (without prejudice to coastal states' environmental rights under the new Law of the Sea Convention).<sup>131</sup> In this connection it was noted, for example, that Article 12 of the Convention on International Civil Aviation,<sup>132</sup> under which exclusively international regulations apply to civil aviation over the high seas, would continue to have exactly the same effect with respect to the exercise of freedom of overflight in the exclusive economic zone, despite the changes in terminology for the geographic areas in question.<sup>133</sup> It was also noted that the new Law of the Sea Convention should not be regarded as altering the obligations of the parties to bilateral and multilateral treaties dealing with specific activities or areas.

### *Entry Into Force*

Discussion of this item centered largely on the number of parties necessary for the convention to enter into force.<sup>134</sup> A basic question raised was

<sup>128</sup> Conf. Doc. FC/7 (Aug. 9, 1979) contains the president's summary of the debate on relation to other conventions. See ICNT/Rev.1, Arts. 35(c), 51(1), 74(5), 83(4), 282, and 283 in this connection.

<sup>129</sup> Virtually all of the provisions of the 1958 conventions are either repeated, modified, or replaced by the provisions of the ICNT/Rev.1.

<sup>130</sup> This matter will be discussed further in connection with the question of *jus cogens*.

<sup>131</sup> See Conf. Doc. GLE/FC/9 (Aug. 20, 1979).

<sup>132</sup> Convention on International Civil Aviation, 1944, note 49 *supra*.

<sup>133</sup> See Conf. Doc. FC/7, note 128 *supra*. Two provisions of the ICNT/Rev.1 are directed to this kind of problem. Article 58 preserves within the economic zone "the freedoms referred to in article 87 of navigation and overflight." Article 87 is the provision enumerating the freedoms of the high seas. Article 86, dealing with the application of the high seas provisions, is not a definition, and expressly states that it "does not entail any abridgement of the freedoms enjoyed by all states in the exclusive economic zone in accordance with article 58." The ICAO question was one of those that led to the adoption of the quoted terms. The author notes this point in 72 AJIL at p. 69 and note 45 thereof in explaining them, referring generally to "insufficiently informed oral remarks of employees of certain nonmaritime specialized agencies" as one of the reasons for the clarification of the text regarding freedom of navigation and overflight in the economic zone.

<sup>134</sup> Conf. Docs. FC/9 (Aug. 14, 1979) and FC/11 (Aug. 16, 1979) contain the president's summary of the debates on entry into force.



whether the requirement should simply be quantitative, or should refer to particular categories of states as well. The relevance of the composition and voting structure of the Council of the Seabed Authority was noted in this regard.

There was widespread support for establishing a preparatory commission prior to the entry into force of the convention. Its principal responsibility would be to draft the initial rules, regulations, and procedures for deep seabed mining. It was emphasized that such a commission would have preparatory functions only and would not be an interim seabed authority with the power to conduct or authorize mining.<sup>135</sup>

The idea of permitting states to accept the convention provisionally was also discussed.<sup>136</sup> While there were substantial doubts about this approach, it was widely agreed that should it be adopted, provisional acceptance would have to apply to the entire convention under the same conditions as permanent acceptance. The difference is that a state would cease to be a provisional party at such time as it decided not to become a permanent party.<sup>137</sup>

The main reason advanced for permitting provisional acceptance is that it would encourage more rapid and widespread acceptance of the convention. For some countries, some of the time-consuming formalities of permanent acceptance might not apply. For others, where the executive would not act alone, the need for provisional approval only might facilitate consideration of the convention and help significantly to overcome fears of the unknown that could prevent its permanent acceptance.

### *Denunciation*

The question of denunciation did not stimulate extensive debate.<sup>138</sup> Among the grounds proffered for denunciation were the entry into force of binding amendments or regulations over the objection of a state. The general view was that every state retained the sovereign right to withdraw from a convention of this sort, although such withdrawal would not affect its obligations under customary international law.<sup>139</sup> Reference was made to the declaration of the San Francisco Conference confirming the right to withdraw from the United Nations despite the absence of a Charter provi-

<sup>135</sup> Conf. Docs. FC/8 (Aug. 13, 1979) and FC/8/Add.1 (Aug. 10, 1979) contain a Secretariat study of instruments establishing preparatory bodies. It will be considered at the start of the next session.

<sup>136</sup> The Secretariat recirculated its study of provisional application, UN Doc. A/AC.138/88 (June 12, 1973).

<sup>137</sup> During the discussion of ratification in the Group of Legal Experts on Final Clauses, it was pointed out that signature alone would not bind a state to the provisions of the treaty, and that the principle of Article 18 of the Vienna Convention on the Law of Treaties (note 120 *supra*) would not have either this effect or the effect of impairing the rights and obligations of states under the existing international law of the sea and treaties.

<sup>138</sup> Conf. Doc. FC/13 contains the president's summary of the debate on denunciation.

<sup>139</sup> See Vienna Convention on the Law of Treaties, note 120 *supra*, Art. 43.

sion on the subject.<sup>140</sup> A general view seemed to be emerging that a specific provision on denunciation should be included.

### *Jus Cogens*

One of the novel aspects of the discussion of final clauses was the introduction of the concept of *jus cogens*. As used in the Vienna Convention on the Law of Treaties, the concept refers to a peremptory norm of international law that voids any inconsistent treaty.<sup>141</sup>

When informal debate on final clauses was being organized, representatives of the Group of 77 indicated that certain of its members wished to have "*jus cogens*" added to the list of issues. It was understood that debate on the matter would be permitted. As might be expected, references to *jus cogens* in the course of discussion of final clauses were rarely confined to the concept as it is understood and used in the Vienna Convention, since it is questionable whether a treaty provision can, as such, create a rule of *jus cogens* in that sense.<sup>142</sup>

*Jus cogens* was mentioned in connection with three distinct questions. The first was whether to prepare an article that would identify principles or provisions that would not be subject to amendment or reservations; the entrenched concepts governing the deep seabed review conference under Article 155 were cited as an example. The second was whether an amendment or reservation would be effective (at least with respect to an objecting state) if the convention were silent on amendment and reservations. The third, perhaps the most subtle, explored whether provisions of the law of the sea convention would be regarded as declaratory of international law.

Because it may be argued that subjecting a provision to reservations, and perhaps amendment, weakens the case for regarding it as declaratory of international law, there is a reluctance to permit reservations or easy amendment that transcends the effect on the convention as a treaty. Indeed, the psychological impact of the arguments advanced by the International Court of Justice to distinguish between the lawmaking character of Articles 1 to 3 of the Convention on the Continental Shelf and the contractual character of Article 6 of that convention has been substantial.<sup>143</sup> The widespread use of cross-references in the ICNT is designed to discourage a court from concluding that a general provision is declaratory of international law while the details that made agreement on that provision possible are not. It is conceivable that many states would sooner see the conference fail than permit a text to emerge that allows reservations in connection with priority provisions they regard, or plan to regard, as declaratory of international law. One ingenious argument made by a prospective seabed mining state against permitting provisional application of the convention was that it was incom-

<sup>140</sup> Doc. 1210, P/20, 1 UNCIO Docs. 612, 615-17, 619-20 (1945).

<sup>141</sup> Vienna Convention on the Law of Treaties, note 120 *supra*, Arts. 53 and 64.

<sup>142</sup> It can be argued that even Article 103 of the UN Charter as such binds only UN members.

<sup>143</sup> See North Sea Continental Shelf cases, [1969] ICJ REP. 28-42, paras. 37-72.

patible with the status of the substantive provisions, other than those dealing with the deep seabeds, as new customary law.

As already noted, the question of the relationship between the new convention and the 1958 conventions is in essence another aspect of the customary law question. The strictly legal point that, to the extent they are inconsistent, the new convention supplants the old conventions as between the parties to both was not contested, and was not really the issue. At the start of the law of the sea negotiations, a leading coastal state participant said, "I come to bury Grotius, not to praise him." This spirit informs revived attempts to reduce if not eliminate the value of the 1958 conventions as evidence of customary law and substitute the new convention for them (which, incidentally, seems in the end to provide a more solid foundation for preserving high seas freedoms under modern conditions). As a consensus nears on the noninstitutional parts of the ICNT that are amenable to implementation without a treaty, and as more and more of these provisions become the basis in fact for state practice, there is considerably less resistance to the idea. Needless to say, nothing the convention text says can make it declaratory of customary law, but evidence of the intent of the conference may be relevant.

The question of the relationship between the law of the sea convention and subsequent inconsistent agreements among some of the parties presents the same issue dealt with in Article 103 of the UN Charter. It closely resembles the concept of *jus cogens* as presented in the Vienna Convention, but is in fact a question of modifying obligations under multilateral treaties between certain parties only. Article 41 of the Vienna Convention precludes such modifications if they affect the other parties' rights or are incompatible with the effective execution of the object and purpose of the treaty as a whole. This question has been raised in a proposal by Chile<sup>144</sup> that attempts to make the principle of the common heritage of mankind a true peremptory norm of international law, rendering conflicting agreements invalid. As a practical matter, it seems highly unlikely that states, while parties to the law of the sea convention, would expose themselves to the sanctions available under the convention by entering into subsequent conflicting agreements regarding seabed mining.

One may also ask whether there is any sense in having a major theoretical argument over the issue. A peremptory norm of international law must in the first place be a norm of international law. Were the states principally interested in deep seabed mining to find the implementation of the treaty régime intolerably incompatible with their expectations, and withdraw and proceed with mining on a different basis, an assertion that they are violating customary international law, would have the same significance

<sup>144</sup> Conf. Doc. FC/14 (Aug. 29, 1979) proposes the following text:

The States Parties to the present Convention accept and recognize on behalf of the international community as a whole that the provision relating to the common heritage of mankind set out in article 136 is a peremptory norm of general international law from which no derogation is permitted and which, consequently, can be modified only by a subsequent norm of general international law having the same character.

whether or not the convention contains a clause such as that proposed by Chile.<sup>145</sup>

Should it come to pass that Chile is not persuaded by such arguments or loses control of its proposal, the addition of a veritable Christmas treeful of ornaments seems possible. What are the implications of declaring the principle of the common heritage a peremptory norm of international law, but not the principle of the sovereign rights of the coastal state over the natural resources of the economic zone or the continental shelf? What of the freedoms of navigation and overflight, or the obligation to protect and preserve the marine environment? In the end, something close to a table of contents of the convention might emerge, as occurred in the discussions of such matters during the debate on amendments.<sup>146</sup> Would this result be any different from relying on the rules in Articles 41 and 43 of the Vienna Convention?

### *Participation and the Transitional Provision*

The discussion of participation in the convention, presumably including the right to become a party with the same rights and duties as all other parties, proved to be exceedingly politicized.<sup>147</sup> While it is generally accepted that all states would be permitted to become parties to the convention, and that the "all states" clause would be administered by the United Nations in the same manner as with respect to other treaties, various proposals were also made to permit other entities to become parties, including: the European Economic Community and similar regional economic communities;<sup>148</sup> fully self-governing associated states that choose that status in

<sup>145</sup> It should be noted that an interpretation of the common heritage principle that takes adequate account of the world's needs for raw materials at reasonable prices and the interests of developing countries in deriving financial benefits from deep seabed mining might well preclude restrictive commodity agreements affecting the supply, marketing, or prices of any metal mined from the deep seabeds.

<sup>146</sup> See Conf. Doc. FC/4 (Aug. 1, 1979).

<sup>147</sup> Conf. Docs. FC/13 (Aug. 20, 1979) and FC/17 (Aug. 23, 1979) contain the president's summary of the debates on participation in the convention.

<sup>148</sup> Conf. Doc. FC/5 (Aug. 3, 1979), repeating the text in UN Doc. A/CONF.62/L.32 (Sept. 14, 1978).

Utilization and conservation of living resources, some aspects of the proposed deep seabed mining regime, protection of the marine environment, and potentially transport and energy have been mentioned as matters within the competence of the EEC for these purposes. Koers, *Participation of the European Economic Community in a New Law of the Sea Convention*, 73 AJIL 426 (1979). With respect to the Seabed Authority, Koers notes that EEC participation "in the Assembly (and other organs) will, of course, require special voting arrangements." *Id.* at 434. Were this a reference to the Council, it would certainly be an understatement. Current approaches would give each Council member one vote and rely on the number of votes necessary to prevent action as the basis for protecting seabed mining and consumer interests. The "blocking" numbers discussed proceed on the assumption that seabed mining and consumer states that are members of the EEC would qualify and vote separately.

An informal proposal by the USSR (Conf. Doc. FC/3 (July 30, 1979)) takes a more general approach to the question of international organizations with competence

an act of self-determination supervised and approved by the United Nations and that have full legal and administrative competence regarding the subject matter of the convention (*i.e.*, the Cook Islands and Niue supported by New Zealand, the state with which they are associated);<sup>149</sup> the Trust Territory of the Pacific Islands;<sup>150</sup> any territory that has not attained full independence in accordance with Resolution 1514 (XV) of the General Assembly;<sup>151</sup> any national liberation movement recognized by the United Nations and the regional intergovernmental organization concerned.<sup>152</sup>

The first two of these can be viewed as special problems of applying the "all states" concept. It might be possible to permit such entities to accept the convention in connection with an all states clause, since both are exercising the competence of states in their stead.

Some careful work will be required to ensure that any arrangements in this regard do not permit a state to enjoy the benefits of a party with respect to some matters covered by the convention, but without assuming the obligations entailed in other parts of the convention. If an economic community may become a party only with respect to matters within its competence, a serious question arises as to whether it should be permitted to exercise the rights of a party with respect to areas and nationals of a member state that has not assumed the obligations of the convention for matters that are not within the competence of the community. The question is a variant of the problem of reservations.

In this connection, the European Court of Justice has said:

It is further important to state, as was correctly pointed out by the Commission, that it is not necessary to set out and determine, as regards other parties to the Convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene. In the present instance the important

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in matters dealt with by the convention. It provides:

1. If an international organization established by States conducts activities in one or several spheres regulated by the provisions of this Convention, references to States in the corresponding provisions of the Convention shall be deemed to apply to such an organization, on condition that it declares its acceptance of the rights and duties provided for in this Convention.

2. States Parties to this Convention which are members of such an organization shall take all appropriate steps to ensure that the organization makes a declaration in accordance with the preceding paragraph.

*Compare* Art. 22, Convention on International Liability for Damage Caused by Space Objects, 1972, 24 UST 2389, TIAS No. 7762.

<sup>149</sup> Conf. Doc. FC/10 (Aug. 15, 1979).

<sup>150</sup> Statement and Informal Proposal of the Federated States of Micronesia (Aug. 23, 1979).

<sup>151</sup> Conf. Doc. FC/12 (Aug. 16, 1979). <sup>152</sup> *Ibid.*

thing is that the implementation of the Convention should not be incomplete.<sup>153</sup>

The question of the Trust Territory of the Pacific Islands is largely resolved by the anticipation that associated states<sup>154</sup> will emerge with the necessary internal and external competence to become parties upon termination of the Trust.

The most serious controversy surrounds the last two kinds of entities. The problem of dependencies also arises in the context of the so-called transitional provision.<sup>155</sup> That provision states that resource rights of various dependent territories or territories under foreign occupation or colonial domination "shall be vested in the inhabitants of that territory, to be exercised by them for their own benefit." A "metropolitan or foreign power . . . may not in any case exercise, profit or benefit from or in any way infringe" these rights. In addition, in cases of a dispute over the sovereignty of a territory, if the United Nations "has recommended specific means of solution," these rights "may not be exercised except with the prior consent of the parties to the dispute."<sup>156</sup>

While large numbers of delegations are required for political reasons to make positive statements on dependencies and liberation movements for the record, it is generally understood at the conference that their inclusion could wreck the prospects for ratification of the convention. Whether there is anything to be gained from pressing the issue might be analyzed by examining some of the main objectives that may be involved: legal rights as parties to the convention, protection of the inhabitants of dependencies and occupied territories, and political recognition.

Two distinct questions are involved. First, what state is internationally responsible in fact for ensuring compliance with international law (including the convention) in the offshore areas in question? Second, what are its special duties as regards the present and future interests of the inhabitants? If one approaches the matter in terms of who should be in control of an area rather than who is in control, both of these questions become irrelevant. The only question then is whether it is considered desirable to prejudice the effective entry into force of the convention.

Seen in this context, exercising the legal rights and having the legal duties of a party to the convention becomes a problem only in a few cases where the relationship with a state is so distinctive, and the independent powers of the dependency over its territory so extensive, that a serious practical question of which entity should exercise the rights and duties under the

<sup>153</sup> Ruling on Participation of Member States of European Atomic Energy Community in Convention Relating to Physical Protection of Nuclear Materials in Absence of Concurrent Participation of the Community, 21 O.J. EUR. COMM. (No. C 302) para. 35 (1978), 18 ILM 85, 101 (1979).

<sup>154</sup> Outside the Mariana Islands.

<sup>155</sup> Conf. Doc. FC/11 (Aug. 16, 1979) contains the president's summary of the debate on the transitional provision.

<sup>156</sup> The transitional provision was removed from the treaty articles in the RSNT. It was Article 136 of the SNT.

convention arises in the opinion of both the state and the dependency. The primary objective seems to be the independent exercise of legal rights with respect to coastal resources, especially in the economic zone and on the continental shelf. In these special cases (*e.g.*, the associated states that will emerge in Micronesia after termination of the Trust, the Cook Islands, and Niue) the three common elements are: an independent local government actually exercising comprehensive territorial competence over matters dealt with by the convention, external competence of that government to enter into international agreements on such matters, and recognition of such internal and external competence by the state with which that government is associated. Two theoretical options arise in such cases: to treat such associated states as parties with respect to some matters (*e.g.*, coastal state rights and duties), or to treat them as parties with respect to all matters (including "flags" and membership in the Seabed Authority).

As for liberation movements, the underlying objective seems to be to enhance their political recognition. They cannot, and apparently do not wish to, claim economic zones, mine the seabeds on their own, sail ships under their flag, and so forth,<sup>157</sup> at least until they form governments—at which point the legal issue becomes one of recognition of states and governments, not one of liberation movements. Indeed, a liberation movement would presumably refuse to concede that it might not yet be a national government by the time there are substantial revenues generated from deep seabed mining. In brief, there is no substantial legal point related to the convention in pressing the issue of permitting liberation movements to become parties to it.

The fact that the latest proposal on liberation movements is couched in terms of accession rather than signature suggests a refined appreciation of the problem.<sup>158</sup> Be that as it may, the real problem is that the law of the sea convention cannot be the testing ground for new and controversial developments on the issue. The attempt could wreck the conference; victory could wreck the convention. To put it mildly, the idea of requiring formal recognition of or a commitment to finance certain liberation movements as the price for a law of the sea convention substantially miscalculates the political equation.

Of course, the advocates of permitting liberation movements to become parties may be making an underlying point—unrelated to the law of the sea convention as such—regarding the lawfulness of the physical control being exercised over the land territories sought to be liberated. This question is of the same genre as that adverted to for disputed areas in the proposed transitional provision. It is not a law of the sea question at all; in-

<sup>157</sup> The basic juridical provisions refer, necessarily, to states. "Among the relevant provisions cited were articles 2, 3, 17, 21, 24, 25, 33, 38, 41, 42, 47, 49, 53, 54, 56, 60, 61, 62, 70, 73, 74, 76, 77, 83, 87, 90, 91, 94, 105, 106, 107, 125, 130, 153, 156, 159, 161, 192, 193, 194, 211, 217, 218, 220, 226, 228, 234, 235, 245, 246, 279 and 287 of the ICNT/Rev.1." President's Note, Informal Plenary on Final Clauses, Conf. Doc. FC/17 (Aug. 23, 1979), para. 2.

<sup>158</sup> Conf. Doc. FC/12 (Aug. 16, 1979).

deed, the law of the sea aspect derives completely from the position taken regarding land territory. States that do not recognize the validity of claims to or occupation of territories may maintain the same position regarding claims of right under the convention in respect of those territories (e.g., territorial sea, continental shelf, or economic zone claims).

The basic problem appears to be common to all areas arguably under "foreign" control: the use, allocation, and depletion of natural resources off the coast of dependencies or areas under military occupation. (At least one of the above rubrics presumably covers "foreign"-controlled "disputed areas," as well as areas sought to be freed by the relevant national liberation movements.)

It seems fruitless to approach this issue in terms of who has the right to supervise (administer) resource activities. It is the fact of "foreign" or "metropolitan" administration on the coast, whether lawful or not, that gives rise to the problem. The practical question is: even if its presence is lawful, what are the obligations of a foreign or metropolitan power regarding local inhabitants? No obligations can be imposed in practice if their effectiveness is dependent upon an admission by a power that its claim and presence are illegal.

In the case of military occupation, it seems clear that the traditional protections afforded inhabitants by international law and the Hague and Red Cross Conventions should apply to offshore resources of the coastal state. These rules impose very substantial limitations on the occupying power.<sup>159</sup> For dependencies, the requirements of existing international law may be different, but they are no less solemn. The language of chapter XI of the UN Charter seems more protective of the inhabitants and is free of the legal problems of the proposed transitional provision.<sup>160</sup>

The convention need say nothing at all to preserve these protections under the Charter and other rules of international law. This is made abundantly clear by the preamble of the ICNT,<sup>161</sup> not to mention Article 103 of the Charter. Indeed, several legal problems would be created by treating the matter in the convention itself.

If the conference attempts to state the applicable substantive rules, it runs the risk of dividing and confusing another body of international law.

<sup>159</sup> The application to continental shelf resources of the relevant restraints of international law on the occupying power is not contested. See U.S. Dept. of State, Memorandum of Law on Israel's Right to Develop Oil Fields in Sinai and the Gulf of Suez (Oct. 1, 1976), 16 ILM 733 (1977). Israel's response, while differing on the effect of the relevant rules, states: "The duty of an occupant is *inter alia* to maintain economic prosperity of occupied territory." While "reasonable exploitation" is in its view permitted, "waste or excessive extraction" are not. Ministry of Foreign Affairs Memorandum of the Law on the Right to Develop New Oil Fields in the Sinai (Aug. 1, 1977), 17 ILM 432, 443 (1978).

<sup>160</sup> Some of the problems are discussed in 69 AJIL (1975) at pp. 786-87 (regarding SNT Art. 136).

<sup>161</sup> The last preambular paragraph of the ICNT/Rev.1 affirms that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of this Convention."



In order to avoid leaving something out, it must either draft beyond its expertise (and mandate) or make a general cross-reference to international law. This also raises the possible implication that these other rules of international law would apply offshore only by virtue of, or to parties to, the law of the sea convention. Since fisheries zones and continental shelves already exist, and problems may arise before the convention enters into force, that is an undesirable result.

In addition, it should be noted that the interpretation and application of any such clause would inevitably involve very sensitive political issues. For example, how many states would delegate to the UN General Assembly the power to determine whether part of what they consider their territory is in reality, at least for purposes of the convention, an area under foreign occupation or colonial domination? With respect to judicial or arbitral consideration of such matters, it is instructive to note the strong resistance to the ICNT requirement for adjudication or arbitration even of offshore boundaries, and the fact that even though the ICNT would require some third-party procedure on offshore delimitation entailing a binding decision, it provides that "such procedure or decision shall exclude the determination of any claim to sovereignty or other rights with respect to continental or insular land territory."<sup>162</sup>

Thus, inclusion of a clause on this subject would inevitably produce demands for an exclusion from compulsory third-party dispute settlement procedures and a right to reserve to the clause. Such demands would threaten a broader reopening of the question of exceptions to dispute settlement and would hinder attempts to limit reservations generally. If, as seems likely, reservations would be the end result, inclusion of a clause accomplishes nothing as a matter of treaty law and casts doubt upon its value as evidence of customary law.

## VII. CONCLUSION: PROSPECTS FOR THE NINTH SESSION

The three major obstacles that must be overcome to achieve a treaty are the remaining unresolved deep seabed mining issues, including voting in the Authority; the politically inspired proposals regarding dependencies and national liberation movements; and the pitfalls of formal procedures. A significant testimony to the extraordinary progress made by the conference is that the second and in some measure the third of these have nothing to do with the substance of the law of the sea and involve problems wholly extraneous to it. Nevertheless, only a considerable and probably enhanced determination by important conference leaders to resolve the problems and to protect the convention from slow but mortal unraveling is likely to overcome these obstacles and to see the conference through to a successful conclusion in the year or so envisaged. Those who have relaxed and enjoyed the fray for so long on the assumption that the ICNT is already international law should take serious note of the fact that there are now voices calling it only a stage in the development of the law that should be followed by new,

<sup>162</sup> ICNT/Rev.1, Art. 298, para. 1(a).

inconsistent unilateral actions, such as demands that requests be made of coastal states for permission to navigate in the economic zone.<sup>163</sup>

It is difficult to deal with the view that, in the end, this procedurally innovative, informal, marathon conference must formally adopt texts according to the procedures sanctified by tradition and its Rules of Procedure. Some holding this view participated in other conferences where formal procedures such as voting on individual amendments and articles both in committee and plenary were in fact employed. Others have spent much of their careers working on resolutions of the UN General Assembly rather than legally binding treaties that must be submitted to governments for ratification. Yet the emphasis on the integrity of the "package deal" that dominated the debate in the Informal Plenary on questions such as amendments to the convention after ratification must also be maintained during the formal stages of the conference.<sup>164</sup> Without doubt, the Rules of Procedure<sup>165</sup> must be respected; but that includes the gentleman's agreement on consensus procedures.<sup>166</sup>

To produce a widely acceptable law of the sea convention, there will have to be a working consensus on the final informal text (subject perhaps to additional scrutiny by the Drafting Committee). That final informal text will have to become the Convention on the Law of the Sea, no matter how many intermediate stages it passes through along the way. There could no longer be any changes of substance that affect the consensus.

Voting on individual amendments, individual articles, or even individual parts risks destroying the convention. Admittedly, the danger of voting on amendments is greater in committee than in Plenary,<sup>167</sup> and the danger of

<sup>163</sup> This theme was resoundingly pressed by three distinguished Nova Scotia lawyers, Professors Gold, Flemming, and Johnston, at the 13th Annual Meeting of the Law of the Sea Institute in Mexico City in October 1979. Their remarks will be published in the *Proceedings*. These lawyers—albeit unwittingly—have posed fundamental questions about the willingness of informed members of the Canadian public to support the integrity of the Canadian side of the massive and revolutionary bargains on both freedom of navigation and coastal state pollution controls struck with the rest of the world. The broader question is the conclusion states will draw about the possibilities for serious negotiation in the future.

<sup>164</sup> The procedural and substantive implications of the "package deal" approach to the negotiations are the subject of an illuminating essay by the leader of the French delegation, Guy Ladreit de Lacharrière, in *Aspects juridiques de la négociation sur un "package deal" à la Conférence des Nations Unies sur le droit de la mer*, in *ESSAYS IN HONOR OF ERIK CASTRÉN* (Publications of the Finnish Branch of the International Law Association No. 2, Helsinki 1979).

<sup>165</sup> Note 14 *supra*.

<sup>166</sup> Appended to the Rules of Procedure, reprinted in 73 AJIL 3 n.11 (1979).

<sup>167</sup> In a main committee, a determination that all efforts at consensus have been exhausted can be made, and an amendment can be adopted, by a majority of those present and voting; the "cooling-off period" during which a vote can be deferred is 5 days. Rules of Procedure, note 14 *supra*, rule 55. In Plenary, the requisite majority is two-thirds of those present and voting, provided that majority includes at least a majority of the states participating in that session of the conference (something on the order of 75 affirmative votes at a minimum); the "cooling-off period" is 10 days. Rules 37 and 39.

voting on articles may be greater than the danger of voting on amendments. Since the informal texts are plenary documents issued on the joint responsibility of the president and the chairmen, it would make sense to concentrate formal proceedings in the Plenary, at least insofar as any decisions are concerned.<sup>168</sup> But still, the very idea of voting is fundamentally incompatible not only with the concept of consensus but with the preservation of the "package deal" and the view that the noninstitutional aspects of the convention are the most authoritative evidence of modern international law.

This approach has been questioned on the ground that the absence of records regarding the substantive negotiations makes it difficult for delegations to convince their governments or domestic public opinion that they have in fact made every effort to achieve changes in the text, and have not succeeded. However, politically astute groups able to bring substantial pressure to bear on their delegations are probably well aware of the fact that the time for making maximum efforts for changes is prior to completion of an informal text, not afterwards. Accordingly, the main function of the formal stage of the conference would seem to be to afford an opportunity for states to record their preferences and disappointments. Even such a procedure has the inherent danger of stimulating exchanges on questions of interpretation that could undermine the fragile agreements of which the overall consensus is composed. It was suggested that delegations be encouraged to circulate their statements in writing rather than deliver them orally.

The "balance" of the convention is so delicate, and the web of implicit bargains and complex relationships so opaque, that any attempt to take serious action on the premise that no article has been agreed would surely prove as destructive as it is naive. The only sure defense against the various risks that will arise during formal proceedings is the existence of a large enough group of sophisticated delegations that is prepared, as a matter of principle, to oppose every procedural or substantive proposal that could upset the consensus. The strength, skill, and discipline of that "escort"—its ability to forestall or defeat any action, of whatever inherent merit, that might damage its charge—will determine the outcome.

<sup>168</sup> The conference has provided for negotiations in Plenary in which the president would have the chairmen of the 3 main committees associated with him on the podium. UN Doc. A/CONF.62/62, note 5 *supra*, para. II(14).

## THE REGIME OF STRAITS AND NATIONAL SECURITY: AN APPRAISAL OF INTERNATIONAL LAWMAKING

By W. Michael Reisman \*

The United States military potential may be viewed in two interlocking dimensions. The first is nuclear deterrence: the maintenance of a posture designed to deter other states with nuclear military potential from nuclear adventures. The second is comprised of nuclear and more conventional capabilities, designed to communicate to the widest spectrum of adversaries a capacity and willingness to exercise coercion in different settings in order to protect vital national interests.

The importance of the oceans to the use of the military instrument is obvious: the oceans, their airspace, and submerged areas are some five-sevenths of the world arena. Both of the dimensions of military potential currently include use of the oceans, their airspace, and, in particular, their straits; both require an international normative regime which facilitates that use.<sup>1</sup> Possible future uses, particularly with regard to superjacent airspace, must also be considered in determining what constitutes a minimally acceptable normative regime. It is clear, for example, that greater use of airspace for military and commercial purposes and the routinization of shuttles with satellites may make the airspace over these five-sevenths of the globe even more critical.<sup>2</sup>

In many ways, U.S. national interests in these dimensions of the maritime regime resonate positively with the common interests of the world in a system of minimum order. An effective system of mutual deterrence between the superpowers is not only in their own interests; it is a prerequisite to general survival. In any community, common interests must

\* Of the Board of Editors.

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<sup>1</sup> Regarding the impacts of norms on naval activity, see Knight, *The Law of the Sea and Naval Missions*, 103 U.S. NAVAL INSTITUTE PROCEEDINGS 34 (1977); Osgood, *U.S. Security Interests in Ocean Law*, in A. HOLLICK & R. OSCOOD, *NEW ERA OF OCEAN POLITICS* 75 (1974); Hill, *U.S. Law of the Sea Position and its Effect on the Operating Navy: A Naval Officer's View*, 3 OCEAN DEV. & INT'L L.J. 341 (1976). For a more extreme view, see O'Connell's remarks in *BRITAIN AND THE SEA* (Papers and Records of a Conference at the Royal Naval College, Greenwich, September 12-14, 1973); O'Connell, *International Law and Contemporary Naval Operations*, 44 BRIT. Y.B. INT'L L. 19 (1970).

<sup>2</sup> Some perspectives are offered in Pickett, *Airlift and Military Intervention*, in *THE LIMITS OF MILITARY INTERVENTION* 137 (Stern ed. 1977).

predominate; this has been an enduring postulate of international maritime law. "Navigation and shipping," Ambassador Pardo has said, "... are fields where because of the requirements of international trade and intercourse ... the international interest ... must prevail."<sup>3</sup> Deterrence is an uncompromisable security necessity for all members of the world community. Where national claims are inconsistent with the regime that provides effective deterrence, they must yield to the inclusive interest, for minimum order is inescapably the preeminent common interest.<sup>4</sup>

The United States system of deterrence<sup>5</sup> is based on a nuclear triad: warheads delivered by land-based ballistic missiles, by aircraft, and by ballistic missiles carried by submarines (SLBM's).<sup>6</sup> Prelaunch location,

<sup>3</sup> Statement delivered before the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond Limits of National Jurisdiction on March 23, 1971, quoted in Lapidoth, *Freedom of Navigation—Its Legal History and its Normative Basis*, 6 J. MAR. L. & COM. 259-72 (1975). Where goals are stated in functional terms, it is important to test the institutional arrangements for their realization functionally, for in conventional terms, there may appear to be inequalities. Functional goals may be fulfilled when one state exercises virtual plenary jurisdiction in waters within 12 miles of its coast, while another, whose coasts front on a strait, may enjoy considerably less jurisdiction. The test here is not formal equality but whether the goal is approximated.

<sup>4</sup> I do not minimize the substantial interests of coastal states in establishing regimes to deal effectively with the increasingly intensive and potentially noxious uses of their coastal waters. Young writes, "No underinsured, ill-equipped, ill-navigated, chartless, flag-of-convenience-registered 250,000 ton tanker can ever be 'innocent' in the English Channel or the Malacca Strait, or, should it find itself there, in the Canadian Arctic." Young, *New Laws for Old Navies: Military Implications of the Law of the Sea*, 16 SURVIVAL 262, 265 (1974). Obviously, an acceptable regime must protect those interests, but unless it is compatible with minimum order requirements, no interests will survive. In many circumstances, it should be plain that coastal interests may be enhanced by *not* enlarging coastal competence: see note 48 *infra*. In other circumstances, organizational and normative design may accommodate freedom of navigation and coastal interest, *e.g.*, in absolute liability standards, insurance schemes, and punitive damages. See, *e.g.*, the statement of John R. Stevenson before Subcommittee II of the Seabed Committee, July 28, 1972, UN Doc. A/AC.138/SC.II/SR.37, at 2 (1972), cited in Knight, *Issues before the Third UN Conference*, 34 LA. L. REV. 155, 184 (1974). For an earlier discussion, see E. Lauterpacht, *Freedom of Transit in International Law*, 44 GROTIUS SOCIETY TRANSACTIONS 313, esp. 319-20 (1958-59).

<sup>5</sup> For general background, see P. GREEN, DEADLY LOGIC: THE THEORY OF NUCLEAR DETERRENCE (1966); R. JONES, NUCLEAR DETERRENCE: A SHORT POLITICAL ANALYSIS (1968); H. KAHN, THINKING ABOUT THE UNTHINKABLE (1962); A. LEGAULT, THE DYNAMICS OF THE NUCLEAR BALANCE (1974); S. MAXWELL, RATIONALITY IN DETERRENCE (1968); P. MORGAN, DETERRENCE: A CONCEPTUAL ANALYSIS (1977); R. ROSECRANCE, STRATEGIC DETERRENCE RECONSIDERED (1975); A. GEORGE & R. SMOKE, DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE (1974). For historical and comparative perspectives, see R. NAROLL, MILITARY DETERRENCE IN HISTORY: A PILOT CROSS-HISTORICAL SURVEY (1974).

<sup>6</sup> On submarine warfare, see Rathjens & Ruina, *Trident*, in THE FUTURE OF THE SEA-BASED DETERRENT 66 (Tsipis, Cahn, & Feld, eds., 1973); Hill, *Maritime Power and the Law of the Sea*, 17 SURVIVAL 70 (1975); Garwin, *Antisubmarine Warfare and National Security*, in PROGRESS IN ARMS CONTROL? READINGS FROM SCIENTIFIC AMERICAN 82-94 (Russett & Blair, eds. 1979), and see the editors' Introduction, *id.* at 30-31; R. H. Smith, ASW—*The Crucial Naval Challenge*, 98 U.S. NAVAL INSTITUTE PROCEEDINGS 126-41 (1972); Scoville, *Missile Submarines and National Security*, 226

storage, relative mobility, method of delivery, targeting accuracy, and vulnerability introduce significantly different strategic, deterrent, and political factors for each.

Land-based missiles, from fixed bases and, to a lesser degree, from aircraft, exercise an inherent attraction for preemption or first strike, whereas submarine missiles, by virtue of their mobility and comparative invisibility, do not. Many students of this area believe that for the foreseeable future antisubmarine warfare techniques pose no serious threat to U.S. submarines—assuming the subs are submerged. The differences between land basing and submarine delivering are more than marginal. A former Secretary of State contends that “by some time in the early 1980s the Soviet Union will have the capability to destroy with a reasonable degree of confidence most of our land-based ICBMs. In the same period of time we will not be able to destroy the Soviet ICBM force.”<sup>7</sup> Even if this prognosis proves wrong, other significant factors must be taken into account. For one, submarine missiles are more stable politically. Precisely because land-based missiles exercise a preemption and first-strike attraction for adversaries, democratic allies hosting them will be vulnerable to domestic political pressure for their removal. The more democratic a host becomes, the more it becomes susceptible to domestic pressure to expel the very missiles protecting the alliance; national defense planners encounter this phenomenon in domestic politics about siting land-based missiles. Even where the foreign host is undemocratic, land-based missiles may make it subject to extraordinary political pressures or blandishments by the adversary. Without addressing relative military utility, it seems clear, for these and other reasons, that submarine missiles offer a more reliable deterrent.<sup>8</sup>

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SCIENTIFIC AM. 18 (1972), reprinted in Russett & Blair eds., this note *supra*; Polmar & Paolucci, *Sea-Based “Strategic” Weapons for the 1980’s and Beyond*, 104/5 U.S. NAVAL INSTITUTE PROCEEDINGS 98 (1978); Holst, *The Navies of the Superpowers: Motives, Forces, Prospects*, in *POWER AT SEA, II: SUPERPOWERS AND NAVIES 4* (Adelphi Papers No. 123, 1976). For a more popular presentation, see Stanford, *The Deadly Move to Sea*, N.Y. Times Magazine, September 21, 1975.

<sup>7</sup> *Kissinger’s Critique*, THE ECONOMIST (London), February 3, 1979, at 17, 18. The development was anticipated almost 20 years ago by Dr. Oskar Morgenstern:

The United States can make its force invulnerable by hardening. . . . But this has the simple consequence that these sites will come under correspondingly heavier attack. Their locations in the United States . . . are perfectly known to the enemy. With modern missile technology it is easy to nullify any degree of hardening by the dispatch of more missiles with more and more powerful nuclear warheads. Hardened bases draw heavier fire, mostly ground bursts producing deadly fall-out that spreads throughout the continent. . . .

Morgenstern, *Effective and Secure Deterrence, The Oceanic System*, [1960] RCAF STAFF C.J., reprinted in Polmar & Paolucci, *supra* note 6, at 107.

<sup>8</sup> The major vulnerability of airpower is that it must get off the ground. Land-based missiles may become unacceptably vulnerable in the next decade as the USSR’s throw-weight increases. To counter this development, defense specialists seek to increase the number of launch points, which, in turn, incites public resistance in the neighborhoods where siting is projected. SLBM’s do not present these problems; moreover, they often traverse shorter distances, making them more effective and advantageous.

Terms such as "gunboat diplomacy" and "showing the flag" are rather anachronistic ways of expressing the fact that an integral part of political power at any level of social organization is the general expectation that an actor has the capacity and will to use force to conserve or extend vital interests. Stability is increased when capacity, will, and vital interest are correctly appraised by others; it is decreased when they are misperceived. This process proceeds even when troops rest in their barracks and ships bunker at home ports, for it is an ongoing assessment of possibility. As Lasswell put it:

Demands for colonies, ships, and treaty revisions are continually modified in the light of estimated changes in the relative fighting position of groups; estimates of fighting effectiveness are differentially modified by actual changes in the natural resources and technology; and identifications with this or that collective symbol are partially controlled by the supposed prospects of success of that symbol in the struggle for status.<sup>9</sup>

One of the key and often misunderstood functions of the military instrument is not *during* war, but before war, and hopefully in preventing war. The military instrument is an unwelcome and yet ubiquitous feature of politics *at all times* and its relative utility at any particular time depends on comparative quanta as well as locations.<sup>10</sup> Hence the continuing im-

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Thus, Morgenthern, with extraordinary prescience, argued:

Indeed, we must go further and place the major part of the retaliatory force outside our country . . . on the vast expanses of the world's oceans, in fact under the waters. We then combine through the use of nuclear-powered, missile-firing Polaris submarines the tremendous advantages of mobility with invisibility; and we can distribute individual units *randomly*, thereby making surprise attack on any even remotely substantial part of that force impossible. I call this the *Oceanic System of Defense*.

Morgenthern, *supra* note 7, at 107.

<sup>9</sup> H. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 40 (1935; Free Press Paperback, 1965). See also E. LUTTWAK, *THE POLITICAL USES OF SEAPOWERS* 1-38 (1974). Young, *supra* note 4, argues at 266 that "probably no naval vessel can now count on being freely allowed passage through straits in time of trouble, whatever the small print of the relevant convention might say." The comparative certainty of that statement will be affected by the normative regime that results; the latter will certainly influence the degree of freedom of passage in noncrisis periods, when the military instrument continues to be important.

<sup>10</sup> See generally, E. LUTTWAK, note 9 *supra*; McGwire, *Changing Naval Operations and Military Intervention*, in Stern ed., *supra* note 2, at 151; Feld, *Military Demonstrations: Intervention and the Flag*, *id.* at 197; J. CABLE, *GUNBOAT DIPLOMACY* (1971). In this respect, Pirtle's comments would appear to miss the point. Obviously, the depth and breadth of straits make them susceptible to blockage or mining during intense belligerency: Patterson, *Mining: A Naval Strategy*, 23 *NAVAL WAR C. REV.* 52 (1971). This vulnerability must be factored into calculations by all parties who may even discover a common interest in keeping the straits open in those periods. But a key concern of an appropriate maritime regime is to keep the straits maximally open in non- and prebelligerent situations: Pirtle, *Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited*, 5 *OCEAN DEV. & INT'L L.J.* 492 (1978). In his emphasis on power alone, Pirtle, like Young (note 9 *supra*), would appear to misunderstand the general function of law in the power arena.

portance of communicating strategic and tactical capabilities. In the contemporary arena, strategic and tactical capabilities employ submarine as well as surface and aerial elements, all of which may require relatively easy access to large parts of the oceans and, in particular, transit through straits. Indeed, the expectation of accessibility is, itself, a key component of the military effectiveness of the weapons system.<sup>11</sup>

In a deterrence system, the normative regime must fulfill these requirements for all parties and must not be run aground to serve the apparent short-term advantages of one party in the ceaseless zigs and zags of competitive technological and weapons development. Thus, the fact that the USSR may benefit from making the United States "straits-bound" with regard to submerged or surface passage in a particular part of the world or that the United States may benefit from having the USSR "straits-bound" in the interim when the range and accuracy of U.S. SLBM's do not require the proximity afforded by straits passage, does not, in terms of long-range interests, justify either in establishing a regime which diminishes the *deterrent* capacities of the other. In the logic of a deterrence system, each party must remain assured of its deterrent competence; as assurance erodes, the inclination to preempt increases.

Among other things, the effectiveness of both the SLBM component of the deterrence system and the surface and aerial components of the strategic and tactical system requires unrestricted access to large parts of the oceans. In the case of SLBM submarines, access must include the right to remain submerged in order to avoid detection, a consideration at best only partially satisfied by the increasing range and accuracy of SLBM's. As a recent Stockholm International Peace Research Institute study puts it:

Unlike torpedo or cruise missile-carrying counter-shipping submarines, the ballistic missile submarine has a strategic rather than a tactical role. Its operations are therefore not confined to the vicinity of a convoy or a task force; rather it roams submerged in the millions of cubic kilometres of ocean from where it can be within range of its strategic inland targets. It does not seek to approach but rather avoids, surface ships, since its main operational requirement is to remain undetected and thereby ensure the availability of its ballistic missiles at any instant.<sup>12</sup>

In deterrence theory, detection of the submarine is as systemically dangerous as would be an antiballistic missile system to protect cities:

The deployment of ABM (anti-ballistic missile) systems to protect urban areas was prohibited by the SALT I agreements, the reason being that such systems impede the ability of ballistic missiles to attack urban areas and hence erode the counter-value role of these missiles. Similarly, an ASW [antisubmarine warfare] system designed to attack missile-carrying submarines could threaten the sec-

<sup>11</sup> For an excellent discussion, see F. KRUGER-SPRENGEL, *THE ROLE OF NATO IN THE USE OF THE SEA AND THE SEABED* (Woodrow Wilson International Center for Scholars Ocean Ser. No. 304, 1972).

<sup>12</sup> "Antisubmarine Warfare," *WORLD ARMAMENTS AND DISARMAMENT*, SIPRI Y.B. 1974, at 303, 304.



ond-strike capability of these submarines, and would thus be as undesirable as an urban ABM system: both ABM and ASW systems undermine the credibility of deterrence as a viable strategic posture. The institutionalization of deterrence as the mutual strategic posture of the Soviet Union and the United States (and presumably also France, Britain and China) appears to proscribe any military operation that could threaten the stability of strategic weapon systems on which the credibility of deterrence is based.<sup>13</sup>

An acceptable public order of the oceans as it pertains to security should provide for wide surface and aerial access and rights of submerged passage as unconditionally as possible.<sup>14</sup>

<sup>13</sup> *Id.* at 304. These conclusions will not be accepted by American or Soviet strategists who view strategic forces as being not only deterrent, but also as war fighting; they will obviously desire to threaten the second-strike capabilities of the adversary, a sequence with which this article will not deal.

<sup>14</sup> Professor Burke has argued that "[t]here appears to be a very insubstantial basis for concluding that the security position of the powers employing nuclear or other submarines would be materially prejudiced by requiring these craft to travel on the surface through straits or other parts of the territorial sea." W. BURKE, *CONTEMPORARY LAW OF THE SEA: TRANSPORTATION, COMMUNICATION AND FLIGHT 12* (Law of the Sea Institute Occasional Paper No. 28, Univ. of R.I., 1975). Burke implies in a footnote that the development of underwater surveillance systems makes undetected passage through straits improbable: if this is the case, there is cogency to his argument. But the works he cites to support his contention are at best ambivalent on this point and at worst directly contrary to it. After a discussion of all the surveillance systems designed to locate submarines, one of the cited works observes:

Acoustic countermeasures designed to confuse the sonar devices of an opponent seem to offer considerable opportunity for effective innovation. Torpedoes carrying recorded submarine sounds, which are now employed to test and practice the use of acoustic homing torpedoes, can be easily modified to spoof the sounds of a submarine in order to confuse even the most sophisticated passive sonar. Jamming of the large passive arrays with noise makers is relatively easy since, unlike the case of electromagnetic radiation, the relevant frequency band is rather limited and can be easily covered. Other counter-ASW measures include the reduction of the acoustic cross-section of submarines by using smaller hulls made of reinforced plastics and titanium, or using fuel cells (developed for space use) that will replace the cumbersome and relatively noisy reactor with a much quieter power crew; such power plants can give future hunter-killer submarines the speed and depth characteristics of the considerably larger and noisier nuclear-power craft.

SIPRI, *TACTICAL AND STRATEGIC ANTI-SUBMARINE WARFARE* 31 (1974).

But the piece continues, "In several countries work is going on to develop torpedo-countermeasure resistance (counter-countermeasures) and achieve sonar improvements that aim at neutralizing acoustic countermeasure efforts." Once perfected, if not sooner, such efforts will probably result in still another round of countermeasures. To the same effect Pirtle contends that the operationalization of the *Trident* system, with its increased range and accuracy, will minimize the importance of straits passage for submarines. Pirtle, *supra* note 10, at 488. Like Burke, Pirtle does not address some of the considerations raised in the cited SIPRI studies. Neither considers that the common interests in the global deterrence system may require that both the United States and the USSR enjoy plenary navigation rights through straits.

Nor should changes in technology alone be invoked to devalue straits for U.S. security. Adversaries may have or may acquire means for detecting submerged passage of U.S. vessels through straits, but that does not terminate the utility of a right of submerged passage. There are many actors who will not have that means of detection, and secrecy of passage may still have strategic value with regard to interactions with them.

In the nature of things, normative regimes indulge some and deprive others and hence are always under stress. Particular components are always undergoing long-term erosion or reinforcement. But at about the time that the sea-based deterrent became increasingly refined and began to loom as one of the major bases of national security, the international legal regime of the oceans supplied many of the user access requirements through four venerable though not equally stable principles: (1) a complex of user rights traditionally referred to as the freedom of navigation on the high seas; (2) a 3-mile territorial sea, which left most of the oceans as high seas and among other things resulted in (3) a belt of international waters in most of the critical geographical straits of the world; (4) a right of innocent passage in the territorial sea which, as we shall see, was relatively broad in terms of the user and narrow in terms of the discretion afforded to the coastal state to characterize passage as noninnocent.

It was the concatenation of these legal principles that made the sea-based components of the security system possible. The U.S. interest in the maintenance of this concatenation was expressed, with few exceptions, and sometimes *despite* the U.S. delegation, in the products of the 1958 Law of the Sea Conference.<sup>15</sup> The pertinent conventions emerging from that conference took account of those interests and, in many though not all key sectors succeeded in preserving the legal environment indispensable for the deterrence system. Ironically, these norms were prescribed when the United States was so strong that the norms themselves may not have been exigent; nuclear predominance was so great that the abiding importance of the ocean and straits dimension may have been underestimated. But as the constellation of political, military, technological, and resource factors changes and U.S. power potentials vis-à-vis other actors at least equalize, an appropriate normative system becomes more urgent.

The purpose of this article is to compare the concatenation of norms of what may be called the 1958 system<sup>16</sup> with the concatenation that is emerging in the Third United Nations Conference on the Law of the Sea (UNCLOS)<sup>17</sup> and to assess whether the newer regime as it pertains to

<sup>15</sup> See generally Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AJIL 607 (1958). See also Slonim, *The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea*, 5 COLUM. J. TRANSNAT'L L. 96 (1966). Oddly enough, the U.S. delegation espoused a number of positions actually contrary to its interests. For example, it supported a subjective conception of innocent passage, and when it undertook its unsuccessful démarche for a 6-mile territorial sea, it did not insist on a straits exception. One can only speculate as to whether these were blunders or the result of an appraisal of the then political dependency of key straits states.

<sup>16</sup> Convention on the Territorial Sea and the Contiguous Zone (1958), 15 UST 1606, TIAS No. 5639, 516 UNTS 205 [hereinafter referred to as "Territorial Sea Convention" without additional citation]. Convention on the High Seas (1958), 13 UST 2312, TIAS No. 5200, 420 UNTS 82 [hereinafter referred to as "High Seas Convention" without additional citation].

<sup>17</sup> Third United Nations Conference on the Law of the Sea, Revised Informal Composite Negotiating Text for the Eighth Session, UN Doc. A/CONF.62/WP.10/Rev.1 (April 28, 1979), reprinted in 18 ILM 686 (1979). Research for this article was based

straits meets the requirements, in a new context, of both an international deterrence system and a U.S. sea-based security system.<sup>18</sup> Key questions are whether the new regime provides as much mobility to submarines as does the extant regime and whether it permits surface and aerial components to be shifted as security interests require.

Given the importance of the SLBM component of the defense system, a rather rigorous examination would appear called for. Since UNCLOS will produce a complex convention, an essentially textual approach to construction, as conceived by the Vienna Convention on the Law of Treaties, would appear required because of the Vienna Convention's directives,<sup>19</sup>

on the Informal Composite Negotiating Text (ICNT) of 1977, but the provisions concerned are cited from the more recent ICNT/Rev.1, where only minor changes were made in them.

<sup>18</sup> This article does not address the related issues of the adequacy to security concerns of the regimes for the exclusive economic zone and for archipelagos; some of the problems treated here arise in those regimes as well. For example, Articles 56 to 58 transform certainties about many inclusive high seas rights into grave questions with only the most general guidelines for decision (*see, e.g.*, Article 59). Treatment of these matters must await an additional article.

<sup>19</sup> On the unfortunate predilection for textualism in international legal interpretation, *see, e.g.*, U.S. Nationals in Morocco case, [1952] ICJ REP. 196, 199, and, most recently, Aegean Sea Continental Shelf case, [1978] ICJ REP. 20 ff. The Vienna Convention's codification in Articles 31 and 32 provides:

#### Article 31

##### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32

##### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

and ineluctable owing to the absence of a formal record of the *travaux*.<sup>20</sup> The alternative hardly recommends itself. *Travaux* should be used to supplement incomplete texts, but there is something inherently implausible, in a period immediately after a text's redaction, in using extraneous material, even if it were not ambiguous and contradictory, against the manifest purport of the text. It is even more curious to suggest that use *before* the treaty has been accepted.

Given the very special political and legal problems dealt with here, it would appear equally problematic to use certain practices, as evidence of alleged custom, to illuminate the text. The Vienna Convention seems to rule out prior practice for interpreting the text, permitting in Article

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Vienna Convention on the Law of Treaties, May 22, 1969, UN Doc. A/CONF.39/27, reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969). On the issue of "special meanings" of terms and burden of proof, see OFFICIAL RECORDS, UN CONFERENCE ON THE LAW OF TREATIES, DOCUMENTS OF THE CONFERENCE 42, UN Doc. A/CONF.39/11/Add.2 (1971). With regard to supplementary means of interpretation, note that Article 32 requires that the party seeking to adduce the supplement show that an interpretation without that material would be ambiguous, obscure, manifestly absurd, or unreasonable. That is a high threshold, indeed.

<sup>20</sup> The records of UNCLOS summarize speeches on straits passage made on the record in the 1974 Caracas and 1975 Geneva sessions. Key statements on straits passage may be found in Volume I of the *Official Records* at pp. 59, 60, 63, 68, 71-72, 74, 75-76, 79, 80-81, 84, 85, 86, 87, 91, 92, 94, 96, 98, 99, 100-01, 104, 108, 110, 111, 113, 114-15, 116, 118, 119, 124, 125, 127, 128, 129, 131, 132, 135, 136, 137, 141, 142, 144, 146, 148, 151, 152, 153, 155, 159, 160, 168, 169, 172, 178, 187. In Volume II of the *Official Records*, key statements may be found at pp. 124-42.

It would be a misnomer to refer to these pages as evidence of a "discussion"; they appear, rather, as a series of prepared and read statements, with no interaction between the speakers evident. To cite one example, at the 26th meeting of the Plenary on July 2, 1974, Mongolia, Yugoslavia, Tanzania, Mauritania, and India spoke in succession. Mongolia called for free passage through all international straits. Yugoslavia affirmed coastal jurisdiction "to effectively guarantee their security and to safeguard their legitimate interests"; "commercial navigation" for "permissible and legitimate purposes" should also be guaranteed. Tanzania then contended that the entire notion of freedom of the seas was outmoded, and Mauritania followed by calling for innocent passage through straits. The circle was closed by India which called for free passage. 1 OFFICIAL RECORDS 91-93 (1975).

Professor Burke, who has criticized commentators for construing the ICNT textually, concedes that there are no adequate legislative histories, and the records of different groups meeting in closed or secret meetings are not available. Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 WASH. L. REV. 193, 202-03 (1977). The artful interpreter may, of course, pick and choose and cut and trim speeches from the meetings, but it is really quite difficult to see how this sort of record can help to illuminate a text. Off-the-record and secret meetings, in which transcripts may have been made, might indicate the actual line of consensus (if any), but the probative value of such records against the text and against the official record is a matter of question. As yet there is no systematic study of the theory and practice of the use of *travaux* in international interpretation. Thus, both *lex lata* and the otiose but actually meager record of this draft impel the interpreter to the text. Even with adequate *travaux*, a construction *contra legem* rather than *praeter legem* is most difficult to sustain, especially during periods shortly after the text was accepted. For the special problems involved in construing statements in interest by the United States and inferring acquiescence by others, see note 63 *infra*.

31(3)(b) reference to "subsequent practice in the application of the treaty." As for prior practice, it would be as difficult to construe submerged passage through straits now less than 6 miles in width as generative of a customary right of submerged passage through straits in general as it would be to construe such passage through territorial waters as generative of a right of submerged passage there. By its nature, submerged passage is not the sort of practice that generates customary rights. The notoriety and opportunity for protest by parties thereafter subordinated—requisite components of formation of prescriptive rights—can hardly be fulfilled when the strait state does not or cannot know of the passage or lacks the means of stopping it. And even if such practices were deemed to have generated customary rights in one strait, they could not *eo ipso* be applied to all straits, nor would they be probative of features of surface or aerial passage.

Both the Vienna Convention and the special features of this problem thus impel us to textual construction.

### I. FREEDOM OF NAVIGATION

One of the freedoms of the high seas mentioned in Article 2 of the 1958 Convention on the High Seas is "the freedom of navigation,"<sup>21</sup> a term comprehensive in intention including movement, observation, inspection, maneuvers, tests, and so forth, carried out above, on, and below the surface. The design of Article 2 is noteworthy. The freedoms or protected uses of the high seas are to be exercised "with reasonable regard to the interests of other states," but cannot be subjected to state sovereignty: "no state may validly purport to subject any part of them to its sovereignty." The "freedoms" can be regulated only by the treaty or by international law: "Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law." Thus, these freedoms may be deemed to be absolute in the sense that, absent a treaty or other norm, improper use may give rise to protest or stronger action on another plane, but will not permit an aggrieved state to interfere with the allegedly abusive use on the same plane.<sup>22</sup>

While the general freedom of navigation is potentially subject to some regulations, expressed either in the convention itself or in another treaty, no regulations may be applied to warships; they are immune from other than flag jurisdiction. Article 8 states that they "have complete immunity

<sup>21</sup> See generally, M. McDUGAL & W. BURKE, *PUBLIC ORDER OF THE OCEANS* 751 *et seq.* (1962); J. COLOMBOS, *INTERNATIONAL LAW OF THE SEA* 64 (6th rev. ed. 1967); for historical background, see P. POTTER, *THE FREEDOM OF THE SEAS* (1924); for military implications, see Deddish, *The Right of Passage by Warships through International Straits*, 24 JAG J. 79 (December 1969-January 1970).

<sup>22</sup> C. GIDEL, 1 *LE DROIT INTERNATIONAL PUBLIC DE LA MER* 236 (1932); M. McDUGAL & W. BURKE, *supra* note 21, at 869 *et seq.*; The S.S. Lotus, [1927] PCIJ ser. A, No. 10, at 25; The Jessie, The Thomas F. Bayard, and the Pescawha (Great Britain v. United States), 1 Ann. Dig. 175, Reports: Neilsen's 429 (1926); and see The Le Louis, [1817] 2 Dodson, [1853] Eng. Adm. R. 210.

from jurisdiction of any State other than the flag State." Hence, freedom of navigation for warships may be deemed to be the most comprehensive of the protected uses of the high seas. The "high seas" are defined in Article 1 of the 1958 Convention on the High Seas as "all parts of the sea that are not included in the territorial sea or in the internal waters of a state." Given the historic uses of the ocean, "all parts" has both a vertical and horizontal extension.

Whatever the vertical definition of high seas, the term "freedom of navigation" appears only to be used with regard to the high seas. Navigation through territorial waters in the Convention on the Territorial Sea and the Contiguous Zone of 1958 is characterized in Article 14 as "innocent passage" or "navigation." The words "freedom of navigation" are not used in this connection. In Article 16(4) of the Territorial Sea Convention relating to straits all of whose waters are territorial at some point, the reference is to "innocent passage" and not "freedom of navigation": "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." The International Court of Justice used similar language in the *Corfu Channel* judgment.<sup>23</sup> Insofar as a body of water connecting two parts of the high seas or the high seas and the territorial waters of a state was less than 6 miles in breadth, no special straits regime in favor of users existed. The waters were territorial and the principle of innocent passage applied with the ambiguous proviso that passage not be suspended so long as it was innocent.

On the high seas, "freedom of navigation" includes the right of submerged movement of submarines. However, this freedom does not extend under existing treaties to the "innocent passage" rights of foreign ships through territorial waters in general or through territorial waters in straits. Article 14(6) of the Territorial Sea Convention states: "Submarines are required to navigate on the surface and to show their flag." Hence a strict interpretation, in line with the principles of construction of the Vienna Convention on the Law of Treaties,<sup>24</sup> would induce the interpreter to conclude that "freedom of navigation" has not included freedom of submerged transit through territorial waters in straits, under treaties now in force, a point of some importance insofar as ambiguities in proposed texts are to be clarified in the light of the *lex lata*. More generally, the principles of innocent passage rather than freedom of navigation govern transit by any foreign vessel through territorial waters. In this respect the key difference between freedom of navigation and innocent passage is competence. In freedom of navigation, competence about the character of the user is the flag state's; in innocent passage it is the coastal state's. As for the cavil that an international tribunal will vindicate the user, it is plain fantasy. If there is an international tribunal, how does one compel the coastal state to appear there? In the unlikely event that it should appear, how

<sup>23</sup> [1949] ICJ REP. 4, 29.

<sup>24</sup> See note 19 *supra*.

can one expect the tribunal to apply norms of such exquisite vagueness in ways favorable to the user?

As long as the major maritime powers insisted on a 3-mile territorial sea, a belt of international waters between some of the more strategically critical straits was maintained.<sup>25</sup> Merchantmen as well as warships benefited from passage rights which became increasingly more protected in international law from the late 19th century on. UNCLOS has, however, produced a new regime. Article 3 of the Informal Composite Negotiating Text (ICNT) provides: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." The rather alarming tendency, enunciated most authoritatively by the International Court in the *Iceland Fisheries* case,<sup>26</sup> to view select provisions in international drafts as indicators of consensus and hence evidence of innovative customary law, despite their failure to win the formal support necessary for adoption in conformity with constitutive processes, virtually transforms Article 3 into custom. The prophecy becomes self-fulfilling when many states, acting on the purported authority of draft Article 3, proceed to exercise their putative right, thereby providing the evidence of state practice that confirms the consolidation of the custom.<sup>27</sup> Factors such as quantitative simplicity make provisions on the order of Article 3 more likely candidates for accelerated customization than more complex provisions which, in the dynamics of conference bargaining, may have been parts of packages or trades for support in return for inclusion of Article 3 in the draft.<sup>28</sup> Be that as it may, the continuing erosion of the U.S. commitment to a 3-mile limit means that formerly high seas belts for passage through critical straits may become territorial waters. With a 12-mile territorial sea available to coastal states on demand, as many as 116 straits that currently include a high seas belt and hence are open to passage under the "freedom of navigation" may lawfully be territorialized and henceforth, in the absence of a special and clearly prescribed regime, available to ships only under the much more limited right of innocent passage. Only some of those straits may be currently vital, but a draft long-term treaty must be weighed against long-term interests, under which straits of only

<sup>25</sup> For discussion of the waxing and then waning of the 3-mile rule, see S. SWARTZ-TRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* (1972).

<sup>26</sup> *Fisheries Jurisdiction* (Judgment), [1974] ICJ REP. 3, 26.

<sup>27</sup> See, in this regard, *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, Decision of 30 June 1977, HMSO Cmnd. 7438, Misc. No. 15 (1978), reprinted in 18 ILM 397 (1979); and see especially the concurring opinion of Judge Briggs at 120 (ILM at p. 457).

<sup>28</sup> "It no longer seems to be seriously doubted that a 12-mile territorial sea has been established by customary international law, or soon will be unless a trend develops toward even wider limits." Burke, *Submerged Passage*, *supra* note 20, at 194 n.6.



marginal utility now may acquire the greatest and most urgent importance. Does the doctrine of "innocent passage" in its 1958 form or in its UNCLOS transformation meet the security requirements of the United States?<sup>29</sup>

## II. RIGHT OF INNOCENT PASSAGE

Articles 14 to 17 of the 1958 Convention on the Territorial Sea and the Contiguous Zone deal with "the right of innocent passage."<sup>30</sup> The comparable provisions in the ICNT are Articles 17 to 26. Both references are to surface passage and not to overflight. In both texts, there is substantial congruence with regard to the referents of passage, but marked differences with regard to the meaning of "innocence."<sup>31</sup> Article 14(4) of the 1958 text states: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law." For our purposes, it is the first sentence of Article 14(4), dealing with the notion of innocence, which is important; the

<sup>29</sup> One of the more alarming aspects of the straits debate has been the identification of those straits that are currently indispensable as the maximum number of straits likely to be indispensable in the future. Pirtle, for example, writes that "[a]lthough all straits serve the same navigation function, straits unrelated to 'lifelines' or military objectives can be factored out of the national security equation." *Supra* note 10, at 487. This type of extrapolation represents the most primitive form of policy analysis and should be eschewed. The relative importance of different avenues of the oceans in the future will depend on technique, contexts, and needs which cannot be envisaged now. It should be clear that the prudent course is not to surrender any of these maritime highways if it can be avoided. Where they must be sacrificed, it is foolish to persuade ourselves of their triviality, since it induces us to concede them for less and less. For a persuasive statement, see Grandison & Myer, *International Straits, Global Communications and The Evolving Law of the Sea*, 8 VAND. J. TRANSNAT'L L. 393, 414-15 (1975). But see U.S. DEP'T. OF STATE, OFFICE OF THE GEOGRAPHER, MAPS RELATING TO THE LAW OF THE SEA, No. 6, World Straits Affected by a Twelve-Mile Territorial Sea. See also Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits*, 51 ORE. L. REV. 759, 772 (1972).

<sup>30</sup> On innocent passage in general, see M. McDUGAL & W. BURKE, *supra* note 21, at 174 *et seq.*; J. COLOMBOS, *supra* note 21, at 132-35. See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS §45; Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Substantive Law*, 27 BRIT. Y.B. INT'L L. 1, 28-29 (1950); Deddish, *supra* note 21. On Soviet theories, see W. E. BUTLER, *Soviet Concepts of Innocent Passage*, 7 HARV. INT'L L.J. 113, and THE SOVIET UNION AND THE LAW OF THE SEA 51-70 (1971). See also Przetacznik, *Freedom of Navigation Through Territorial Sea and International Straits*, 55 REV. DROIT INT'L SCIENCES DIPLOMATIQUES & POLITIQUES 222, 299 (1977). Some useful though dated discussion of the customary right of innocent passage and its relevance to non-signatories of the 1958 convention may be found in Donat-Pharand, *Innocent Passage in the Arctic*, 6 CAN. Y.B. INT'L L. 3 (1968).

<sup>31</sup> There is, unfortunately, no concise term to denote a passage that is "not innocent." "Noxious" passage seems too strong in connotation, especially in the light of the criteria proposed by the ICNT. The interest in precision would appear to outweigh the interest in elegance. I will use the term "noninnocent" passage to designate passage that fails one of the tests of the 1958 convention or the ICNT.



second sentence would appear to refer to the more technical aspects of passage. Article 19(1) of the ICNT replicates the first part of the 1958 provision but then illuminates it in paragraph 2:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

(a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) Any exercise or practice with weapons of any kind;

(c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) Any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) The launching, landing or taking on board of any aircraft;

(f) The launching, landing or taking on board of any military device;

(g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State;

(h) Any act of wilful and serious pollution, contrary to this Convention;

(i) Any fishing activities;

(j) The carrying out of research or survey activities;

(k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) Any other activity not having a direct bearing on passage.

The intention may have been no more than to illuminate Article 14, but the change in language here is substantive in result. Article 14 of the 1958 convention permitted the coastal state to characterize passage as non-innocent if it was, in its view, "prejudicial to the peace, good order or security of the coastal state." This formula requires the coastal state to demonstrate that effects deriving from the projected passage will be prejudicial to the coastal state itself. The category of effects may have been too ambiguous and open-ended for the prudent international user and could have been made "more precise and less susceptible to the discretionary appreciation of the coastal state,"<sup>32</sup> but it was, at least, limited to effects on the coastal state. In contrast, the ICNT, introducing the Charter formula, both severs the link to effects on the coastal state and extends the range of effects of a projected passage that the coastal state may take account of in assessing the purported innocence of a passage. Possible effects on other states may apparently be taken into account, if they are illicit under the Charter. Article 51 of the Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary. . . ." Many scholars consider the Charter's post hoc requirement for activation of the right

<sup>32</sup> Burke, *Contemporary Law of the Sea*, *supra* note 14, at 11.

of self-defense quite obsolete and contend that the Charter must now be interpreted to permit an anticipatory self-defense. If that interpretation is accepted, the discretionary judgment given the coastal state under ICNT Article 19 is even broader than would appear on its face. Professor Burke remarks pertinently:

It is one thing to base this judgment only on the activities of particular ship [*sic*] in transit (even in light of the general context of contemporary relations between the coastal state and others) and quite another to reach conclusions derived from a much broader state of affairs such as the nature of the cargo aboard, its ports of call, destination, previous history in transit, and so forth. To permit coastal officials to take into account the latter range of factors, and to link them with prevailing political relations with or between other states, broadens coastal discretion very considerably and extends it to substantial license. Concern for the broad community interest (including the coastal interest as a flag state in other contexts) justifies establishing limits on coastal discretion by providing that the innocence, or lack thereof, of passage must be determined only by specific acts occurring during passage in the territorial sea itself.<sup>33</sup>

The ICNT formula is not limited to principles *expressed* in the Charter; it refers to principles of international law "embodied" in the Charter ("*incorporé*" in the French version, "*incorporado*" in the Spanish). Whatever "embodied" means, it would not appear to require an explicit provision. Hence, it will be for the coastal state initially, and often primarily and effectively, to determine whether a principle of international law it alleges is "embodied" in the Charter.

Consider also the second part of paragraph 2(a). If the intention of the drafters was to limit the discretion of the coastal state by adding a qualification to the permissible impacts of the transiting ship on the sovereignty, territorial integrity, or political independence of the coastal state,<sup>34</sup> then it may have failed. Syntactically, the second part of Article 19(2)(a) can be read as qualifying "threat or use of force." Consequently, the text may authorize the coastal state to characterize as noninnocent, and hence suspendable passage, activities in violation of the principles of international law embodied in the Charter of the United Nations, which are not necessarily a threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state. The impression of the French text is even more spacious, requiring that ships and planes "s'abstiennent . . . de toute autre action en violation des principes du droit international."

Some proponents of the draft contend that a practical restraint on the discretion of the coastal state may be derived from the words, "in the ter-

<sup>33</sup> *Id.* at 12.

<sup>34</sup> This assumption, which would predispose the interpreter to construe restrictively coastal state competences to limit innocent passage, would appear to be unwarranted if the innocent passage provisions of the ICNT are compared with those of the 1958 convention. ICNT Article 19 introduces so many new limitations on innocent passage that the counter-assumption that the text intends to increase coastal state competence would appear to be the better working hypothesis.

ritorial sea." In other words, they argue, the discretion of the coastal state to characterize a passage as noninnocent requires that the threat of violation of international law occur while the ship is in passage. There is, in short, an alleged locational requirement. But the requirement is an ineffective limitation on coastal state discretion for two reasons. First, innocence is no longer causally related to impacts on the coastal state. Second, in the environment of modern technology, the symbolic or "flag-showing" functions of surface vessels cannot be suspended during strait transit or become operative only when the ships have assumed their stations; the symbolic function commences the moment that course changes are noted and increases in intensity as the ships continue on the new course. Consider a scenario of a war in the Middle East: As a symbol of U.S. commitment and a signal of deterrence, the President orders ships in the North Atlantic to make for the eastern Mediterranean and ships in the Pacific to make for the Arabian Sea. The moment Soviet satellites note the new course, the communication of intention has been made; it is increased in intensity as the ships remain on course and move closer to the designated theater. If a state believes that the U.S. action is an unlawful intervention, in violation of international law, will it deem that communication temporarily suspended as the ships move through straits and/or territorial waters?

In belligerent situations, a state cannot be expected to tolerate enemy activity in its coastal waters. Both the 1958 and 1977 versions recognize a self-defense exception with regard to the passage of vessels of other states in innocent passage and through straits. But the 1977 conception of innocent passage goes further, for it may authorize the coastal state to characterize proposed passage by maritime users as noninnocent if the passage is related to activities in violation of international law and the Charter, even though those activities do not threaten the coastal state to the extent of activating a right of self-defense. In this respect the 1977 version transforms the UN Charter and the general reference to international law into a type of neutrality law to be specified by the coastal state on a case-by-case basis. It is an interesting idea, to be sure, but one that has been rejected in the past. In the *S.S. Wimbledon*,<sup>35</sup> for example, Germany sought to suspend French transit rights in the Kiel Canal, not for reasons of self-defense but on grounds of neutrality. The Permanent Court of International Justice rejected the claim, essentially for conventional law reasons, and then enunciated a more general principle:

... [W]hen an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.<sup>36</sup>

<sup>35</sup> Judgment No. 1 (Merits), [1923] PCIJ ser. A, No. 1.

<sup>36</sup> *Id.* at 28.

Presumably, the dictum would apply equally to a coastal state's inclination to prohibit passage, lest it contribute otherwise to a violation of international law. The obligations of third states in such matters have probably been extended in the International Court's *Namibia* opinion.<sup>37</sup> The *Wimbledon* subordinates such obligations to rights of user in international waterways. The ICNT, in turn, may be viewed as a legislative overruling of the *Wimbledon* principle, both for straits passage and for innocent passage. Given the absence of centralized international decision in security matters such as these, the net result could be a significant extension of coastal state jurisdiction over the characterization of the innocence of a proposed passage.

It is not difficult to imagine situations in which these new doctrines may operate to the detriment of U.S.-perceived security interests. *Wimbledon*-type situations are quite likely to occur, when the U.S. function in a foreign conflict is to provide an ally with food, oil, or matériel, all of which, under doctrines of modern warfare, can be considered vital to the prosecution of the belligerency.<sup>38</sup>

Even symbolic participation may be circumscribed. In January 1979, the United States elected to send a force of jet fighters to visit Saudi Arabia. Ostensible purposes included affirming support for the Saudi Government, emphasizing U.S. concern to the Soviet Union, and communicating, by deed, messages to multiple audiences in Iran. It was, in short, a type of "showing the flag" operation, using the medium of planes rather than ships; indeed, the prospect of sending an aircraft carrier from the South China Sea, the more conventional modality of communication, had been considered and then rejected. Spain refused to allow the jets to refuel in U.S. bases in Spanish territory.<sup>39</sup> Though its action was apparently based on treaty interpretation,<sup>40</sup> it is clear that Spain could have made a not implausible argument in terms of Article 2 of the United Nations Charter with regard to use of airspace superjacent to land territory and waters. That argument can be made with much greater ease with regard to innocent passage than to freedom of navigation. The remarks of Pirtle with regard to straits apply with equal force to innocent passage: "The implications of discretionary power to determine subjectively the innocence of passage through straits and to unilaterally determine limitations on such passage are far-reaching."<sup>41</sup>

The point is not that Charter principles should not be more widely applied; they should. But an aspect of determining the utility of a norm and,

<sup>37</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1970] ICJ REP. 16, 55 *et seq.*

<sup>38</sup> On this, see Grandison & Meyer, *supra* note 29, at 419.

<sup>39</sup> Burt, *Madrid Bans Refueling for F-15's on Visit to Saudis*, N.Y. Times, Jan. 13, 1979, §1, at 3 (city ed.).

<sup>40</sup> Art. VIII (2), Agreement in Implementation of Chapter VIII of the Agreement of Friendship and Cooperation between the United States and Spain, August 6, 1970, 21 UST 2259, TIAS No. 6977.

<sup>41</sup> Pirtle, *supra* note 10, at 481.

in particular, fixing its level of generality or specificity, is the decision structure that will be applying it. Many Charter principles were designed to be applied by UN organs in accord with Charter procedures; the level of generality and accordingly the amount of discretion passed on to the applier took this into account. As a general jurisprudential matter, an open-textured normative formulation in a decision process appropriately structured to the situation may be desirable because it gives discretion to the applier; the same formula may be undesirable and invite abuse if the application is unilateral. When norms whose application threatens severe deprivations to others are to be applied unilaterally, prudence requires that these norms be framed at lower levels of generality, lest the application itself threaten public order. As Burke remarked of the alternative, "The substitution of a wholly decentralized authority, fragmented amongst over 100 coastal nations, does not represent an improvement, and could lead to serious impediments to continued efficiency in transport of commodities around the globe."<sup>42</sup>

Obviously, "innocent passage," under its most generous interpretation, is a much narrower doctrine than "freedom of navigation." Freedom of navigation is navigation on the high seas. It requires no characterization, for it self-actualizes; it is what is done. Innocent passage, however, requires the coastal state to characterize the passage as appropriately innocent. Only when it has affirmatively done so is the passage insulated from lawful suspension by the coastal state. Moreover, the 1958 convention imposes the regime of innocent passage of ships through straits whose waters are territorialized (Article 16(4)), and a submarine's would-be innocence, both under the 1958 and 1977 texts, requires it to surface and to show its flag. In short, a transposition of these parts of the 1958 regime to a context in which territorial seas may be extended to 12 miles, territorializing heretofore international waters in the straits, would not appear to meet the security requirements of the United States or the Soviet Union. Since the conception of innocent passage in the ICNT is even more laden with conditions whose fulfillment must be judged by the coastal state, the emerging trend in this area of the law must be viewed, from a national security perspective, as increasingly melancholy.

### III. STRAITS

The ICNT establishes two categories of straits. The first, set out in Article 37 and illuminated and qualified in Article 38, includes straits "used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone." For these straits, the neologistic "right of transit passage" avails; we will consider it in detail below. The second category, set out in Article 45, includes two types of straits: those straits linking high seas or exclusive economic zones with waters subject to national jurisdic-

<sup>42</sup> Burke, *Contemporary Law of the Sea*, *supra* note 14, at 38. But compare his curious reversal in *Submerged Passage*, note 20 *supra*, at 209-10.

tion and those straits not included in ICNT Article 38. For Article 45 straits, only the more restricted right of innocent passage avails.

Article 38 straits and Article 45 straits are not mutually exclusive categories. There is, if one may be permitted to use the metaphor, an undertow running toward Article 45, for two reasons: the structure of Article 38 and the impact of Article 3 of the LOS draft.

Like its predecessor in the 1958 convention, Article 38's definition mixes geographical and use factors. In order for a part of the maritime environment to be characterized as a strait under Article 38 and hence entitled to the somewhat more extended rights of passage than those afforded by innocent passage, it must fulfill two cumulative requirements. It must be a bridge between high seas and/or exclusive economic zones and it must in fact be "used for international navigation." ICNT Article 36 further subjects the geographical component to a special requirement when the strait is formed by an island of the strait state; then there must be no "high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics." Though the category is limited, this is a qualification whose potential for future constriction is great. It does not permit would-be users to invoke political convenience or necessity as a justification for using such a strait, despite the fact that a high seas or exclusive economic zone route manifests similar navigational and hydrographical characteristics.

From its inception, the use criterion has been unclear. Can the use requirement be fulfilled by the potential utility of a strait for international navigation without regard to the intensity of use, as the International Court suggested in the *Corfu Channel* case,<sup>43</sup> or is some level of use actually required to fulfill this condition? The words "used for" in both the 1958 and 1977 versions would suggest a legislative overruling of the *Corfu* judgment. If that is the case, then future decision may establish some threshold of use higher than episodic transit in order for straits to retain their Article 37 character. The result may well be that many "international straits" will be transformed into the second category envisaged under Article 45(1), and users thereafter will not fall under transit passage but will be required to fulfill the even more stringent requirements of "innocent passage." This aspect of the formulation of the ICNT must be viewed as unfortunate from the standpoint of world order, for it is the sort of ambiguity that is likely to excite mischief.<sup>44</sup>

<sup>43</sup> [1949] ICJ REP. 4.

<sup>44</sup> Geography outweighs use in this formula. Ironically, a tribunal could not compute the quantum of use of a strait which might have been intended to fulfill the use requirement so that it could internationalize the strait. Compare *The Case of the Edisto and Eastwind*, 57 DEP'T STATE BULL. 362 (1967); Pharand, *Soviet Union Warns United States Against Use of Northeast Passage*, 62 AJIL 927 (1968). The controversy, by no means settled, of the "innocence" of warships for passage purposes, will thus be transferred to many straits situations. See, in this regard, Przetacznik, *supra* note 30, at 302-15.

Article 45 will absorb other straits because of the flow of territorial waters seaward. Prior to the UNCLOS policy allowing extension of territorial waters to 12 miles' breadth, any body of water beyond a strait which body was more than 6 miles wide contained, perforce, a water and air column whose breadth was equivalent to the surplus over those 6 miles, and that water and air column was legally international, rendering the strait "international" in the sense in which Article 38 of the ICNT uses the term. Subsequent to ICNT Article 3, however, the body of water in the strait must be more than 24 miles wide in order to allow for a column of "international waters." The result is that more of the geographical straits of the world become legal straits for which passage must qualify under Article 38 and Article 45. A side benefit, however, is that now even straits less than 6 miles in width may qualify, *ceteris paribus*, for transit passage.

I do not propose to inquire whether straits currently falling in the Article 45 category are deemed vital for U.S. security. UNCLOS is creating a long-term treaty and in the course of its life, conceptions of security and security needs may be expected to change many times.<sup>45</sup> I take it as given that, over the long haul, some and perhaps many of the straits in this category will become vital. The regime the ICNT provides for straits in the categories established by Article 45 would appear to be insufficient for the security needs of the United States. The passage must be prospectively "innocent," as determined by the coastal state; even if it fulfills the many conditions of innocence, submarines will still be required to effect their passage on the surface. Hence, even if the ICNT regime for straits governed by Article 38 were satisfactory from a security standpoint, the number of international straits falling under Article 45 as well as the "undertow" toward that provision would still stir substantial doubt about the acceptability of the ICNT in this regard.

#### IV. TRANSIT PASSAGE

The ICNT's regime for straits governed by Article 38 poses its own disturbing questions. Article 38 of the ICNT provides:

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded, except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.

2. Transit passage is the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through

<sup>45</sup> See, in this regard, the pertinent remarks of Knight, *supra* note 29, at 772.

the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Earlier drafts submitted by the United States and the Soviet Union may provide a foil. In 1971, the United States proposed the following provision for straits:

In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.<sup>46</sup>

An early Soviet draft provided that "[n]o State shall be entitled to interrupt or suspend the transit of ships through straits, or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind."<sup>47</sup> There are some striking additions, deletions, and arrangements in the ICNT product, in particular, the introduction of the concept of "transit passage."

"Transit passage" is a neologism; it lies somewhere between "freedom of navigation" on the one hand, and "innocent passage" on the other. It is a compromise, a concession or a second-best solution<sup>48</sup> when contrasted

<sup>46</sup> 65 DEP'T STATE BULL. 266 (1971). Thus, John Stevenson in a statement to Subcommittee II of the Seabed Committee, July 28, 1972: "The United States and others have also made it clear that their vital interests require that agreement on twelve mile territorial sea be coupled with agreement on free transit of straits used for international navigation and these remain basic elements of our national policy which we will not sacrifice." *Supra* note 4.

For an early review, see Ratiner, *United States Ocean Policy: An Analysis*, 2 J. MAR. L. & COM. 225, 263-64 (1971); Knight, *supra* note 29, at 773. See also Cundick, *International Straits: The Right of Access*, 5 GA. J. INT'L & COMP. L. 107 (1975). Five years after the 1971 proposal, an official explained U.S. objectives as follows: "... what we seek is freedom of navigation (i.e., submerged transit) and overflight for the purpose of transit in straits connecting high seas to high seas. We oppose the restrictions of innocent passage in such straits. . . ." Letter of Stuart French, U.S. Department of Defense, to Senator John C. Stennis (Aug. 11, 1976), quoted in Burke, *Submerged Passage*, *supra* note 20, at 218-19.

<sup>47</sup> UN Doc. A/CONF.62/C.2/L.10 (1973), at 189-90, Art. 2(e).

<sup>48</sup> Much has been made of the coastal state's interest in having submarines pass on the surface through straits. While concern for navigation and for rules of the road may be valid, there would appear to be no increment of coastal security in having submarines surface when proximate to the coastal state. Indeed, these arguments seem to be based on a misperception of the distinctive nature of the submarine's function and a confusion of the submarine with surface vessels. Even if the transiting submarine were targeting sites within the coastal state, it would not have to



with the earlier maritime power drafts. The key question is whether, on its face or as construed by international law's methods of interpretation, the new doctrine of transit passage gives rights, in a quantity and with certainty sufficient to make the regime acceptable from a security standpoint. Some commentators are convinced that it does. Pirtle, for example, writes that "[t]he ICNT provisions on transit passage and archipelagic sea-lanes passage constitute a treaty weighted in favor of the navigation and security interests of the United States."<sup>49</sup> U.S. negotiators apparently agree and believe that transit passage is very, very close to the freedom of navigation available on the high seas and, moreover, that the text provides a right of submerged passage by submarines which would unquestionably be deemed to be an exercise of the freedom of navigation.<sup>50</sup> In support of this interpretation one may note that the ICNT's definition of "transit passage" does, indeed, include a reference to the "freedom of navigation" and does not include a requirement of surface passage by submarines. Furthermore, insertion of "transit passage" seems to exclude "innocent passage." But the text is not explicit and an interpretation based ultimately on an intersection of *inclusio* and *exclusio* is not the sort of case a lawyer happily sends to trial.

The more optimistic interpretation of Article 38 encounters a number of obstacles. When a legal document speaks of duties, it may be presumed to mean legal duties and not moral or ethical duties whose content or compliance depends only upon the duty-bound party. The correlative of a duty is a right. Though Article 39 speaks of user duties, it necessarily imports coastal rights. It must be construed as allowing the coastal states a broad prescriptive and applicative competence with regard to transit passage unless we are to assume that the "duties" are no more than moral imprecations. There is no correlative here to Article 236, the sovereign immunity clause, with regard to coastal regulations under Article 42. Of most concern are some of the duties imposed on users by the relevant terms of Article 39(1):

1. Ships and aircraft, while exercising the right of transit passage shall:

- (a) Proceed without delay through or over the strait;
- (b) Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering

approach the state, since the range of its missiles would permit it to stand off beyond territorial or straits waters. As for showing the flag, that traditional naval function can only be accomplished when the sub has surfaced. The likelihood that the submarine will become a target for nuclear or conventional attack and set off, theoretically, secondary nuclear explosions or radiation contamination increases with increased visibility to adversaries. From a security standpoint, the coastal state's safety increases *the less* others know of the transiting submarine's whereabouts. It is thus more likely that the coastal state's demand for surface transit is based either on misunderstanding of the situation or the desire to increase its competence in order to augment power vis-à-vis the transiting state.

<sup>49</sup> Pirtle, *supra* note 10, at 486.

<sup>50</sup> Letter from Senator Barry Goldwater to the author, July 23, 1976.

straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;

(d) Comply with other relevant provisions of this Part.

In order for passage to be "transit passage," it must be effected without delay, not be a "threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits" (note the plural usage here), and not "in any other manner in violation of the principles of international law embodied in the Charter of the United Nations." Because these are legal duties and hence require characteristics that the coastal state must assess, "transit passage" takes on many of the features of innocent passage. In comparison, high seas "freedom of navigation" has virtually no limitations or qualifications other than the duty of reasonableness which attends virtually every right. And insofar as international norms do apply, the danger of provocative unilateral application is minimized by other norms and by the spatial context.

Since the major differences between innocent passage and freedom of navigation are the conditions and right of qualification of the coastal state with regard to the former, "transit passage" seems more a species of innocent passage than a high seas freedom. Though ICNT Article 44 does conclude that "[t]here shall be no suspension of transit passage," that is not the same as saying "[t]here shall be no suspension of passage." In other words, a state bordering a strait might unilaterally determine that a particular transit, in given circumstances, violates ICNT Article 39(1)(b), hence is not a "transit passage" in the meaning of the convention and may either be prohibited *entirely* or permitted only upon the fulfillment of conditions imposed by the coastal state, for example, upon surfacing.

Moreover, transit passage, as defined in ICNT Articles 37 to 39, requires characteristics that are incompatible with the high seas notion of freedom of navigation. In particular, the word "solely" in Article 38(2), the broad right of characterization necessarily given to the coastal state in Article 39(1)(b), and the ambiguous scope of Article 39(1)(d) add conditions that never burdened "freedom of navigation." Though not without ambiguity, Article 41(1) may constitute possible authorization to the strait state to insist on surface transit of submarines through busy straits as a safety regulation, particularly when contrasted with Articles 42 and 236. The equivocality of these provisions would excite no concern were there an explicit provision stating that submarines may always traverse international straits submerged.

The net result of the ICNT in this regard is that the extension of territorial waters from a 3-mile limit territorializes formerly high seas belts in strategically critical international straits; in return, the ICNT does not unequivocally guarantee a functional equivalent to the virtually unconditional "freedom of navigation" that other maritime states used to enjoy in the belt of international waters through international straits. Instead,

it offers a right of "transit passage," burdened with qualifications unknown to the "freedom of navigation." The situation could begin to approach Jared Carter's nightmare of "ten, fifteen, twenty Berlin corridors."<sup>51</sup>

#### V. - THE PROBLEM OF SUBMERGED PASSAGE

Even if "transit passage" affords users significantly more rights than does innocent passage as far as surface passage is concerned, a key question for U.S. security is whether "transit rights" permit submarines, while submerged, to traverse straits. Innocent passage does not accord submarines this right; hence, submarines traversing straits under Article 45 of the ICNT must surface in order for their passage to be deemed innocent.

The section dealing with transit rights does not explicitly require submarines to surface, as does ICNT Article 20 and Article 14(6) of the 1958 convention. It is possible to infer a permission from the absence of a prohibition, a possibility whose reasonableness is enhanced by the fact that the parallel innocent passage provisions do contain an express prohibition. It is, alas, equally possible not to infer a permission which is not explicit, especially when international jurisprudence interprets derogations from sovereignty strictly and textually. U.S. negotiators have apparently told members of the Senate that Article 39(1)(c) of the ICNT does accord submarines the right of submerged passage and, perhaps because of some disquiet about the ambiguity of the text, refer to an "understanding" on this point.<sup>52</sup> In my view, neither textual interpretation nor private understanding succeeds in removing clouds from title.

Do the words, "normal modes of continuous and expeditious transit," in Article 39(1)(c) amount to a nonsuspendable license to traverse straits submerged? In order to reach this result, "normal mode" must be construed as noncontextual, nonnormative, and permanently vessel-specific. But in the text and in general, this interpretation is forced and unreal. Mode of transit of different vessels is, in part, a factual question, but it also has normative and contextual components, for what is "normal" will depend on context, including the legal environment. It is neither implausible nor inconsistent with other ICNT provisions to assume that both the coastal and the flag state will participate in determining "normality" for vessels transiting coastal waters.

As for the vessels themselves, a layman is not equipped to characterize the normal mode of transit of submarines but would assume that mode would vary according to such factors as type of channel, density of traffic, safety factors, nature of mission, rules of the road, and so on. What may be "normal" in internal or territorial waters would be "abnormal" on the high seas, and so on. Knauss, for example, writes that ballistic missile submarines now run submerged through their entire patrol, including

<sup>51</sup> Carter, *The Outlook for the Territorial Sea and Navigation through Straits and on the High Seas*, in MARINE TECHNOLOGY SOCIETY, *LAW OF THE SEA REPORTS* 135, 136 (1972).

<sup>52</sup> *Ibid.*

international straits, but notes that "it would certainly be easier and safer to go through those narrow and busy straits on the surface."<sup>53</sup> It is quite likely that a modern submarine moves efficiently and safely submerged, but one could not infer from this datum (which might itself be controverted in some contexts) that submerged passage was "normal" for all circumstances.<sup>54</sup> Nor would Article 39(1)(c) appear to override the state's regulatory competence for matters such as navigation and safety.<sup>55</sup> In other words, the user would be hard pressed to justify evading such regulations on grounds that they required departure from its normal mode of transit.

From a textual standpoint, the "normal modes" aspect of ICNT Article 39(1)(c) raises problems not easily resolved, especially in view of the textual orientation of international treaty construction. The "freedom of navigation" for passage through straits established in Article 38(2) is not freedom of navigation in the high seas sense: it is "freedom of navigation and overflight solely for the purpose of continuous and expeditious transit." That qualification was apparently introduced in order to deny ships transiting straits all the other components of freedom of navigation, such as overt military exercises and weapons testing, surveillance and intelligence gathering, and refueling. The purport of the provision is negative, *i.e.*, vessels should refrain from activities other than those incident to transit. The "normal modes" qualification appears in the following context: "Ships and aircraft while exercising the right of transit passage, shall . . . (c) [r]efrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress. . . ." The plain and natural meaning of that provision would appear to emphasize the notion of expeditious transit. As two U.S. negotiators commented in 1975, "The 'security' problem with submarine and military aircraft transit of straits is in fact one of limiting the right to transit to its normal incidents."<sup>56</sup> In other words, you may do

<sup>53</sup> Knauss, *The Military Role in the Oceans and Its Relations to the Law of the Sea* in *LAW OF THE SEA: A NEW GENEVA CONFERENCE* 77 (L. Alexander ed. 1972). But compare Goldblat, *Law of the Sea and the Security of Coastal States* in *LAW OF THE SEA: CARACAS AND BEYOND* 301 (Christy et al. eds. 1975).

<sup>54</sup> Thus Professor Burke, writing in 1975, observed:

Another contention is that safety requires submerged transit. It seems rather late in the date to urge this seriously in view of the previously wide acceptance of a requirement for surface transit in the territorial sea, including acceptance by the major powers operating nuclear submarines. There may be substance to this point, but concern for safety can be satisfied in other ways more consonant with coastal interests than simply providing for unannounced submerged passage by large nuclear-powered vessels carrying nuclear weapons.

*Contemporary Law of the Sea*, *supra* note 14, at 12.

<sup>55</sup> Burke argues on the basis of textual analysis that "Article 38 does not authorize the coastal state to determine what is a 'normal' mode of transit each time a vehicle approaches a strait." *Submerged Passage*, *supra* note 20, at 214. That may be so, but the ICNT would appear to permit the coastal state to determine or participate in determining "normal mode" for classes of vessels and/or for specific time periods, *e.g.*, periods of crisis.

<sup>56</sup> Stevenson & Oxman, *The Third United Nations Conference on The Law of the Sea*, 69 AJIL 1, 15 (1975).

things normally associated with modes of continuous and expeditious transit, even though such activities would otherwise be forbidden in transit passage. Sonar, for example, may yield information of intelligence value, and one of the ancillary functions of the use of sonar on the high seas may be the intelligence dividend.<sup>57</sup> Even though you may not gather intelligence in transit passage, you need not suspend sonar when you transit straits if you ordinarily use sonar in your continuous and expeditious transit. Thus, the simplest or most natural interpretation of Article 39(1)(c) is one that does not focus on normal mode, whatever that may be, but rather on the activities ancillary to transit, which, absent this provision, would be prohibited by Article 38.

Alternative interpretations of Article 39 encounter other problems. There are, for example, internal contradictions if Article 39(1)(c) is read to permit submerged transit of straits. The subsection immediately preceding subparagraph (c) recognizes the coastal state's competence to appraise the contemplated passage, *inter alia*, for its conformity to the principles of international law embodied in the UN Charter. If submerged passage is secret passage, then how can the coastal state perform that function under subsection (b)? How can it control unauthorized research and survey activities which may be undertaken by the submerged vessel under Article 40? How can it implement its safety and sea lanes regulations (Articles 41 and 42), and so on?<sup>58</sup> If anything, the structure of the entire section dealing with transit passage emerges as a more coherent drafting complex if no right of submerged passage is hypothesized.

The provisions regarding innocent passage, including the requirement that submarines traverse territorial waters on the surface, appear in part II of the ICNT, while the issue of transit passage occurs in part III. Could an authoritative interpreter infer from this an implied bar of the rules of innocent passage to all of part III? Such a construction seems forced and, for such a grave matter, unsatisfactory. It is far more reasonable to assume that provisions will be interpreted by reference to the entire instrument, a point confirmed by the Vienna Convention<sup>59</sup> and the recent *Beagle*

<sup>57</sup> One would, in this regard, take exception to Professor O'Connell's view that free transit would permit one

to go through using your sonar, with helicopters engaged in dunking sonar operations, with missiles unhoused, etc., etc., and doing a zig-zag pattern and the like, all of which one would assume you could do in the high seas but not in the territorial seas engaged in innocent passage.

BRITAIN AND THE SEA (Papers and Records of a Conference at the Royal Naval College, Greenwich, 1973), cited in Young, *supra* note 4. To the contrary, it would appear that the words "normal mode," reasonably construed, would limit many of the operations in Professor O'Connell's *reductio*. Compare Knight, *supra* note 29, at 773, especially the reference to "on-board activities."

<sup>58</sup> Despite Professor Burke's assertion (*Submerged Passage*, *supra* note 20, at 208), it is difficult to see how the qualifications of ICNT Articles 38 and 39 could be as easily fulfilled by a submarine as a surface vessel. With regard to Article 38(1)(c), for example, how can one tell if a passing submerged vessel is or is not preparing to cause injury?

<sup>59</sup> Article 31(2)(a), UN Doc. A/CONF.39/27 (1969), DOCUMENTS OF THE CONFERENCE, *supra* note 19, at 287, 293.

*Channel* arbitration.<sup>60</sup> In any case, part III does make incorporations by reference to the rules of innocent passage, for example in Article 45, and refers generally to other provisions in Article 38(3).

The presence of conditions whose fulfillment must be certified by the host state in order for passage to be innocent and hence nonsuspendable would probably lead an international tribunal, were it seized of the case, to conclude that passage is not a right at all, but a type of license. This is not the place to enter into extensive discussion of international servitudes,<sup>61</sup> but it is worth recalling the International Court's judgment in the *Right of Passage* case.<sup>62</sup> There the Court distinguished between passage not subject to conditions by the host, a virtual servitude whose suspension by the host would be delictual, and passage subject to conditions, for which suspension by the host could be lawful. It is apparent with regard to straits that nothing akin to a servitude is being created in the ICNT. Hence, anticipation of extensive construction of the rights granted would appear unwarranted.

Allegations by U.S. negotiators to members of the Senate of an "understanding" on the right of submerged passage through straits are puzzling.<sup>63</sup>

<sup>60</sup> CONTROVERSY CONCERNING THE BEAGLE CHANNEL REGION [Chile v. Argentina] (Santiago 1977).

<sup>61</sup> See generally North Atlantic Coast Fisheries Arbitration (United States v. Great Britain), Hague Ct. Rep. (Scott) 141 (Perm. Ct. Arb. 1913), PERMANENT COURT OF ARBITRATION, NORTH ATLANTIC COAST FISHERIES ARBITRATION, Vols. 1-12 (Washington: GPO, 1913); S.S. Wimbledon, [1923] PCIJ ser. A, No. 1; Rights of Passage, [1960] ICJ REP. 6; for a survey of the literature, see D. O'CONNELL, 2 INTERNATIONAL LAW 602 *et seq.* (2d ed. 1970).

<sup>62</sup> [1960] ICJ REP. 6.

<sup>63</sup> Goldwater letter, *supra* note 50. Professor Burke develops another conception of "understanding." He sifts "comments, questions and proposals" about submerged passage and finds that these confirm, in his judgment, an understanding shared by participants that submarines would have a right of submerged transit through straits. *Submerged Passage*, *supra* note 20, at 205. There are many serious problems with this approach. The first, as mentioned, is that there is no record to speak of, but only fragments; how probative such a record would be is open to grave question. The second is that many of the statements that are available can be disqualified for interest. The fact that the United States, for example, continued to insist on its understanding of an equivocal text (*see id.* at 206) neither banishes the obvious equivocality of the text nor proves that others accepted the interpretation pressed by the United States. It simply proves that the text is equivocal and that the United States, unable to secure a text that clearly expressed its interest, had no choice but to say petulantly, "Well, this is what *we* mean." Alas, the objective in this game is not to make statements, off the board, but to win the text that you need. Third, the acquiescence by others is derived essentially from the absence of evidence in the "record" that others did not object. Whatever the chairmen of individual committees may have thought, recent diplomatic history should demonstrate the peril of this course. In negotiations with the People's Republic of China over Taiwan, the United States apparently satisfied itself with an understanding based on its own statement, which was not challenged by China. At a later stage, China "clarified" its position and the U.S. "understanding" dissolved. Despite all of the alleged "understanding" he tries to reconstruct, Professor Burke is still somewhat cautious about conclusions; in a single page, he shifts from an "unmistakable" right of submerged passage, to "little room for question," and then "strongly suggests" (*id.* at 207). The ambivalence is important. The point of the

If it is a conference-wide understanding that is documented and/or incorporated by-reference through a general provision, then this is a telling point. There are, of course, conventional requirements for such an understanding. There is a possibility that the Vienna Convention in Article 31 may require that such an agreement be between all the parties or be accepted by the other parties.

Unfortunately, there is no record of such an understanding and no way of establishing that all parties to the treaty share or accept this ancillary agreement. If our negotiators are referring to a suppressed document, presumably concluded with a much smaller number of states, its power to counter the plain and natural meaning of the convention would appear doubtful, to say the least. Whether an agreement that has not been registered under Article 102 of the United Nations Charter can be invoked against a multilateral treaty, which presumably will have been, is also doubtful.

"An oral agreement," Samuel Goldwyn quipped, "isn't worth the paper it's written on." The idea of an undocumented "understanding" among all or even most of *the more than 150 delegations* at the LOS conference is preposterous, and the lawyer who would believe it, advise reliance on it, or invoke it before a tribunal would be very naïve indeed. If our negotiators are referring to "secret" understandings with key strait states about a U.S. right of submerged transit through their straits, then one can only remark on the peril and shortsightedness of such a course.<sup>64</sup> If the plain and natural meaning of the ICNT is against these understandings, then they are unlikely to survive changes of government in the strait states, if that long. Why there should be an understanding on something so important at a meeting whose manifest function is to articulate norms on the subject is also puzzling. The asymmetry in our willingness to accept understandings in matters vital to us but to concede explicit provisions in matters vital to others is more than disquieting.

## VI. APPRAISAL AND CONCLUSION

The straits regime of the ICNT poses two problems: the absence of an express right of submerged passage in a context of other provisions, many of which could be inconsistent with an allegedly implied right, and, second, the more general problem, common to the innocent passage regime, of the

present inquiry is not that submerged passage is excluded, but that it is not certain in the text, and, in the absence of express confirmation, is unlikely to defeat coastal competences which are explicit and could be used to require surface passage and, in some circumstances, ban passage and overflight.

<sup>64</sup> This hypothetical strategy is reminiscent of Boss Hague's apothegm that an honest politician is one who stays bought. The notion that bilateral agreements with particular states are sound strategy for matters of the sort discussed here rests on the assumption that association of a state with one alliance or another is stable. Recent experience in Iran, Ethiopia, Afghanistan, Somalia, Vietnam, and China, to mention only a few, should demonstrate to both superpowers the advantages of a system of real rather than personal rights, for uses deemed to be of inclusive security concern.

enhanced primary competence of the coastal state to characterize any passage below, on, or above the surface as violating "transit" requisites and hence not "transit passage."

The language of the Camp David agreement of 1978 dealing with straits passage may be contrasted with that of the UNCLOS text. It is particularly instructive for, though bilateral, it purports to enunciate many general norms and is the first major diplomatic statement on the subject since the ICNT draft. Moreover, the United States played a significant role in its formulation. Rather than adopting or even intimating any relation with the UNCLOS formula, the Camp David formula states in part: "[T]he Strait of Tiran and the Gulf of Aqaba are international waterways to be open to all nations for unimpeded and nonsuspendable freedom of navigation and overflight."<sup>65</sup> With this sort of formula, tortured, casuistic interpretations are not necessary. Indeed, Camp David is redundant in emphasizing precisely what the ICNT overlooks. The waterways are characterized as "international" and any hint of a territorial competence with regard to passage is repeatedly excluded; there is no "right of transit" characterizable by the coastal state, but instead and only the traditional freedom of navigation, and that right may not be impeded or suspended. Interpreted logically or teleologically, Camp David produces freedom of navigation and, were it necessary, even a right of submerged transit. The ICNT achieves nothing approaching that clarity.

Empson analyzed seven types of ambiguity in our culture,<sup>66</sup> but a wise old country lawyer was wont to remark that there are only two kinds that matter: your ambiguities and the other fellow's. It is as unwarranted to contend that UNCLOS rejects outright the types of straits passage needed for U.S. security as it is to contend that UNCLOS grants them outright. The problem is the ambiguity. It would be imprudent to ignore the erosion in the UNCLOS draft of key aspects of a maritime regime that will continue to be important to the United States and irresponsible to deny the transformation of certainties into ambiguities. In the changing world power process, these may prove to be the other fellow's ambiguities. Fortunately, there are yet opportunities, at the international and national levels, for dispelling any possible misunderstandings about the regime of straits and national security and for assuring a regime that will serve the common interests of the world community.

<sup>65</sup> U.S. DEP'T OF STATE, PUB. NO. 8954, *THE CAMP DAVID SUMMIT* (Near East and South Asian Ser. 88, 1978), cited from 17 ILM 1463, 1470 (1978).

<sup>66</sup> W. EMPSON, *SEVEN TYPES OF AMBIGUITY* (1930).



# THE REGIME OF STRAITS AND THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

By John Norton Moore \*

## I. INTRODUCTION

The negotiations at the Third United Nations Conference on the Law of the Sea have been the most important catalyst of this century for a new legal and political order for the oceans. The conference, together with its preparatory work within the "Seabeds Committee," has indelibly stamped ocean perspectives. Even without a widely acceptable, comprehensive treaty the influence of these perspectives on state practice will be profound—indeed, it already has been, for example, in legitimizing 200-mile coastal fisheries jurisdiction. If the conference is able to clear the remaining hurdles, particularly that of deep seabed mining,<sup>1</sup> the new treaty is likely to govern oceans law for the foreseeable future.

One area of the negotiations that is generally regarded as concluded is that of the regime for transit of straits. The revised Informal Composite Negotiating Text (ICNT/Rev.1),<sup>2</sup> which embodies the conference's work product, includes a chapter on straits used for international navigation and a related chapter on archipelagic states. These chapters are not among the remaining unresolved issues. Within the conference resolution of these issues has been welcomed, as it has been widely understood that their satisfactory resolution was a *sine qua non* for a successful treaty.

Recently, there have been two serious and opposing challenges con-

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<sup>1</sup> For an analysis of the deep seabed negotiation, see Moore, *In Search of Common Nodules at UNCLOS III*, 18 VA. J. INT'L L. 1 (1977); J. N. MOORE, R. WOLFRUM, P. STOPFORD, & J. STENDER, *DEEP SEABED MINING IN THE LAW OF THE SEA NEGOTIATIONS (II): TOWARD A BALANCED DEVELOPMENT SYSTEM* (Oceans Policy Study 1:3, Michie Press, 1978).

<sup>2</sup> This article is based on the Third United Nations Conference on the Law of the Sea, Revised Informal Composite Negotiating Text for the Eighth Session, UN Doc. A/CONF.62/WP.10/Rev.1 (April 28, 1979) (ICNT/Rev.1), reprinted in 18 ILM 686 (1979). This succeeds the Informal Composite Negotiating Text (ICNT), the Revised Single Negotiating Text (RSNT), and the Single Negotiating Text (SNT).

cerning straits from some members of the oceans and international legal communities within the United States. On the one hand, some such as Richard G. Darman, writing in a recent issue of *Foreign Affairs*,<sup>3</sup> have challenged the importance of straits transit and have sought in a revisionist mode to "rethink United States oceans interests." On the other hand, some such as Professor W. Michael Reisman, writing in this issue of the *Journal*,<sup>4</sup> while reaffirming the importance of straits transit, have challenged the adequacy of the negotiated straits regime for national security needs. Either of these virtually opposing challenges, if widely accepted, could influence the outcome of Senate debate on advice and consent to a new law of the sea treaty, and more broadly and importantly could sow confusion as to the future regime of straits transit in international law and U.S. policy toward it.

In making this statement, I do not challenge the legitimacy of expression of these strongly held views. Richard Darman and Michael Reisman are among our most sophisticated theorists, and their articulate surfacing of both points of view, which for some time have been undercurrents in the oceans community, should lead to a more complete understanding of the issues.<sup>5</sup>

## II. THE IMPORTANCE OF A STRAITS REGIME

A straits regime that recognizes the community interest in transit through straits, and provides freedom of navigation through, over, and under

<sup>3</sup> Darman, *The Law of the Sea: Rethinking U.S. Interests*, 56 FOREIGN AFF. 373 (1978).

<sup>4</sup> Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, *supra* at p. 48.

<sup>5</sup> A central theme of the Darman challenge, echoing a view of some members of the seabed industry, is that navigational rights in the treaty may not be worth the costs that they project will be associated with acceptance of the treaty, and particularly with what they feel is likely to be an ambiguous regime for seabed mining. Professor Reisman does not raise the seabed mining issue and is concerned with the merits of the national security issues associated with straits transit. The interpretational challenge he espouses, however, seems first to have been publicly triggered by a letter of July 23, 1976, from Senator Barry Goldwater to a number of international lawyers inquiring in less than neutral terms whether the conference text would "guarantee" submerged transit through straits. It is said by some in Washington that the Goldwater letter may have been inspired by one segment of the seabed mining industry, a speculation perhaps fostered by a negative response from a former partner of a prominent Washington firm representing one of the seabed industries that conceded that the author was "not an international law scholar." This, of course, is in any event not a responsibility of Professors Darman or Reisman whose challenges must be fairly dealt with on their merits and on their merits alone.

The United States should not and will not adhere to a law of the sea treaty unless it unambiguously protects assured access to seabed minerals. This is a pledge repeated by every administration that has dealt with the issue and is an article of faith on Capitol Hill. If seabed mining is dealt with adequately in the negotiation, the hypothetical trade-off that concerns Darman, of course, will be only an imaginary "horrible."

straits used for international navigation while meeting legitimate safety and environmental concerns of straits states, is of fundamental importance in ocean law. Although there has been repeated focus on straits transit as a requirement of maritime states, and particularly as a requirement for acceptance of a comprehensive treaty by the United States and the Soviet Union, the principal reason for such transit rights is that they are strongly in the interest of the entire community of nations. Straits such as Bab el Mandeb, Gibraltar, Hormuz, Dover, Lombok, Malacca-Singapore, and over a hundred others serve as routes for the bulk of the world's shipping trade. To permit extending coastal states' jurisdiction to enable them unilaterally to control or impose conditions on such an important community freedom would be inequitable, inefficient, and conducive to conflict. Transit through such chokepoints is fundamentally different from transit through the territorial sea in general, and in the common interest must be recognized as such.

As with many important interests, the costs associated with any failure to recognize freedom of navigation through straits will not necessarily be immediately manifest. Initial challenges may be subtle, plausible, and limited. Through time, however, the common interest will be eroded by unwarranted restrictions on transit, discrimination among users, uncertainty of transit rights, inefficient and inconsistent regulations, efforts at political or economic gain in return for passage, increased political tensions, and perhaps even an occasional military confrontation as in the *Corfu Channel* case.<sup>6</sup>

Similarly, any straits regime, to be lasting, must fairly meet the real concerns of strait states concerning safety of navigation through straits and protection of the marine environment. Failure to establish an adequate international framework for such protection in the short run will detract from the effort to protect the oceans environment and in the long run may seriously threaten navigational freedom as strait states react through unilateral claims.

The issue, in short, is not any one strait, any one country, any one period of time, or any one commercial or strategic need, but rather protection of the common interest in straits transit and a lasting and appropriate balance between it and the safety and environmental concerns of strait states. Had this situation not been broadly understood at the Third United Nations Conference on the Law of the Sea (UNCLOS), no amount of insistence by the maritime nations would have sufficed for agreement.

In addition to this fundamental basis for protecting freedom of navigation through straits, there are a variety of significant commercial, strategic, and conflict management factors of concern to all nations but reflected most immediately in their impact on the interests of the United States, the

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For a broader frame of reference concerning these straits, seabed mining, and other oceans policy issues in the context of overall U.S. foreign policy interests, see J. N. MOORE, *A FOREIGN POLICY FOR THE OCEANS* 1 (Oceans Policy Study 1:4, 1978).

<sup>6</sup> The *Corfu Channel* case (Merits), [1949] ICJ REP. 4.

Soviet Union, and other maritime nations. These include:

- Efforts to increase the stability of the strategic balance between the United States and the Soviet Union (an issue that rationally should be a matter of great concern for all nations) benefit from actions that increase the relative invulnerability of the strategic missile (SSBN) submarines of both sides. The oceans are ideal for dispersing targets and therefore deter any destabilizing temptation toward first strike. Similarly, the number of SSBN submarines of both sides is more easily verifiable and, at least at current technologies, oceans strategic forces are less vulnerable and less accurate than land-based missiles, which doubly deters counterforce first-strike temptations and increases stability through verifiability. Given these stabilizing tendencies of ocean strategic forces, it is in the common interest that an oceans regime protect the secrecy of SSBN forces and not, for example, require that they surface in straits or provide notification to strait states of transit (with associated intelligence targeting of such notice). Arguments made by some American scholars that the *Trident* and associated missile systems, because of greater range, would not need to transit straits miss the point, as all such arguments accept a lessening of the ocean area available for SSBN forces and thus in some degree decrease the relative invulnerability of seaborne forces.<sup>7</sup> Moreover, to the extent that legal restraints on SSBN forces appear to fall more heavily on Soviet forces, they may encourage further Soviet reliance on the more destabilizing land-based missiles. As technology for detection of strategic submarines develops and as the number of such submarines decreases with deployment of the *Trident* system, it will be even more important for the oceans regime not to introduce factors further pressuring the relative invulnerability of sea-based deterrent forces.

- As an open society with strong traditions for following a rule of law, the United States would not be unreasonable in being concerned about possible lack of reciprocity in straits transit if its SSBN submarines, for example, were legally required routinely to surface in straits. Would the restraint of law operate equally on other nations, or would there be a temptation to take advantage of the greater secrecy afforded by a less open society? Whether or not this would be the case, as a legal norm with arms control implications, any restrictive requirements for SSBN submarines would have some of the same dangers for all parties as an unverifiable arms limitation agreement.

- It is important to preserve transit rights of aircraft, both civil and military. Moreover, such transit rights are most needed precisely

<sup>7</sup> See, e.g., Osgood, U.S. Security Interests and the Law of the Sea (paper prepared for the Conference on the Law of Sea: U.S. Interests and Alternatives, the American Enterprise Institute, Washington, D.C., Feb. 14, 1975). Darman also emphasizes "the increased range and sophistication of U.S. missiles and missile-launching submarines" as an argument against the need for straits transit rights. See Darman, *supra* note 3, at 375, 376.

Charles E. Pirtle also sounds the Osgood-Darman trumpet. In a recent paper he says, "The purpose of this paper is to challenge the validity of U.S. claims that national security is inexorably bound to a right of unimpeded transit through straits." Pirtle, *Transit Rights and U.S. Security Interests: "Straits Debate,"* 5 OCEANS DEV. & INT'L L.J. 477, 479 (1978). One can only marvel at the rigidity of the straw man constructed by Pirtle in this phrase.

in those settings where political pressure would make them difficult if not impossible to protect if they were ceded to others. United States overflight of the Strait of Gibraltar during the Yom Kippur War is a case in point: overflight of land territory had been denied even by our NATO allies, and negotiation of such a right would have been impractical if not impossible. This concern for freedom of overflight is strongly shared by those charged with protection of commercial aviation interests around the world; it would be a mistake to conceptualize it as a need only for military aircraft or only in a particular area.

- Unimpeded access through straits for commercial ships on a global basis may be as important as preservation of military transit rights. For example, the United States, Japan, the nations of the European Economic Community, and many developing countries are critically dependent on supplies of oil that must initially move through one or more straits. Yet it is precisely large tankers, liquefied natural gas (LNG) ships, and other "controversial" vessels such as nuclear-powered ships that present the greatest potential problem of multiple and inconsistent coastal state regulations or other inefficient restrictions. Moreover, because unnecessary increased costs resulting from an inefficient or restrictive straits regime ultimately will be borne by all, this commercial interest is substantial even for nations with a small merchant marine who rely on flag vessels of other nations.

- Modern nuclear submarines run safest "in their normal mode," that is, submerged, and it is a mode for which they are designed. On the surface they are less maneuverable, their systems for avoiding collision work less well, they are difficult to see even with good visibility, they present only a small and possibly misleading radar target for other shipping seeking to avoid them, and they must travel in an area of higher density of shipping with consequent increased risk of collision. For these reasons, as well as for the inconsistency with their primary mission, SSBN submarines do not transit straits unless the depth and other hydrographic characteristics permit safe submerged navigation. To require them to transit on the surface would be to increase the collision risk significantly, despite the occasional "intuitive" argument to the contrary one sometimes hears based on assumptions about shallow straits these submarines are unlikely to transit in any mode.

- To permit strait states discretion to control shipping or aircraft could lead to expanded conflict. Transit rights through important international canals such as Suez are frequently guaranteed even for belligerents (provided the canal state itself is not involved). The rationale for these provisions is to avoid drawing the canal state into the conflict. Under the laws of neutrality, any differential favoring of one belligerent could occasion loss of neutral rights and broaden the conflict to include the strait state. And in the nuclear age any effort to identify when an SSBN submarine might be in a strait could, if successful, risk routine targeting of the strait, just as home ports of SSBN's may be routinely targeted.

- To permit strait states control of warships or commercial navigation or overflight could spill over into other areas of coastal state functional jurisdiction, such as any potential economic zone, and occasion increased restrictions in those areas. This spillover threat and the long-run relation between transit rights and other oceanic free-

doms are usually ignored by those focusing narrowly on military straits transit rights. There is also a similar spillover effect at work between ship transit rights and overflight rights and between military and commercial rights.

- Military and commercial activities may be as effectively discouraged when rights are uncertain and ambiguous as when there are no legal rights. As Ambassador Elliot Richardson has observed, for adequate protection it is necessary that transit rights be clear and widely accepted. If an exercise of a right is to be accompanied by a severe political dispute about the existence of that right, then the value of the right itself is impaired.<sup>8</sup>

Reisman and I are in agreement that freedom of navigation through straits is important, and I believe that his article makes an original and substantial contribution to an understanding of that importance. Darman, however, in his revisionist effort at "rethinking U.S. interests," succeeds only in rethinking them poorly when he questions the importance of straits transit rights. Difficulties with the Darman analysis include, among others, the following.

First, the argument "that an increasingly territorialist regime could be of net advantage to the United States"<sup>9</sup> is seriously in error for analyzing the U.S. interest in straits transit and navigational freedom as a zero-sum game against the Soviet Union. The most important issue, as discussed above, is fundamentally to preserve through time the common interest in straits transit. Darman's argument is also simplistic in failing to take account of a variety of important factors that cut the other way in his own analysis. These include the mutual interest in stable sea-based strategic forces, the risk of asymmetrical noncompliance with nonverifiable arms-affecting measures, the greater dependence of the United States on imported raw materials, particularly oil, and indeed the fundamental asymmetry in the strategic geopolitical equation: the Soviet Union is a land power bordering on its most important allies, while the United States must be more concerned with allies across the sea in Europe, Asia, and elsewhere. Because U.S. naval roles are predominantly sea control and Soviet ones predominantly sea denial, even if we were to assume solely a zero-sum analysis against the Soviet Union and that a loss of straits transit

<sup>8</sup> See, e.g., Richardson, "National Security and the Law of the Sea" (July 13, 1974) (Remarks by Ambassador-at-Large Elliot L. Richardson, Special Representative of the President for the Law of the Sea Conference, at the Launching of the U.S.S. *Samuel E. Morison*, Bath, Maine, on file at Center for Oceans Law and Policy, University of Virginia). In this statement Ambassador Richardson points out:

Analysis of the law of the sea, particularly by lawyers, tends to focus on legal substance while ignoring the importance of international consensus in maintaining the international environment needed to support optimum flexibility in global deployments. It is not enough merely to insist that freedom of navigation and overflight beyond a narrow territorial sea and unimpeded transit through, under, and over straits are essential. Nor is it enough to be prepared to assert our rights in the face of challenge. Our strategic objectives cannot be achieved unless the legitimacy of these principles is sufficiently accepted by the world at large that their observance can be carried out on a routine operational basis.

*Id.* at 8.

<sup>9</sup> Darman, *supra* note 3, at 377, and generally at 376-78.

rights or navigational freedoms would have a heavier impact on the Soviet Navy than on the United States Navy, such a loss still would not necessarily create a security gain for the United States.<sup>10</sup> That is, measures that inhibit use of the oceans, because of the asymmetrical need for oceans use, may affect U.S. security needs even more. Put another way, a hypothetical legal constraint that inhibits U.S. naval forces by 10 percent in ability to carry out a particular mission and simultaneously inhibits Soviet counterforces by 15 percent may still be a net loss to the United States because the inhibition on Soviet naval forces may be only partially passed through in effective sea denial, and thus may be more than offset by the decline in U.S. ability to perform a vital mission. Another way to conceptualize the same effect is that the Soviet role, largely sea denial, may now be partly performed by the across-the-board 10 percent inhibiting factor more efficiently than by Soviet counterforces. By definition, a 10 percent inhibiting restraint is 100 percent effective in achieving a 10 percent reduction, yet it would not be reasonable to assume equivalent 100 percent effectiveness for any counterforce sea denial effort. The net effect, then, could be a reduction in the ability of the United States to perform a vital defense mission. Nevertheless, because the issue is not merely zero sum against the United States and because it involves stability of strategic forces, it would still be in the Soviet interest to support freedom of navigation in general and through straits in particular.

Second, Darman's statement that "[f]or the past decade . . . 'national security' interests—particularly interests associated with military functions—have been predominant in the development of U.S. policy toward a comprehensive treaty on the Law of the Sea"<sup>11</sup> is simplistic. It merely repeats a popular (and no doubt deeply felt and honestly held) belief, particularly of seabed mining groups, that their interest was being neglected—or was about to be traded off—for something else. During the period of over 3 years in which I chaired the process of preparing instructions for the U.S. delegation, it was repeatedly made clear that the United States had a variety of objectives that could not be sacrificed, notably including assured access to seabed minerals as well as freedom of transit through, over, and under straits.<sup>12</sup> The National Security Council Inter-agency Task Force spent more time by far on nonmilitary issues than on military ones, and if any single issue received more attention than others, it was seabed mining. It is time that analysis of U.S. policy move from this myth about overemphasis on military concerns and understand that just because national security interests are important does not mean that they are the only interests understood to be important or that other interests are being traded off.

<sup>10</sup> See generally for background on naval defense issues, J. NATHAN & J. OLIVER, *THE FUTURE OF UNITED STATES NAVAL POWER* (1979).

<sup>11</sup> Darman, *supra* note 3, at 375.

<sup>12</sup> Ambassador Richardson has reaffirmed this point that we will not trade off basic interests to gain protection for navigation. See Richardson, *supra* note 8, at 12. No U.S. representative to the conference has stated a different view.

The most bizarre of the Darman arguments is his urging the weak pattern of executive and congressional response to "creeping jurisdiction" as persuasive evidence that straits transit and other navigational freedoms are unimportant to the United States, despite the repeated assertions of official U.S. spokesmen to the contrary.<sup>13</sup> But if an on-the-merits analysis suggests that such freedoms are important, that importance is altered not at all by a recitation of instances in which the interest was not adequately protected. Rather, the argument is a classic error in logic, asserting that the "is" demonstrates the "ought."

In addition, it simply is not true that core strait transit rights and navigational freedoms have been acquiesced away by the United States. The exercises in low-level pragmatism that have occurred at the expense of ocean interests have generally been only at the periphery of such rights and usually have not directly involved navigational freedoms. Indeed, the United States did reaffirm its continuing position of overflight rights through Gibraltar when challenged by Spain in the Yom Kippur War, and more recently has reaffirmed its longstanding policies on navigational freedom and has initiated a systematic program for assuring its ocean freedoms. The pattern of U.S. response is also complicated by the difficulty of proving in advance the effect of unilateral assertions of one form of jurisdiction on another. In passing the 200-mile Fishery Conservation and Management Act, for example, Congress was not saying that the encroachment of creeping jurisdiction on navigational freedoms was unimportant. Rather, it was not persuaded that an extension of fishery jurisdiction would result in encroachments on navigation, and throughout the debate proponents of the act insisted that these were separate issues.

Finally, the Darman argument fails to take account of the fact that the executive branch has been pursuing a multilateral strategy for resisting "creeping jurisdiction" and in that context unambiguously insisted on straits transit rights and other navigational freedoms. Darman ignores this pattern of practices in concluding that these interests have been left to atrophy. In this connection, it should be remembered that the multilateral forum in which navigational interests were vigorously espoused has been regarded as the most important arena for the development of oceans law and thus for protecting freedom of navigation. Finally, although I believe that the pattern of protection of all ocean interests, not just navigational rights, has been weaker than it should have been, the reason is rooted more in failure to conceptualize and systematize a foreign policy for the oceans than in any assessment that a particular interest was unimportant.

The principal problem with the Darman analysis is less these and other particular failings of his own point of reference than the narrowness of that reference.<sup>14</sup> The importance of straits transit goes far beyond the

<sup>13</sup> Darman, *supra* note 3, at 378-79.

<sup>14</sup> Like many other contemporary international relations theorists, Darman seems seriously to underestimate the role of authority in international relations. See Darman, *supra* note 3, at 382. See generally on the point, Moore, *The Legal Tradition and*



military needs of any particular country at any point in time. The real issue is whether we will have a lasting oceans regime that protects the navigational heritage of all nations while meeting the legitimate concerns of coastal states. In what may be its principal achievement, UNCLOS has developed such a regime for straits.

### III. BACKGROUND TO INTERPRETING THE UNCLOS STRAITS REGIME

#### *A Point of Comparison: Ambiguities and Inadequacies of Straits Transit Prior to the UNCLOS Consensus*

Both interpretation and evaluation of the straits regime of the Third United Nations Conference on the Law of the Sea presuppose a point of reference. What is the pre-UNCLOS straits transit regime and how does it compare with the UNCLOS regime? Reisman's analysis suggests that the pre-UNCLOS regime is simply one of freedom of navigation through areas of straits beyond 3 nautical miles and that this is the appropriate point of comparison with the UNCLOS regime. Existing international law, unfortunately, is less clear.

The United States is a party to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone which establishes a general regime of "innocent passage" for transit through the territorial sea. Article 16(4) of that convention seems to envisage the regime of innocent passage for straits used for international navigation subject only to the proviso that "[t]here shall be no suspension" of such innocent passage rights. Under the Geneva Convention, then, whatever ambiguities and inadequacies there are in the regime of "innocent passage" in general will apply in areas within straits overlapped by the territorial sea, except as the doctrine of changed circumstances (increase in breadth of the territorial sea) or a pattern of customary law/historic rights for straits transit has altered that regime.

The current regime of "innocent passage" unfortunately is replete with ambiguities and inadequacies if applied generally to straits transit.<sup>15</sup> These include:

- failure to recognize the essential separateness from the standpoint of community policies of a regime for passage through the territorial sea in general and for transit of straits used for international navigation;
- no right of overflight as a matter of independent oceans law;
- a requirement that submarines in innocent passage must "navigate on the surface and . . . show their flag";
- the subjectivity inherent in the definition of "innocent passage,"

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*the Management of National Security*, ch. 10 in *TOWARD WORLD ORDER AND HUMAN DIGNITY* (Reisman & Weston eds. 1976).

<sup>15</sup> See generally on the inadequacies of the innocent passage regime and the history of straits transit problems, M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 187-269 (1962).

coupled with the right of coastal states to "take the necessary steps in . . . [their] territorial sea to prevent passage which is not innocent";

- uncertain and imbalanced coastal state regulatory competence over vessels in innocent passage, particularly uncertain prescriptive and enforcement competence for dealing with vessel-source pollution;

- uncertainties concerning the protected category of "straits used for international navigation"; and

- the failure of some strait states to adhere to the 1958 Geneva Convention with its definition of "innocent passage" and their consequent assertion of even more restrictive norms such as requirements for prior notification for transit of warships, and ambiguous or highly restrictive concepts of passage through "archipelagic waters" or broadly defined "historic waters."

Equally unfortunate in light of these ambiguities and inadequacies of the innocent passage regime, the Second United Nations Conference on the Law of the Sea in 1960 failed to reach agreement on the breadth of the territorial sea. While one may reasonably infer from its voting records, plus the limitation of the contiguous zone to 12 miles in the 1958 convention, that at maximum the territorial sea may not exceed 12 nautical miles, that is slight comfort for straits transit rights in straits from 6 to 24 nautical miles' width. Even prior to the UNCLOS consensus that combined a 12-mile maximum breadth for the territorial sea with new provisions on "straits used for international navigation" and "archipelagic states," considerably more states recognized a territorial sea of up to 12 miles than supported the U.S. position of only 3 miles. In current state practice, as of November 2, 1979, 23 states, including the United States, recognized 3 miles; 7 recognized limits beyond 3 but less than 12; 76 claimed or accepted 12 miles, including the Soviet Union, the People's Republic of China, Canada, Mexico, Italy, France, India, and Indonesia; and 25 recognized limits beyond 12 miles, ranging from 15 to 200. This pattern of state practice makes it increasingly difficult to urge that any territorial sea beyond 3 nautical miles and up to 12 is unlawful. Certainly as a basis for future protection of straits transit, breadth alone is a frail reed indeed.

There is a sound alternative legal basis in the event of a breakdown in UNCLOS negotiations, but it does not offer the certainty of Reisman's hypothetical point of comparison. Thus, although the Soviet Union has long maintained a 12-mile limit, it asserts historic rights for freedom of navigation through straits used for international navigation, even if such straits are overlapped by the territorial sea. The United States, I believe, would be on even stronger grounds in asserting customary law rights in straits broader than 6 miles as state practice moves toward a 12-mile limit. Certainly, U.S. acceptance of the 1958 Territorial Sea Convention did not contemplate a territorial sea of 12 nautical miles completely overlapping more than 116 straits used for international navigation. This right of free or unimpeded transit through straits in the 3- to 12-mile range (*i.e.*, in straits broader than 6 miles and narrower than 24) is reinforced by the Japanese decision to recognize a territorial sea of 12 miles except in five

straits where a 3-mile maximum breadth is maintained. It is also powerfully reinforced by the UNCLOS straits model recognizing transit passage rights through straits used for international navigation. Indeed, because of the potential power and influence of the UNCLOS straits model in interpreting rights of straits transit, it would be difficult to separate the UNCLOS regime from an evolving customary international law of straits transit. Under such an evolving customary law, strait state competence simply does not extend to transit.

Although I believe for these reasons the United States is on sound legal ground in insisting on freedom of navigation through straits used for international navigation with or without a comprehensive law of the sea treaty, the contemporary law is a great deal messier and more uncertain than is implied in Reisman's model. Moreover, at least some important straits, such as Malacca-Singapore, are not protected by Reisman's "high seas" model since they are less than 6 miles wide. Finally, the "high seas" model does not accurately reflect many other ocean claims which, though not recognized by customary international law, do reflect insistent pressures for expanded coastal state jurisdiction in the contemporary oceans political arena. Most importantly, these include claims by "archipelagic states" to enclose important straits with "archipelagic baseline systems" and claims by coastal states to regulate vessel-source pollution and thus, fairly directly, shipping. In the real world, accommodation of these interests in ways that meet coastal and archipelagic states' concerns while protecting navigational freedoms can be achieved far better through broad-based negotiation than through a pattern of response to unilateral claims.

### *Applicable Principles of Interpretation*

Reisman indicates as a starting point for interpretation of the UNCLOS text that "[s]ince UNCLOS will produce a complex convention, an essentially textual approach to construction, as conceived by the Vienna Convention on the Law of Treaties, would appear required because of the Vienna Convention's directives, and ineluctable owing to the absence of a formal record of the *travaux*."<sup>16</sup> I believe, as will be seen, that even a strict textualist approach to the UNCLOS regime strongly supports a right of submerged transit and other essential elements of a viable straits transit regime. Nevertheless, if a strictly textualist analysis left any ambiguity, as Reisman feels is the case, it would appear that under the "Vienna Convention directives" recourse may be had to supplementary means of interpretation. Thus, Article 32 provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) *leaves the meaning ambiguous or obscure; or*

<sup>16</sup> Reisman, *supra* note 4, text at notes 19 and 20.

(b) leads to a result which is manifestly absurd or unreasonable.<sup>17</sup>

Moreover, even Article 31, the "[g]eneral rule of interpretation," requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose";<sup>18</sup> thus, overall textual context and object and purpose should be considered even in threshold determinations. Paragraph 4 of Article 31 also provides, "[a] special meaning shall be given to a term if it is established that the parties so intended,"<sup>19</sup> and thus makes clear that full context concerning special meanings of terms should also be considered in threshold determinations. Presumably, Reisman's principal substantive thesis is that the UNCLOS regime is ambiguous (and thus squarely triggers Article 32) rather than that it is unambiguously opposed to the United States interpretations. Indeed, in concluding he writes: "It is as unwarranted to contend that UNCLOS rejects outright the types of straits passage needed for U.S. security as it is to contend that UNCLOS grants them outright. The problem is the ambiguity."<sup>20</sup> Any interpretation asserting that the text clearly prohibits submerged transit, for example, would be manifest nonsense, and to my knowledge no one has made such an assertion.

This somewhat broader interpretive ambit of the Vienna Convention, at least for settings of asserted ambiguity, more nearly reflects the descriptive and prescriptive conclusions of the most sophisticated analysis of the law of interpretation of international agreements to date, that of McDougal, Lasswell, and Miller in *The Interpretation of Agreements and World Public Order*.<sup>21</sup> In summarizing the practice of examining preliminary events prior to the outcome of an agreement, the authors say: "Thus today it is fair to say that the majority of writers and decision-makers reject the restrictions of earlier years—even if in somewhat indirect ways—and favor instead a thorough contextual analysis within the limitations of time and resources available in any given case" (and by "contextual" the authors refer to full context and not just to full textual context).<sup>22</sup>

Reisman implies as a second reason for his virtually exclusively textual analysis that it is "ineluctable owing to the absence of a formal record of

<sup>17</sup> Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969) (emphasis added), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969). Although the United States has not yet ratified the Vienna Convention, it is generally accepted as reflective of the customary international law of treaty interpretation. See, e.g., Briggs, *United States Ratification of the Vienna Treaty Convention*, 73 AJIL 470 (1979).

<sup>18</sup> The Vienna Convention on the Law of Treaties, *supra* note 17.

<sup>19</sup> *Ibid.*

<sup>20</sup> Reisman, *supra* note 4, text at note 66.

<sup>21</sup> M. McDougal, H. Lasswell & J. C. Miller, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).

<sup>22</sup> *Id.* at 123. The background of the Vienna Convention, of course, suggests a more rigid textualist emphasis than this quotation. As the legal realists have reminded us, however, doctrine and reality are not necessarily coincident, and in practice interpretation under the convention may well approximate the quoted McDougal, Lasswell, & Miller summary despite the syntax used to achieve such a result under the convention.

the *travaux*.”<sup>23</sup> It is an overstatement to say there are no formal *travaux*, since official conference records are kept as well as certain notes and records of the Secretariat. Nevertheless, Reisman is essentially correct that the formal record is sketchy and incomplete. As has been seen, however, it is not merely formal *travaux* that the Vienna Convention contemplates as a supplementary means of interpretation but also more generally “the preparatory work of the treaty and the circumstances of its conclusion.” In its analysis of Article 32 of the Vienna Convention, the International Law Commission clearly refused to limit applicable *travaux* in any way, for example, by whether the materials were published or unpublished. Instead, it said, in an unmistakably broad concept of *travaux*, that “trying to define *travaux préparatoires* . . . might only lead to the possible exclusion of relevant evidence”;<sup>24</sup> and “object and purpose” and “special meanings” of terms are to be taken into account even in the initial determination under Article 31.<sup>25</sup>

When the permissible context is thus broadened as it should be, there is a great deal of relevant evidence that must be considered and that strongly supports the interpretations Reisman questions. This evidence includes repeated statements by the United States, the Soviet Union, and other maritime states concerning the essentiality of transit passage (including submerged transit and other incidents), followed by absence of objections to the ICNT text by these parties; efforts by extreme strait states to reopen the text and prohibit submerged transit or overflight of straits; common and uncontradicted use of special terms during negotiations such as “freedom of navigation” and “in the normal mode” to include submerged transit; and an on-the-record exchange indicating that the United Kingdom’s transit passage text contemplated overflight and submerged transit. It is the widespread understanding of these and other background circumstances that is loosely referred to by some as an “understanding” supportive of textual interpretations advanced by maritime states, not some mysterious or secret off-the-record document or agreement.

In this regard I agree with Professor William Burke’s general criticism of restrictive interpretation of the UNCLOS straits regime: “One difficulty with this . . . [and] other criticisms of the Revised Text is that they rest almost completely on textual exegesis and manipulation of words without regard for, and with virtually no reference to, the negotiating context.”<sup>26</sup>

<sup>23</sup> Reisman, *supra* note 4, text at note 20.

<sup>24</sup> Draft articles on the law of treaties with commentaries, adopted by the International Law Commission at its 18th session, OFFICIAL RECORDS, UN CONFERENCE ON THE LAW OF TREATIES, DOCUMENTS OF THE CONFERENCE 7, 43, UN Doc. A/CONF.39/11/Add.2 (1971).

<sup>25</sup> Apparently, the proponent has the burden of showing “special meanings” of terms under the Vienna Convention, but the point is that such special meanings may be shown and are not excluded by an initial textual focus.

<sup>26</sup> Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 WASH. L. REV. 193, 193 (1977). This article is the definitive work to date on the interpretation of the straits chapter of the ICNT.

In short, although I believe that a purely textualist approach amply supports the generally accepted interpretation of the UNCLOS straits regime, even if it did not, the "circumstances of its conclusion" or "negotiating context" would provide such support. The Reisman analysis is seriously flawed in not taking account of these contextual features.

#### IV. THE UNCLOS CONSENSUS AND THE REGIME OF STRAITS TRANSIT

This section will analyze the text of the UNCLOS straits regime, discuss counter-textual assertions advanced by Reisman and others, and examine the preparatory work and circumstances of its conclusion (negotiating context). It will proceed individually by major issue, taking in order recognition of the separateness of passage through the territorial sea in general and straits transit, overflight rights, rights of submerged transit, certainty of transit rights, scope of strait state regulatory competence, transit rights for warships, archipelagic sea lanes passage, and categories of straits.

##### *Recognition of the Separateness of Straits Transit*

*Text.* One of the greatest shortcomings of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is that with the exception of a single clause providing for "no suspension" of innocent passage in straits, it fails to differentiate meaningfully between passage through the territorial sea in general and transit of straits. In the UNCLOS text this crucial distinction is recognized for the first time in the history of oceans law. Thus, "Innocent Passage in the Territorial Sea" and "Straits Used for International Navigation" are separate parts of the text, each clearly with its own regime. Indeed, "Innocent Passage in the Territorial Sea" is a section of part II, the chapter on the territorial sea and the contiguous zone. "Transit Passage," however, is a section of a separate part III, the chapter on straits used for international navigation. Passage through the territorial sea in general is dealt with by the term "innocent passage" and transit of the broadest category of straits is dealt with by the term "transit passage." Similarly, the analogous right of passage through archipelagic sea lanes is termed "archipelagic sea lanes passage."

Lest there be any mistake, part III on straits repeatedly makes it clear that straits are governed by "this Part," that is, by the straits part. Thus, Article 34(1) speaks of "[t]he régime of passage through straits used for international navigation *established in this Part*." Article 34(2) provides that "[t]he sovereignty or jurisdiction of the States bordering the straits is exercised *subject to this Part*." Article 35, entitled "*Scope of this Part*,"

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Burke goes on to say:

There is a loss of plausibility when the interpreter makes no attempt to take into account the issues being negotiated, their origin, the contrasting views and proposals of the principal participants, contemporary interpretations of these proposals, and the formulation of the outcome in relation to these communications among the parties in the negotiations.

*Ibid.*

enumerates three categories not affected by "*this Part*," and Article 36 enumerates another for which "[t]his Part does not apply." By Article 37 "[t]his section applies" to all other categories of straits, except as part III itself specifically applies the innocent passage regime to certain categories of straits in Article 45. In addition, Article 37, which leads off a section of the straits part entitled "Transit Passage," is entitled "*Scope of this section*" and says, "[t]his section applies to straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone." Article 38(1) provides that "[i]n straits referred to in article 37, all ships and aircraft enjoy the right of transit passage." Article 38(2) says that "[t]ransit passage is the exercise in accordance with this Part." Establishment of sea lanes and traffic separation schemes pursuant to Article 41 is explicitly required to be "[i]n conformity with this Part." And coastal state regulatory competence affecting transit passage is by Article 42 explicitly made "[s]ubject to the provisions of this section."

Similarly, Article 38(3) provides that "[a]ny activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention," and thus clearly implies that activities which are an exercise of the right of transit passage are not subject to the other provisions of the convention. Even more importantly, Article 39(1), which sets out the duties of ships and aircraft during passage, by ending its enumeration with the flag state obligation to "[c]omply with other relevant provisions of this Part," thus completing an inclusive list, excludes duties that might be implied from other parts of the convention, for example the part dealing with innocent passage. In contrast to Section 2, "Transit Passage," Section 3, "Innocent Passage," makes clear that "[t]he régime of innocent passage, in accordance with section 3 of Part II [the innocent passage section of the territorial sea chapter], shall apply" in the categories of straits enumerated. The analogous "archipelagic sea lanes passage" established in Article 53 contrasts clearly with innocent passage applicable outside of designated sea lanes and air routes (or if none are designated, "through the routes normally used for international navigation"). Similarly, Article 25 of the innocent passage section, which is derived from Article 16 of the Territorial Sea Convention, does not include paragraph 4 of Article 16 which deals with straits, and thus confirms that the UNCLOS text deals with straits transit in a separate chapter, unlike the Territorial Sea Convention which treats the issues together. As an added precaution, Article 233 plainly states that the regime for coastal state regulatory and enforcement competence for pollution from vessels in innocent passage in the territorial sea in general shall not "affect the legal régime of straits used for international navigation," except for a specifically enumerated enforcement right against vessels not entitled to sovereign immunity with respect to violations of major, internationally approved traffic separation or discharge regulations, which is rooted in Article 42 of the straits chapter.

This textual record leaves no reasonable doubt that the regime of transit

passage of those straits used for international navigation enumerated by Article 37 (and not excluded by Articles 35, 36, or 38(1)) is established exclusively by the straits chapter and is not governed by provisions elsewhere in the text concerning innocent passage in the territorial sea in general.

*Counter-textual Arguments.* Those who charge the straits regime with "textual ambiguity" generally fail to note the important advance in oceans law made by UNCLOS in providing that innocent passage in the territorial sea in general, on the one hand, and "transit passage" and "archipelagic sea lanes passage" through straits and sea lanes, on the other, are fundamentally different and require different regimes.

In a letter to Senator Barry Goldwater of July 29, 1976, Professor Gary Knight argues that Article 34(1) of the straits chapter might be interpreted to apply Article 20 from the general innocent passage regime stipulating that submarines "are required to navigate on the surface and to show their flag."<sup>27</sup> Article 34(1) provides: "The régime of passage through straits used for international navigation established in this Part shall not in other respects affect the status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil."

To prevail in this interpretation, Knight must establish that "other respects" means "other respects of passage not dealt with in this part" (as

<sup>27</sup> Letter from H. Gary Knight to Senator Barry Goldwater, at 11-13 (July 29, 1976) (the letters referred to in this note are on file at the Center for Oceans Law and Policy, University of Virginia). Knight does not assert that this interpretation is a necessary interpretation, merely that it is "arguable." He concludes his discussion on this point by saying, "an honest case can be made both for and against the proposition that Article 19 [Article 20 of the ICNT] is applicable to 'transit passage.'" *Id.* at 13.

The letter from Senator Goldwater of July 23, 1976, to a number of international lawyers on the issue of interpretation of the straits chapter asks several questions that may confuse fair interpretation such as: does the term "'freedom of navigation,' as used in international law, include freedom of submerged transit through territorial waters in straits?" This confuses the doctrines of high seas freedoms and innocent passage and distracts attention from the major rationale of the straits chapter, that as high seas freedoms are lost in straits by an expansion of the territorial sea it becomes imperative to create a new regime protecting freedom of navigation through territorial waters in straits.

Despite the less than neutral terms of the letter, Professors Richard B. Bilder, William T. Burke, Louis Henkin, Brunsen MacChesney, Ved P. Nanda, and Stefan A. Riesenfeld interpreted the text as clearly including a right of submerged transit. In contrast, Professors Gary Knight, Jerome C. Muys, Michael Reisman, and Alfred Rubin did not assert that the text prohibited submerged transit but merely that it did not unambiguously include it. The responses of Professors Richard Falk, Edward Gordon, and Woodfin L. Butte do not as easily fit into either category. The counter-textual arguments indicated in these letters are, I believe, fully dealt with in this article.

Of particular relevance to the inapplicability of the Article 20 requirement concerning surface transit of submarines is Burke's statement in his reply that "[i]t is my opinion that Article 19 [Article 20 in the ICNT] is inapplicable to transit passage and that the RSNT makes this clear beyond reasonable doubt." Letter from Professor William T. Burke to Senator Barry Goldwater, at 1 (July 29, 1976).



well as establish that submerged transit is not dealt with in this part), rather than the more straightforward "respects other than the regime of passage." Were it not that the overall textual structure of the straits chapter and transit passage section repeatedly limits the scope of transit passage to that enumerated in "this Part," and that submerged transit is provided for by the straits chapter, this interpretation might be arguable, though strained. Even if taken alone, it would not be the most reasonable textual construction, in view particularly of its operative focus on *status* of waters and *exercise* of jurisdiction without mention of residual *applicability of a regime* of innocent passage or *duties* of transiting vessels. Nor is it consistent with the omission in Article 25 of paragraph 4 of the parent Article 16 of the Territorial Sea Convention, an omission confirming the repeated textual indication that straits transit issues are governed by the straits chapter, or with the use of a specific cross-reference to straits in Article 233: that is, where straits used for international navigation were meant to be affected outside the straits chapter, a specific cross-reference was used.

In fact, the draft convention consistently achieves such cross-chapter effect either through specific cross-reference or by use of the term "this Convention" rather than "this Part." No such reference appears in conjunction with Article 20. In short, the straits chapter deals with all aspects of the regime of passage (either by inclusion or exclusion) and cannot be said to leave any of those aspects to part II by implication.

If the text is taken as a whole, then, as the Vienna Convention requires, the interpretation espoused by Knight is not credible. Rather, in overall context Article 34(1) is unmistakably intended to preserve coastal state resource rights and regulatory competence over scientific research and activities other than "passage." To argue that Article 34(1) prohibits submerged transit in the face of the overwhelming textual evidence to the contrary is logic chopping at its worst!

*Negotiating Context.* Nothing could be clearer in the overall negotiating context than the attempts by the strait states to have innocent passage through the territorial sea in general and straits transit treated as synonymous. Thus, the eight-nation strait state working paper introduced in the Seabeds Committee on March 27, 1973, recited as a first "basic consideration" that "navigation through the territorial sea and through straits used for international navigation should be dealt with as an entity since the straits in question are or form part of territorial seas."<sup>28</sup> And a representative of Spain said during debate on the straits article:

Straits used for international navigation were an integral part of the territorial sea in so far as they lay within territorial waters. Any attempt to set up separate regimes for the territorial sea and for straits would clearly violate the fundamental principle of the sovereignty of the coastal State over its territorial sea. . . .<sup>29</sup>

<sup>28</sup> Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen: Draft articles on navigation through the territorial sea including straits used for international navigation, UN Doc. A/AC.138/SC.II/L.18 (March 27, 1973).

<sup>29</sup> Statement of Mr. Ruiz Morales of Spain, UN Doc. A/AC.138/SC.II/SR.60 at 188

Similarly, nothing could be clearer than that the United States, the Soviet Union, and other maritime states sought to have this difference recognized as a fundamental distinction in oceans law. For example, the United States representative said in Committee II of the Seabeds Committee on April 2, 1973:

We should be clear, Mr. Chairman, that the community interest at stake in international straits is far more vital than simply the right of innocent passage in the territorial sea. The issue is no less than whether the freedoms of the high seas enjoyed by all nations are to remain meaningful.

A principal goal of the Law of the Sea Conference must be to agree on a regime which will minimize the possibilities of conflict among nations, conflicts which may arise because of uncertainties as to legal rights and responsibilities. In view of the importance of straits used for international navigation, any regime for such straits which depended upon a set of criteria that could be subjectively interpreted by straits states would sow the seeds of future conflict and undercut a major goal of the Conference. For these reasons, Mr. Chairman, it is completely inappropriate to approach the problem of transit through straits as though it were simply a problem of passage through the territorial sea which could be dealt with by the doctrine of innocent passage.<sup>30</sup>

Again, at the Caracas session of the conference on July 22, 1974, it was said:

The U.S. delegation has stated on numerous occasions the central importance that we attach to a satisfactory treaty regime of unimpeded transit through and over straits used for international navigation. Indeed, for states bordering as well as states whose ships and aircraft transit such straits, there could not be a successful Law of the Sea Conference unless this question is satisfactorily resolved. The inadequacies of the traditional doctrine of innocent passage—a concept developed not for transit through straits but for passage through a narrow belt of territorial sea—are well known.<sup>31</sup>

To my knowledge, since the initial appearance of the straits chapter in the Single Negotiating Text (SNT), which clearly made this distinction, no nation has questioned that this separate regime is established in the text and that the straits chapter, and not the innocent passage articles, governs all aspects of transit through Article 37 straits used for international navigation. Based on my experience in the negotiations, I am cer-

(1973). Similarly, in another representative statement of the strait state view, Mr. Tolentino of the Philippines said in explaining the 8-power draft straits articles, "navigation through the territorial sea and through straits used for international navigation should be dealt with as one entity thus necessitating a unified approach." UN Doc. A/AC.138/SC.II/SR.58 (1973).

<sup>30</sup> Statement by John Norton Moore, U.S. representative to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, April 2, 1973, USUN Press Release No. 32(73) at 2 (April 3, 1973).

<sup>31</sup> Statement by John Norton Moore in Committee II on July 22, 1974, 71 DEP'T STATE BULL. 409, 409-10 (1974).

tain that any other interpretation would have produced an instant rejection from the United States, the Soviet Union, and other maritime states.

The Knight argument that Article 34(1) incorporates Article 20 by implication is further contravened by the circumstance that Article 34 was originally presented and explained by the United Kingdom in April 1975 in the Straits Working Group of the conference. An interpretation of this article as denying submerged transit rights hardly seems credible in view of the commitment of the United Kingdom to those rights. Rather, it was intended to protect resource and other nontransit interests.

### *Overflight Rights*

*Text.* The UNCLOS text states unmistakably that transit passage includes overflight rights as a matter of general oceans law. Article 38(1) speaks of "all ships and aircraft," 38(2) provides for "freedom of navigation and overflight," 39(1) says "ships and aircraft," 39(3) sets out specific duties of "[a]ircraft in transit," 42(5) speaks of "a ship or aircraft," and 44 uses "navigation or overflight." Similarly, the analogous right of archipelagic sea lanes passage established by Article 53 speaks of "navigation and overflight" and "ships and aircraft."

*Counter-textual Arguments.* To my knowledge, no arguments have been made that the UNCLOS text fails to provide overflight rights. In general, however, those criticizing the straits chapter have failed to point out that in contrast to the Geneva Convention's "innocent passage" regime, the UNCLOS text fully protects overflight rights.

*Negotiating Context.* From the beginning of the negotiation the United States, among others, insisted that there be full overflight rights through straits for all categories of aircraft. Certain strait states opposed this position. Indeed, the continued efforts by Spain and Greece to remove overflight rights from the text only resulted in enhancing its clarity, and the amendments they recently introduced to that effect were not adopted by the conference.<sup>32</sup>

### *Submerged Transit*

*Text.* An analysis of the full text makes clear that transit passage includes rights of submerged transit through straits for those straits covered by the transit passage regime. The innocent passage section includes a specific article requiring submarines "to navigate on the surface and to show their flag"; by contrast, there is no such requirement in either the transit passage section or the archipelagic states chapter dealing with the

<sup>32</sup> See Amendments to the Informal Single Negotiating Text (March 30, 1976) (submitted to Committee II by Spain), in 2 DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—NEW YORKER SESSIONEN 1976, at 514, 518 (ed. Platzöder 1977) [hereinafter cited as Platzöder]; UN Doc. A/CONF.62/C.2/Informal Meeting/4 (April 26, 1978) (unpublished Informal Suggestion Submitted to Committee II by Spain); and Amendments to the Informal Single Negotiating Text Part II (undated) (submitted to Committee II by Greece) in Platzöder, at 530.

analogous archipelagic sea lanes passage, even though the transit passage section expressly enumerates the duties of ships during passage. That list of duties is clearly exhaustive since it ends with a catch-all obligation to "comply with the other relevant provisions of *this Part*." Moreover, both the Territorial Sea Convention and the innocent passage section of UNCLOS establish a pattern that if submerged transit is to be prohibited, it will explicitly be so stated. In contrast, there is nowhere in the straits and archipelago chapters a duty to navigate on the surface through straits or "archipelagic sea lanes." In my judgment, these textual provisions, taken together, undeniably establish the right of submerged transit in straits, and nothing else, text or *travaux*, is needed. Nevertheless, the existence of the right of submerged passage is further attested to by a wide variety of other textual indications.

- Not even the high seas chapter provides explicitly for submerged transit. The reason is that the phrase "freedom of navigation" in Article 87 includes submerged operations, just as it did in Article 2 of the 1958 Geneva Convention on the High Seas. Given this background, no provision other than "freedom of navigation" is needed to include a right of submerged transit. In contrast, the innocent passage chapter requiring surface transit does not use this terminology.

- The term "freedom of navigation" is used in defining transit passage in Article 38(2). Given the high seas background of this term, it surely includes rights of submerged transit, and the text cannot reasonably be read to exclude those rights from the "freedom" granted. Indeed, the use of the term establishes that any requirement in derogation of such "freedom of navigation" must be spelled out in the text. Given the important and consistent use of the term to refer to high seas rights, it would have little meaning in the article unless it was intended to reserve rights of submerged transit and other freedoms of transit. That is, it preserves "freedoms" associated with transit.

- The provision in Article 39(1)(c) that ships shall "[r]efrain from any activities other than those incident to their normal modes of continuous and expeditious transit" establishes, since it appears in a list of duties, that transit passage includes a right of transit in the "normal mode of continuous and expeditious transit." Because the "normal mode of continuous and expeditious transit" of modern submarines is submerged, a right of submerged transit is comprehended. It should be noted that normal mode in this regard is modified only by "of continuous and expeditious transit," not some other standard.

- Article 53(3) concerning the analogous right of archipelagic sea lanes passage provides that it is a right "of navigation and overflight in the normal mode." Even more importantly, the archipelagic sea lanes passage regime employs a specific cross-reference to *and only to* Articles 39, 40, 42, and 44 (not to Article 20 requiring navigation on the surface) in enumerating duties of ships and aircraft. It simply is not credible in light of the overall object and purpose of the text that archipelagic states have accepted a right of submerged transit in sea lanes through archipelagic waters if no such right is provided through straits used for international navigation outside of such waters.

In any event, the similar terminology and repeated cross-references in the archipelagic states chapter indicate that transit passage and archipelagic sea lanes passage are equivalent rights. There seems no difference in any other important respect, and in the absence of a clear intention otherwise, it would not seem reasonable to assume that they differ on the right of submerged transit.

- The existence of Article 45 makes it clear that when a cross-reference is intended to the innocent passage section from the transit passage section, it is made explicitly. Similarly, Articles 29, 31, and 32 in the innocent passage chapter make it clear that when a provision of that part is intended to have effect beyond that part or to be affected by another part, it is so stated. This specific cross-reference practice is also followed in the environmental chapter on issues concerning navigational rights as spelled out in Articles 211(4), 220(2), and most importantly, 233 and 236, which also apply in straits. Articles 233 and 236 particularly show that whenever an article outside of the straits part is intended to have an effect on the straits part, it is specifically stated to so apply or to apply to the entire convention. In short, the overall textual scheme of the convention is that in the absence of a specific cross-reference in at least one of the parts to be affected, nothing in the convention outside the straits chapter affects transit rights through straits used for international navigation.

- The innocent passage and straits transit sections are not even parts of the same chapter. Rather, innocent passage appears in a general part on the territorial sea and contiguous zone, and straits transit appears in a separate chapter on straits used for international navigation. Similarly, paragraph 4 of Article 16 of the Territorial Sea Convention, the only paragraph in the Territorial Sea Convention dealing explicitly with straits, is omitted from the comparable Article 25 in the innocent passage section of UNCLOS, and the issue is dealt with instead in the separate straits chapter of UNCLOS.

- Finally, of some peripheral support are the Article 39 duty to "[p]roceed without delay," which is most consistent with transit rights in a normal mode, that is submerged, for a modern submarine, and the articles making reference to nuclear-powered vessels in the innocent passage section, Articles 22(2) and 23, which, like Article 20, are omitted from the transit passage section of the text.

Under the Vienna Convention requirements, these provisions must be read together in their overall context. In that context, for all the reasons just mentioned, as well as the omission of a duty to navigate on the surface from the exhaustive list of transit duties in Article 39 and the repeatedly expressed assertion mentioned earlier that transit passage is governed by "this Part," that is, by the transit passage section of the straits chapter, there can be no reasonable doubt that even solely on a textual analysis the UNCLOS text provides a right of submerged transit.

*Counter-textual Arguments.* A number of textual arguments have been advanced by Knight and Reisman to demonstrate that the existence of a right of submerged transit is ambiguous under the UNCLOS text.

Knight seems to ask why, if submerged transit is so important and is included, it was not spelled out in the text as such.<sup>33</sup> The answer is quite

<sup>33</sup> See the letter to Senator Barry Goldwater from H. Gary Knight, *supra* note 27, at 11.

clear. The existing 1958 Geneva Convention on the High Seas and the high seas chapter of the ICNT both speak only of "freedom of navigation." They do not spell out a right of submerged transit beyond use of that phrase. Yet such rights on the high seas are understood by all to include the right of submerged transit. Moreover, altering the UNCLOS straits text to spell out that submerged transit is included in "freedom of navigation" could without such alterations elsewhere have negative implications not only for Article 87 (high seas) of the UNCLOS text—which presumably might be altered—but also for Article 2 of the 1958 Geneva Convention—which cannot be without a new conference of its own. Because of the clarity of meaning of the term "freedom of navigation," none of the straits proposals advanced by the United States, the Soviet Union, and the United Kingdom, which were well known as intended to include submerged transit, explicitly used language providing for that right. Rather they relied on the clearly understood phrase, "freedom of navigation."<sup>34</sup> There can be no doubt, then, that the absence of such an explicit provision is not a persuasive argument for an interpretation negating the right of submerged transit when neither the paradigm straits articles for submerged transit nor the high seas articles themselves include such an explicit provision.

Knight also argues that Article 20 might be applicable to the transit passage section through Article 34(1). For the reasons previously discussed in connection with the separation of the innocent passage regime and the transit passage regime, this argument is but logic chopping. It does not fairly take account of the overwhelming range of textual indications running counter to this interpretation, but rather relies on a vague argument to the exclusion of all such indications.

Reisman argues that the language, "in the normal mode," does not clearly establish a right of submerged transit, although he seems to concede that some submerged transit may be "in the normal mode." Thus, he implicitly disagrees with Knight's argument that Article 34(1) by incorporation of Article 20 provides for an obligation to transit on the surface.<sup>35</sup> Taken alone as a textual issue without benefit of the broader textual setting or the negotiating context, this provision, "in the normal mode," would seem an unsatisfactory basis on which to rely for a right of submerged transit. The most important textual bases for such a right, however, are not rooted in this provision, which is only an incidental indication of its existence. Moreover, if the phrase "normal mode" is ambiguous, as Reisman seems to argue, then recourse may be had to the negotiating context, which I be-

<sup>34</sup> The United Kingdom draft articles, for example, provided that

[t]ransit passage is the exercise in accordance with the provisions of this chapter of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas and another part of the high seas or a State bordering the strait.

See Draft Articles on the Territorial Sea and Straits (July 3, 1974) (submitted to Committee II by the United Kingdom), 3 OFFICIAL RECORDS, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 183, UN Doc. A/CONF.62/C.2/L.3 (1974).

<sup>35</sup> Reisman, *supra* note 4, text at notes 53 and 54.

lieve makes abundantly clear that this phrase includes submerged transit. Indeed, paragraph 4 of Article 31 of the Vienna Convention provides that the intention of the parties is the guide to special meanings of terms, so that negotiating context must be examined on the meaning of such terms even if no ambiguity is alleged.

Reisman also argues that "normal mode" may be determined by the strait states acting pursuant to their competence under Articles 39 to 42.<sup>36</sup> For example, implementation of certain sea lanes by strait states may be inconsistent with a right of submerged passage. This argument is premised on what I believe to be a serious misinterpretation of the UNCLOS text. That is, Articles 39 and 40 are intended solely to establish flag state obligations and not to create rights unilaterally enforceable by a coastal state. Similarly, Articles 41 and 42 are carefully drafted to require international approval for any sea lanes or traffic separation schemes, and there is nothing inconsistent between such internationally agreed lanes and a general right of submerged transit. In fact, the initial U.S. straits article, which clearly contemplated submerged transit, would have permitted even the unilateral imposition of such lanes by strait states without assuming any inconsistency with a right of submerged transit. To the same effect, the areas of regulatory competence granted the strait state under Article 42 are carefully drafted so as not to create problems for submerged transit. (Both these issues of "flag state obligations" and coastal state regulatory competence will be discussed in some detail in the next few sections of this article.) Even if these articles did grant significant regulatory competence to the strait states, which they do not, Article 44 requires that "[s]tates bordering straits shall not hamper transit passage" and Articles 32, 42(5), and 233 taken together establish immunity for warships transiting straits. In light of the abundant textual evidence that submerged transit is contemplated and is not subject to strait state interference, it is difficult to understand how the inconsistency that Reisman sees would be a reasonable interpretation of the straits chapter.

Finally, in a letter to Senator Goldwater, Reisman argues:

It is true, as our negotiators aver . . . that Article 19 [Article 20 of the ICNT] appears in Chapter I rather than in Chapter II of the Text [Parts II and III of the ICNT]. On the other hand, innocent passage is reapplied in Section 3 of Chapter II [section 3 of part III of the ICNT] (dealing with a second species of straits—"straits used for international navigation") and Article 38(1)(d) [39(1)(d) of the ICNT] obliges transit passage ships to "comply with other relevant provisions of this chapter." If, to argue in the manner of our negotiators, Article 19 is part of the regime of innocent passage and if innocent passage is a relevant provision of Chapter II, then the duty of surface transit may be "understood" to apply.<sup>37</sup>

Reisman's effort to demonstrate ambiguity in the UNCLOS text is particularly strained by this argument, for it completely ignores the purpose

<sup>36</sup> Reisman, *supra* note 4, text at note 58.

<sup>37</sup> Letter from W. Michael Reisman to Senator Barry Goldwater, *supra* note 27, at 4-5 (August 5, 1976).

of Article 45, which is to establish the innocent passage regime in certain straits not covered by transit passage. By its terms, Article 45 does not apply to transit passage straits; thus, it is not "relevant" under Article 39(1)(d) to such straits and is not included within the list of duties comprehended for transit passage. If anything, the specific reference in the transit passage section to the Article 45 category of straits, in which the regime of "non-suspendable innocent passage" is to be applied, lends clarity to the separateness with which the regimes of innocent passage and transit passage are regarded.

In summary, none of the arguments made to demonstrate that the UNCLOS text is ambiguous on submerged transit are persuasive, even on their individual merits, and the greatest failing of them all is that they do not fairly deal with the abundant evidence from the text as a whole supporting a right of submerged transit.

*Negotiating Context.* Even if there were any ambiguities concerning the right of submerged transit in the UNCLOS text, they would be overwhelmingly dispelled by the negotiating context.

First, the United States and the Soviet Union repeatedly made clear that they could not accept a law of the sea treaty that did not provide for freedom of navigation through straits, including submerged transit. In fact, on no other issue in the negotiation did the major participants express themselves so unmistakably on and off the record and make their views so well known. That they accepted the ICNT straits chapter during Committee II's article-by-article reading of the text strongly suggests that they believed the right of submerged transit was included. There can be no doubt that this is the U.S. interpretation. On July 14, 1979, Ambassador Richardson said in a major speech, "National Security and the Law of the Sea": "Under the text [ICNT/Rev.1] we would enjoy free and unimpeded passage, through, under, and over straits and archipelagic waters."<sup>38</sup>

In marked contrast to these views of the principal proponents of submerged transit, its principal opponents have continued their efforts to alter the text to prohibit it. Thus, in 1976 Spain introduced an amendment to the SNT straits chapter that provided: "Submarines and other underwater vehicles are required to navigate on the surface and to show their flag, unless otherwise authorized by the coastal State."<sup>39</sup> And in 1976

<sup>38</sup> See the remarks by Ambassador Richardson, *supra* note 8, at 11.

See also the letter of August 11, 1976, from Stuart P. French, Secretary of Defense Representative for the Law of the Sea Conference, to Senator John C. Stennis, Chairman of the Senate Committee on Armed Services (on file at Center for Oceans Law and Policy, University of Virginia). French writes, after a careful analysis of the issues raised in the replies to the Goldwater letter:

I want to assure you personally that our national security interests in free transit of straits (both submerged transit of submarines and overflight of aircraft without notification or authorization) connecting high seas to high seas are fully protected in the Law of the Sea negotiations as reflected in the Revised Single Negotiating Text.

This letter also details the negotiating history of the phrase, "in the normal mode," fully supporting that it includes, indeed primarily refers to, submerged transit.

<sup>39</sup> Amendments to the Informal Single Negotiating Text (submitted to Committee II by Spain), in Platzöder, *supra* note 32, at 522.



Greece introduced virtually the same amendment to be included in Article 39, "Duties of ships and aircraft during their passage" (exactly the article where such a duty would be expected if intended).<sup>40</sup> Neither of these amendments was adopted by the conference, as it was well known that to do so would end any chances for agreement. In summarizing the work of the 1977 New York session, Professor Bernard Oxman writes of the attempted amendments: "Earlier attempts to impose a requirement that submarines navigate on the surface failed and were not revived."<sup>41</sup>

In addition, the United Kingdom, whose draft articles formed the basis for the ICNT straits articles and who served as cochairman, with Fiji, of the straits negotiating group, obviously intended that the new concept of "transit passage" include the right of submerged transit. Among other contemporary indications of this interpretation, during discussion in the House of Lords on March 9, 1976, Lord Campbell said:

Britain, I understand, has taken a leading part in putting forward the concept of transit passage. . . .

On the question of strategic considerations, we want the Conference to accept that warships and even submerged submarines have the right to go through international straits, even though the territorial seas are to be expanded to 12 miles.<sup>42</sup>

And similarly Lord Goronwy-Roberts in the same forum on May 19, 1976: "We also advocated the creation of a special regime for passage through international straits . . . so as to ensure . . . a right of submerged transit."<sup>43</sup>

Burke, in the best analysis of the straits chapter to date, concludes from statements in the formal conference records that submerged transit is provided by the straits text:

Statements by Sri Lanka, Egypt, Peru and Spain, in commenting both on the United Kingdom proposal and on a United States intervention

<sup>40</sup> Proposed amendments by Greece, *supra* note 32, at 530.

<sup>41</sup> Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AJIL 57, 64 (1978).

<sup>42</sup> 368 PARL. DEB., H.L. (5th Ser.) 1249 (1976).

<sup>43</sup> 370 PARL. DEB., H.L. (5th Ser.) 1409 (1976). Similarly, on February 2, 1978, Lord Kennet asked Her Majesty's Government: "How many 'international straits' [within the meaning of the Composite Negotiating Text] in which the regime of free transit for warships [including submerged submarines] would operate, exist within 12 nautical miles of the United Kingdom?" 388 PARL. DEB., H.L. (5th Ser.) 916 (1978).

It should also be noted that both the innocent passage and transit passage provisions of the SNT built heavily on the UK dual proposal, and that proposal, which was understood by all to permit submerged transit, specifically included in the innocent passage part a general requirement like that in Article 20 of the ICNT that submarines must surface and show their flag. But since in the UK text the article requiring surfacing clearly applied only to innocent passage and not to straits transit, there seems no justification for alleging that in the ICNT, deriving from the SNT patterned on the UK text, Article 20 applies to transit passage.

The Article 34 phrase about the passage regime "not in other respects" affecting the status of the waters was drafted to meet concerns in the UK-Fiji straits negotiating group that a state would not be able to exercise territorial sea rights other than passage, *e.g.*, resource rights. It was not intended to and does not reintroduce innocent passage in any way.

on the subject, are especially revealing of the contemporary understanding of freedom of navigation in this context. Each of these delegations questioned the need for, and desirability of, submerged passage for submarines. The comments, questions, and proposals advanced by these delegations are virtually impossible to explain unless they understood that submerged passage was intended to be included in the concept of "freedom of navigation" in straits.<sup>44</sup>

The record of discussions, proposals, and proposed amendments also shows clearly that those states who sought right of submerged transit supported the language, "freedom of navigation" or "in the normal mode," for this purpose, while those who opposed that right consistently tried to delete these phrases. To my knowledge, no participant in the negotiations has doubted that the ICNT includes a right of submerged transit, nor has it ever been questioned that the phrases, "freedom of navigation" and "normal mode," used interchangeably in that text, include submerged transit.

From my own experience as a United States negotiator of the straits and archipelago chapters I can say unequivocally that at no time did the United States, or to my knowledge any other maritime power, including the Soviet Union and the United Kingdom, or any other participant in the straits and archipelago negotiations, have any doubt that the text fully provides a right of submerged transit through covered straits and archipelagic sea lanes. This issue was made abundantly clear throughout the negotiation and there are absolutely no *travaux* of any kind, on or off the formal record, supporting a contrary interpretation. It should be kept in mind that no one questions that the United States has made it clear that it cannot accept a law of the sea treaty that does not provide freedom of navigation through straits, including submerged transit. Yet not even the U.S. draft articles included a specific phrase referring to submerged transit, as the phrase "freedom of navigation" through a strait was felt to be abundantly clear on this point.

### *Certainty of Transit Rights*

*Text.* The chapter on innocent passage through the territorial sea provides for a right of "innocent passage." This right is qualified by Article 19, which defines passage as innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State," a test subsequently defined in paragraph 2. Most indicative of an intent to give coastal states certain rights to take unilateral action to prevent noninnocent passage is Article 25, which provides that "[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." Similarly, Article 30 provides: "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require it to leave the territorial sea immediately."

<sup>44</sup> Burke, *supra* note 26, at 205.

In marked contrast, "transit passage" in the straits chapter is defined as

the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.

Even more importantly, Article 39 setting out the duties of ships and aircraft during their passage does *not* say, as does Article 19, that passage "shall be considered to be prejudicial . . . if"; rather, it says, "ships and aircraft, while exercising the right of transit passage, shall," and thus differentiates flag state duties from the definition of transit passage rights. Articles similar to 25 and 30, which permit coastal states to interfere with passage under certain circumstances, are notably absent. Finally, under Articles 31, 32, 42(4) and (5), 233, and 236, coastal states shall not interfere with or take enforcement action against warships or other vessels entitled to sovereign immunity. Rather, as expressed in 42(5): "The flag State of a ship or aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits."

*Counter-textual Arguments.* Reisman is concerned that, similarly to the innocent passage provisions in general, a state might be able to characterize passage as "nontransit"—particularly by reference to Article 39(1)(b), which creates a duty for ships and aircraft in transit passage to refrain from use of force in violation of the United Nations Charter—and subsequently to deny passage unilaterally.<sup>45</sup> He points out in this connection that Article 44 merely creates a duty not to hamper "transit passage," not one not to hamper "passage" in general.<sup>46</sup> This argument, however, does not deal with the principal point that, in contrast with the innocent passage section, Article 39 delinks duties of ships and aircraft during passage from the definition of transit passage rights. Rather, these duties are flag state obligations "while exercising the right of transit passage." His argument also does not deal with the previously mentioned structural difference between the two sections, that strait states are not given a unilateral claim to prevent passage, nor with the clear design throughout the convention for warship immunity.

It does not follow as a matter of logic that the existence of flag state duties in Article 39 gives strait states a right to determine violations of such duties unilaterally and to seek to enforce them by denial of passage. Rather, it is entirely consistent with that text and clearly within the specific language of Articles 31 and 42(5) that the flag state shall bear "international responsibility" for such violations, and that enforcement shall be solely through the normal diplomatic (and, if available, judicial) channels. In fact, these provisions, as well as the second sentence of Article 233, would make little sense if strait states could prohibit transit passage

<sup>45</sup> Reisman, *supra* note 4, at 70.

<sup>46</sup> *Ibid.*

for violation of Article 39 duties, and they confirm for vessels entitled to sovereign immunity the other textual evidence of Article 39 itself and the absence of articles comparable to 25 and 30 from the innocent passage chapter. Moreover, Part XII, "Protection and Preservation of the Marine Environment," makes abundantly clear that broad international obligations concerning vessels in navigation do not necessarily result in coastal state rights enforceable by unilateral action, and when they do the text is specific in so stating and providing safeguards.

Finally, even if Reisman's interpretation were accepted, and transit passage rights and flag state duties were linked, it would not follow that a unilateral determination by a coastal state of violation of an Article 39 duty or other straits chapter obligation would terminate the right of transit passage. Rather, the duty would in fact and in law have to be violated, and the transiting state would be on firm ground in protecting its transit rights if there were no such violation. It is precisely this need to avoid confrontation caused by differing interpretations on so important a right that led to the delinkage in the straits chapter between rights of transit passage and duties of transiting ships and aircraft.

*Negotiating Context.* From the beginning of the negotiation, maritime nations were aware of the problem of linkage of transit rights with vague duties or restrictions that could lead to confrontation over straits transit rights. This defect in the innocent passage regime had been all too evident. For this reason, early Soviet draft straits articles, in stipulating duties of transiting ships and aircraft, provided them as flag state obligations not directly enforceable by the strait state. This approach was carried over into the United Kingdom text and the work of the Straits Working Group. Moreover, it was hardly novel: the same distinction between what was commonly referred to as a "flag state obligation" and coastal state authority to take unilateral enforcement action underlay the initial U.S. marine scientific research articles. For that chapter, however, this approach was set aside in favor of a modified consent regime requiring the coastal state's consent. This distinction between a "flag state obligation" approach and broader coastal state authority to take unilateral enforcement action was also fully understood in the vessel-source pollution negotiations over part XII of the text. Although that chapter creates broad flag state obligations to comply with international standards, they are enforceable by coastal states only as specifically set out in the text. Article 233 makes a clear link between that part and the straits chapter, which fully preserves this distinction. Indeed, a "flag state obligation" approach, which creates obligations but not direct rights of enforcement in other states, is a principal underpinning of the 1958 Geneva Convention on the High Seas. Not surprisingly, this result is again consistent with the use of the phrase "freedom of navigation" in the straits chapter taken from that convention.

The seriousness with which the United States viewed the question of certainty of transit rights is indicated by the statement of Secretary of State Henry Kissinger in August 1975, that "[w]e will not join in an agreement which leaves any uncertainty about the right to use world communi-

cation routes without interference.”<sup>47</sup> Many such statements on transit rights were made by conference participants.

### *Strait State Regulatory Competence*

*Text.* Unlike the broader regulatory competence provided coastal states under Articles 21 and 22 for ships in innocent passage, the unilateral regulatory competence accorded strait states under the straits chapter is carefully circumscribed. The only provision that creates any such right is Article 42. Article 41, which deals with sea lanes and traffic separation schemes, in marked contrast with Article 22 on the same subject in the innocent passage chapter, provides in paragraph 4:

Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization [IMCO] with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.

Thus, Article 41 requires that sea lanes or traffic separation schemes be internationally adopted before permitting their designation by a strait state. The only unilateral competence in this article is to prevent the international organization from imposing a scheme without the consent of the strait state.

Only Article 42 is entitled “Laws and regulations of States bordering straits relating to transit passage.” No other article in the straits chapter gives any regulatory competence to strait states. Substantively, Article 42 provides for four instances, and four instances only, where coastal states “may make laws and regulations relating to transit passage.” The first category is for laws and regulations implementing Article 41, and thus does not provide a basis for regulation except to effectuate sea lanes or traffic separation schemes as internationally adopted. The second category permits pollution control laws and regulations “giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.” Again, this authority is limited to effectuating international regulations previously adopted and relating only to discharge standards and not, for example, to design, construction, manning, or equipment. The third basis of authority concerns fishing vessels and permits laws for “the prevention of fishing, including the stowage of fishing gear.” The fourth and final basis permits strait states to make laws and regulations concerning loading and unloading for effectuating their “customs, fiscal, immigration or sanitary regulations.” Article 233 demonstrates that nothing in the marine environment chapter, which deals with the sensitive vessel-source pollution problem, adds to this prescriptive

<sup>47</sup> Address by the Honorable Henry A. Kissinger, Secretary of State, before the American Bar Association Annual Convention, Montreal, Canada, Dept. of State Press Release No. 408, at 5 (August 11, 1975), reprinted in 73 DEP'T STATE BULL. 353 (1975).

competence of strait states with respect to transit passage, and it clarifies the circumstances in which violation of internationally established discharge standards or traffic separation schemes, including associated regulations on under-keel clearance, may entail enforcement measures against vessels in transit passage.

This narrowly drawn regulatory competence is then subjected to four important sets of safeguards. First, Article 42(2) provides: "Such laws and regulations shall not discriminate in form or in fact amongst foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section." Second, Article 44 provides: "States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which it has knowledge. There shall be no suspension of transit passage." Third, Articles 31, 32, 42(4) and (5), 233, and 236 taken together establish that such laws and regulations may not be directly applied to warships or other vessels or aircraft entitled to sovereign immunity. And finally, Article 233 incorporates by reference certain additional safeguards into its enforcement authority.

As a result of both the narrowness of coastal state regulatory competence and the strong safeguard provisions of the UNCLOS text, coastal states are not given authority to suspend or hamper submerged transit, overflight, or other essential components of the transit passage regime.

*Counter-textual Arguments.* Reisman assumes broad strait state prescriptive and applicative competence stemming from Articles 39, 40, 41, and 42. He writes: "Though Article 39 speaks of user duties, it necessarily imports coastal rights. It must be construed as allowing the coastal states a broad prescriptive and applicative competence with regard to transit passage unless we are to assume that the 'duties' are no more than moral imprecations."<sup>48</sup>

Reisman is correct in his premise that Article 39 establishes user duties and "necessarily imports coastal rights"; a duty, of course, implies a correlative right. Wesley Hohfeld has at least taught us that.<sup>49</sup> But his conclusion that "it must be construed as allowing the coastal state a broad prescriptive and applicative competence" is not required as a matter of logic and is inconsistent with the overall context of the UNCLOS text. That the coastal state has rights correlative to the Article 39 flag state duties does not mean that they are unilateral rights to suspend transit passage, and much less that they are of prescriptive and applicative competence. To use a homely property analogy, that I have a right as landlord to receive rent from the tenant does not mean that I necessarily have a right unilaterally to evict him by force when the rent is not paid, much less to prescribe new regulations for payment of rent not spelled out in the lease.

<sup>48</sup> Reisman, *supra* note 4, at 69.

<sup>49</sup> See generally, W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) (see particularly the *Introduction* by Walter Wheeler Cook).

Counter to the Reisman theory, the whole structure of UNCLOS serves to decouple transit passage rights from flag state obligations, as was discussed in the preceding section. That is, they are rights (not merely "moral imprecations") to be pursued through diplomatic channels or, where applicable, third-party dispute settlement, but certainly not unilateral action by the strait state. More important than a larger than permissible logical leap, Reisman's argument on this point ignores the fact that coastal state prescriptive and applicative competences under the straits chapter are narrowly limited to those enumerated in Article 42 (and the safeguards that go along with them). It is no accident that only Article 42 speaks of "[l]aws and regulations of States bordering straits relating to transit passage." No other article in the straits chapter, including Article 39, uses such terminology. And if such competence was intended to be granted under Article 39, why was it not included in the Article 42 listing? The inclusion of a specific cross-reference to implementation of Article 41 shows that where some other article was intended to be implemented unilaterally by strait states, it was included in the Article 42 list. Furthermore, Reisman's interpretation does not seem to square with the clear purport of Articles 233 and 236.

Reisman also uses his assumption of broad coastal state regulatory competence to cast doubt on a right of submerged transit. Thus, he argues, "Article 39(1)(c) [would not] appear to override the state's regulatory competence for matters such as navigation and safety. In other words, the user would be hard pressed to justify evading such regulations on grounds that they required departure from its normal mode of transit."<sup>50</sup> And:

There are . . . internal contradictions if Article 39(1)(c) is read to permit submerged transit of straits. The subsection immediately preceding subparagraph (c) recognizes the coastal state's competence to appraise the contemplated passage, *inter alia*, for its conformity to the principles of international law embodied in the UN Charter. If submerged passage is secret passage, then how can the coastal state perform that function under subsection (b)? How can it control unauthorized research and survey activities which may be undertaken by the submerged vessel under Article 40? How can it implement its safety and sea lanes regulations (Articles 41 and 42), and so on? If anything, the structure of the entire section dealing with transit passage emerges as a more coherent drafting complex if no right of submerged passage is hypothesized.<sup>51</sup>

This line of argument fails completely if, as has been demonstrated in this and the immediately preceding sections, states bordering straits have no right of unilateral action to inhibit passage based on the flag state duties under Articles 39 and 40, and no right of regulatory competence except as is narrowly provided in Article 42 and subject to the safeguards applicable to that provision. In fact, under Article 42 any sea lanes or pollution discharge regulations would need to be rooted in previously adopted international regulations. Even then, they could not "have the practical effect

<sup>50</sup> Reisman, *supra* note 4, text at note 55.

<sup>51</sup> *Id.*, text at note 58.

of denying, hampering or impairing the right of transit passage [including submerged transit]" and could not be applied against warships such as an SSBN submarine. If anything, Reisman's argument is yet another good reason why the UNCLOS text is constructed as it is, as not providing unilateral strait state competence to prohibit transit pursuant to Article 39 duties or broad coastal state regulatory competence, both of which would indeed be inconsistent with a meaningful right of submerged transit.

*Negotiating Context.* Again, as with certainty of transit rights, it was fully understood in the negotiation that one of the defects of the innocent passage regime, if applied to straits, was a vague and overly broad coastal state regulatory competence that could be productive of conflict and seriously impair freedom of navigation through straits. Maritime states, including the United States, asserted repeatedly that any such competence concerning safety and pollution matters would need to be narrowly circumscribed and could not be applied against warships or other vessels or aircraft entitled to sovereign immunity.<sup>52</sup> Extreme strait states espoused contrary views. The United Kingdom articles reflected the former view, and by way of the SNT became the ICNT straits text. Subsequently, the United States, the Soviet Union, and other maritime powers accepted this text by not objecting during the article-by-article reading of the SNT in the Second Committee at the 1976 New York meeting. Spain, however, among other extreme strait states, continued to press its views and in 1976 offered a set of amendments that among other things would have permitted strait states to establish sea lanes and traffic separation schemes unilaterally, except those established "through the waters of two or more States."<sup>53</sup>

In April 1978, Spain again introduced amendments that not only reiterated the previously espoused sea lanes provision but also included specific provisions broadening the limited pollution control authority of Article 42(1)(b) and requiring under Article 39 that ships comply with safety and pollution control standards "established by the coastal State, in accordance with the provisions of Article 42."<sup>54</sup> Also in April 1978, Morocco introduced a set of amendments to the straits chapter that would have substantially broadened strait state regulatory competence under Article 42, including a new provision concerning "marine scientific research and

<sup>52</sup> Most recently, Ambassador Richardson confirmed:

The provisions on these subjects [transit passage and archipelagic sea lanes passage] emphasize the obligations of transiting states rather than the right of coastal States to control transit. This approach is designed to protect legitimate coastal State interests without permitting coastal State interference with transit. As you might expect, the only significant exceptions pertain to enforcement of internationally approved maritime safety and pollution measures.

Remarks by Ambassador Richardson, *supra* note 8, at 11. The "exceptions" refer to Article 233 in conjunction with Article 42.

<sup>53</sup> See Amendments . . . Proposed By the Spanish Delegation, *supra* note 39, at Art. 42(4).

<sup>54</sup> See the Informal Suggestion by Spain, *supra* note 32, at Arts. 39(2)(a), 41(5), and 42(b) and (e).



hydrographic surveys.”<sup>55</sup> These and similar amendments were not adopted by the conference. But if Reisman’s interpretation were correct, there would have been no need for Spain or Morocco to introduce them. Also contrary to Reisman’s view, these amendments recognize that strait state regulatory competence is established under the straits chapter only by Article 42.

Finally, the current version of Article 233, which cross-references Article 42 and clarifies the circumstances in which laws and regulations would be directly applicable to ships in transit passage, was worked out in 1977 after the adoption of the straits chapter as part of a concession on commercial vessels made to Malaysia. This article, with its carefully limited enforcement right, strongly confirms the basic structure of the UNCLOS text described in this section and is inconsistent with the Reisman argument of a threat to submerged passage from inferred broad strait state prescriptive and applicative competence.

### *Transit Rights for Warships*

*Text.* The *Corfu Channel* case made clear that warships as well as commercial vessels have a right of transit through straits used for international navigation. The preparatory work for the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, however, reveals that there was a debate about requiring warships to provide notice to coastal states for innocent passage through the territorial sea, or even to obtain coastal state consent for passage.<sup>56</sup> The issue was resolved in that convention, in conformity with the *Corfu* decision, by not requiring any such notification or consent, even for passage through the territorial sea in general. Nevertheless, in the intervening years such conditions have sporadically been raised.

Both the innocent passage and straits sections (and the archipelagic states chapter as well) of the UNCLOS text continue the Geneva Convention practice that no such notification or consent is required. No article in either part establishes any such requirement; and the references in Articles 19(2)(b) and (f), 29, 30, 31, 32, 39(1)(b) and (c), 39(3)(a), 42(5), 54, 233, and 236 clearly establish that transit by warships and military aircraft in straits (as well as other categories of vessels and aircraft in straits) was contemplated. Similarly, Articles 37 and 53 in the straits and archipelagic sea lanes passage chapters use the phrase, “all ships

<sup>55</sup> See UN Doc. A/CONF.62/C.2/Informal Meeting/22 (April 28, 1978) (unpublished Informal Suggestion submitted to Committee II by Morocco).

<sup>56</sup> See generally McDUGAL & BURKE, *supra* note 15, at 216–21. They conclude on the merits of this issue:

Denial of a right of innocent passage would . . . constitute a greater burden on passage than in the past when lesser breadths were claimed, yet because of progress in weapons technology, would offer much less protection against actual harm to coastal interests. For these reasons it appears desirable from a community policy perspective that there should be no special, discriminatory rule established in regard to access of warships.

*Id.* at 194.

and aircraft enjoy the right of transit [archipelagic sea lanes] passage," a phrase wholly inconsistent with any differentiation on the basis of the military or commercial nature of the vessel or aircraft. Indeed, the security concerns of the "archipelagic states" are creatively dealt with by providing for archipelagic sea lanes and for the regime of innocent passage outside such sea lanes, and by permitting temporary suspension of innocent passage pursuant to Article 52(2) for specified areas outside such sea lanes.

*Counter-textual Arguments.* To my knowledge, there have been no arguments advanced that the UNCLOS straits regime (or any other provision of the ICNT) in any way requires notification or consent for warship passage.

*Negotiating Context.* On this issue, as well as on other vital transit rights, the United States and other maritime nations have repeatedly stated that they could not accept requirements for either notification or consent for warship transit. Contrary views were initially advanced by certain extreme strait states in discussion and draft articles, although the issue did not become as significant as it had at Geneva in 1958. The SNT maintained the freedom in this respect provided by the Territorial Sea Convention, both for vessels in innocent passage in general and for transit passage of straits in particular. In 1976 Yemen introduced an amendment to the RSNT straits chapter that stated: "The coastal State may require prior authorization or notification for the passage through its strait in its territorial sea of foreign warships or nuclear-powered ships or ships carrying dangerous substances."<sup>57</sup>

This amendment, which would have reversed the decision of the International Court of Justice in the *Corfu Channel* case and rolled back more than 20 years of state practice to the contrary, was not adopted by the conference.

### *Archipelagic Sea Lanes Passage*

*Text.* Part IV of the ICNT, "Archipelagic States," establishes a right of "archipelagic sea lanes passage" through archipelagic waters and adjacent territorial sea seaward of archipelagic baselines. This right is in all major respects the equivalent of the right of transit passage through straits. In fact, Article 54 expressly incorporates by reference Articles 39, 40, 42, and 44 of the straits chapter. Comparison of Article 53(3) with Article 38(2) illustrates the interchangeability in the text of the phrases "freedom of navigation and overflight" and "navigation and overflight in the normal mode."

*Counter-textual Arguments.* To my knowledge, no arguments have been advanced that interpret the right of archipelagic sea lanes passage counter to its clear textual intent.

*Negotiating Context.* "Archipelagic States," part IV of the ICNT, was a product of informal consultations between maritime and archipelagic

<sup>57</sup> Amendments to Informal Single Negotiating Text (September 8, 1976) (submitted to Committee II by Yemen), in Platzöder, *supra* note 32, vol. 3 at 678.

states and a balanced Archipelago Working Group composed of both groups. If a convention is ultimately accepted, it will recognize the concept of mid-ocean archipelagic states for the first time in the history of oceans law, and thus will meet important political objectives of those states. As may be recalled, this recognition was not accorded by the First United Nations Conference on the Law of the Sea in 1958. At the same time, the convention would establish a right of archipelagic sea lanes passage in broad sea lanes through archipelagic waters and adjacent territorial seas. The text reflects the understanding—without which the conference would not have accepted the mid-ocean archipelagic concept—that in all major respects the underlying concepts of “transit passage” of straits and “archipelagic sea lanes passage” are identical, including rights of overflight and submerged transit.<sup>58</sup>

### *Categories of Straits*

*Text.* The ICNT recognizes the following four categories of straits used for international navigation.

(1) Those governed by Article 35(c), “in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.” This category includes the Turkish Straits, the Danish Straits, and the Strait of Magellan. In those straits all concerned felt that it would be better to continue existing special legal regimes which provide for freedom of navigation. Part III of the text does not affect the special legal regimes in these straits.

(2) Those governed by Article 36, in which “a high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists through the strait.” By definition, these straits contain an equally usable corridor with high seas freedoms of navigation and overflight. Thus, there was no need to apply the straits chapter to them.

(3) Those governed by Articles 37 and 38(1), “between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone . . . , except . . . if the strait is formed by an island of a State bordering the strait and its mainland . . . [and] a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.” This general category includes the great bulk of straits used for international navigation and would be governed by the regime of transit passage established in the straits chapter. Similarly, straits in archipelagic waters would be governed by the equivalent regime of archipelagic sea lanes passage.

(4) Those governed by Article 45 that either fall within the “island exception” of the preceding category (Article 38(1)) or that lie “[b]etween one area of the high seas or an exclusive economic zone and the territorial sea of a foreign State.” In these straits the regime of nonsuspendable innocent passage in accordance with Article 45

<sup>58</sup> See also Oxman, *supra* note 41, at 66.

and section 3 of part II of the text applies. If an equally convenient route exists seaward of an island, it was felt that there was no need to preserve more than a right of nonsuspendable innocent passage through such a strait. This "island exception" applies to straits such as Pemba (between Pemba Island and the Tanzanian mainland) and Messina (between the Italian mainland and Sicily). The category of high seas to the territorial sea of a foreign state includes the Strait of Tiran, Head Harbor Passage, the Strait of Georgia, and the Gulf of Honduras, all of which are overlapped by a 3-mile territorial sea. The existing 1958 Geneva Convention provides for nonsuspendable innocent passage in this category of straits connecting high seas to the territorial sea of a foreign state. No changes from existing law, except with respect to clarification of the innocent passage regime, apply to this high-seas-to-territorial-sea category by virtue of Article 45.

It should also be noted that the overall qualification applying to all these categories, "straits used for international navigation," reflects customary international law as evidenced by the *Corfu Channel* case, as well as by Article 16(4) of the 1958 Territorial Sea Convention. Therefore, this threshold test will not create additional restrictions on straits transit. Indeed, any category of "straits not used for international navigation" is extremely small. Presumably, the regime of innocent passage would apply pursuant to ICNT/Rev. 1 Article 17 in any such straits overlapped by the territorial sea, and if broader than 24 nautical miles, full freedom of navigation and overflight would apply pursuant to Articles 58 and 87.

UNCLOS has not altered or clarified the existing uncertainty in customary international law over the definition of "straits used for international navigation." Still, the Arctic straits controversy (including the Northwest Passage question) may be defused by the "[i]ce-covered areas" understanding embodied in Articles 234, 236, and 296, which would apply "within the limits of the exclusive economic zone."

*Counter-textual Arguments.* Reisman indicates that UNCLOS "establishes two categories of straits."<sup>59</sup> Actually, it recognizes four categories of straits used for international navigation with four different regimes, as enumerated above, and only the regime of transit passage (with its counterpart archipelagic sea lanes passage) is new (although the other regimes may be varied for some straits falling under the "island exception" of Article 38(1)).

Of greater importance, Reisman suggests that there is an "undertow" running toward Article 45 that over the long haul could subject vital straits to the less protective regime of innocent passage.<sup>60</sup> He seems to overstate the importance of the Article 45 exception to the transit passage regime and to understate the extent to which innocent passage already applies in the high-seas-to-territorial-sea category of straits.

First, Reisman misinterprets Article 45 when he says that it includes "those straits not included in ICNT Article 38."<sup>61</sup> Article 45 includes instead those "[e]xcluded under article 38, paragraph 1, from the application of the régime of transit passage." The difference, though subtle, is sub-

<sup>59</sup> Reisman, *supra* note 4, at 35.

<sup>60</sup> *Id.* at 66.

<sup>61</sup> *Id.* at 65-66 (emphasis added).

stantial. It means, for example, that the Article 35(c) and Article 36 straits are not included within the Article 45 nonsuspendable innocent passage regime.

Second, the "island exception" from the transit passage regime by definition is operative only "if a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island," and then only "if the strait is formed by an island of a State bordering the strait and its mainland." To argue that the straits within the "island exception," such as Pemba, are "vital" in requiring transit passage as opposed to nonsuspendable innocent passage, when such an alternative route is available, may be to overwork the term.<sup>62</sup> In Reisman's own frame of reference, one would also need to ask how many of the straits in this category are less than 6 miles wide and, as a result, already governed by a regime of nonsuspendable innocent passage.

Third, in connection with the high-seas-to-territorial-seas category, Reisman is theoretically correct that a shift from a 3- to a 12-mile territorial sea would increase the number of straits connecting to "the territorial sea of a foreign State," and thus those in which innocent passage would be applied.<sup>63</sup> In the real world, however, no strait would be so affected because those in this category are all less than 6 miles wide. Thus, under the assumptions of Reisman, Tiran would already fall under the nonsuspendable innocent passage regime of Article 16(4) of the 1958 Territorial Sea Convention (at least for parties to the convention), were it not for applicable UN Security Council decisions. Indeed, the addition of the high-seas-to-territorial-sea provision was regarded at Geneva in 1958 as designed expressly for Tiran.<sup>64</sup> But the Security Council has dealt specifically with the issue in Resolutions 242 and 338 as part of the overall effort at achieving a durable Middle East peace. These actions, which affirm "the necessity . . . [f]or guaranteeing freedom of navigation through international waterways in the area," are binding on all members of the United Nations,<sup>65</sup> and thus override both the Territorial Sea Convention and UNCLOS Article 45(1) (b) for the Strait of Tiran (as would any agreements concluded between the parties pursuant to the Security Council requirements, e.g., the recent Egyptian-Israeli agreement cited by Reisman).

Finally, the suggestion that the use of the term, "straits used for international navigation," in the straits chapter is "a legislative overruling of the *Corfu* judgment,"<sup>66</sup> narrowing the customary international law right of passage, is wrong. The International Court of Justice specifically said in that case:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through *straits used for international*

<sup>62</sup> *Id.*, text at note 45.

<sup>63</sup> *Id.* at 67.

<sup>64</sup> Dean, *Geneva Conference on the Law of the Sea*, 53 AJIL 593 (1959).

<sup>65</sup> See THE ARAB-ISRAELI READER 1083, 1188 (ed. Moore 1977).

<sup>66</sup> Reisman, *supra* note 4, text at note 43.

*navigation* between two parts of the high seas without the previous authorization of a coastal State. . . .<sup>67</sup>

And again:

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being *used for international navigation*.<sup>68</sup>

The UNCLOS text tracks the *Corfu* decision closely and, if anything, broadens the category of straits in which passage is protected. In any event, as Reisman points out, "used for international navigation" is found in the 1958 Territorial Sea Convention, to which the United States is party. Reisman might also have pointed out, however, that both the 1958 convention and the UNCLOS text broaden the *Corfu* decision by extending non-suspendable innocent passage to straits connecting to "the territorial sea of a foreign State." Furthermore, since the qualification, "used for international navigation," appears not only in Article 37 (incorporated by reference in Article 38) but also in the title of the straits chapter, as well as in Article 45 itself (as a qualifying criterion), Reisman's argument would not seem to demonstrate much of an "undertow" toward Article 45.

It should be mentioned that Article 45 creates a regime of nonsuspendable innocent passage rather than mere "innocent passage," as Reisman labels it.<sup>69</sup> This distinction is not inconsiderable because the nonsuspendable regime is the only recognition of the separateness of straits in the Territorial Sea Convention and is an essential protection for passage.

Had Reisman made the point that previous uncertainties over whether a strait is "used for international navigation" have continued under the UNCLOS text, he would be correct. But to say that UNCLOS has not resolved all straits problems is quite different from implying that it has resolved them so as to give less protection to navigation.

*Negotiating Context.* Article 35(c) on straits with "long-standing international conventions in force" was carefully worded, after lengthy negotiations with the concerned states, to preserve the special legal regimes within the Danish Straits, the Turkish Straits (the Bosphorus), and the Strait of Magellan, without affecting the normal straits chapter coverage of other straits. In all three cases, freedom of navigation is preserved pursuant to the special convention regime.<sup>70</sup>

<sup>67</sup> The *Corfu Channel* case, [1949] ICJ REP. 4, 28 (emphasis added).

<sup>68</sup> *Ibid.* (emphasis added).

<sup>69</sup> Reisman, *supra* note 4, at section III, "Straits."

<sup>70</sup> With respect to the special convention regimes in each of these three straits, see generally E. BRÜEL, 1 INTERNATIONAL STRAITS 195-200 (1947) (Montreux Convention of 1936 and Danish-Swedish Declaration of 1932), and E. BRÜEL, 2 INTERNATIONAL STRAITS 11-115, 200-51, 252-424 (1947) (the Danish Straits, the Strait of Magellan, and the Turkish Straits). Passage through the Strait of Gibraltar is not subject to special international treaty provisions within the meaning of Article 35(c) of the revised ICNT. See *id.* at 165. This was well understood in the negotiations.

Article 36 was intended, and was so understood by those participating in the straits negotiations, as an "exception" to the transit passage regime only because straits more than 24 nautical miles wide would contain a high seas or economic zone route of equal convenience that would make it unnecessary to traverse even a 12-mile territorial sea. It has never been controverted that high seas freedoms of navigation apply and will continue to apply in such straits.

The regime of nonsuspendable innocent passage under Article 45 was intended to apply to "island exception" straits and to those connecting to "the territorial sea of a foreign State." The first is a narrowly drawn exception made in deference to the availability of a route "of similar convenience." The paradigm straits of applicability for this exception are the Pemba Channel and the Strait of Messina. The second exception continues the broadening of the *Corfu* decision described in the previous section.

#### V. THE UNCLOS CONSENSUS AND THE REGIME OF THE TERRITORIAL SEA

##### *Breadth of the Territorial Sea*

Reisman writes that UNCLOS "has . . . produced a new regime"<sup>71</sup> broadening the territorial sea and that

[t]he rather alarming tendency, enunciated most authoritatively by the International Court in the *Iceland Fisheries* case, to view select provisions in international drafts as indicators of consensus and hence evidence of innovative customary law, despite their failure to win the formal support necessary for adoption in conformity with constitutive processes, virtually transforms Article 3 [establishing a maximum permissible breadth of 12 nautical miles for the territorial sea] into custom.<sup>72</sup>

I would agree that the existence of the law of the sea negotiations, with the consequent political focus on oceans jurisdictional limits, has probably accelerated the trend toward a 12-mile territorial sea. Nevertheless, Reisman does not fully treat this issue in context. First, prior to the UNCLOS negotiations, the trend toward a territorial sea of 12 miles (or even more) was unmistakable. Indeed, it was one of the reasons the United States joined with the Soviet Union and other states in seeking a new straits transit regime to be coupled with a limit on the maximum territorial sea to 12 nautical miles. Through time the 12-mile trend would likely have made itself felt as clearly as it is today anyway, particularly since the Soviet Union had itself taken the step long before UNCLOS. Second, any effort to contain the overall trend of unilateral extensions of coastal state jurisdiction through international negotiation would inevitably have stimulated appetites as well.

If the UNCLOS text is creating instant custom in this area, it should be remembered that this custom also acts against a territorial sea broader than 12 miles, a not inconsiderable issue today when more nations claim beyond 12 than a 3-mile or narrower limit. Additionally, if UNCLOS is creating

<sup>71</sup> Reisman, *supra* note 4, at 59.

<sup>72</sup> *Ibid.* (footnote omitted).

custom concerning a 12-mile limit, it is simultaneously creating custom for transit passage of straits, as these issues have been linked at every stage of the negotiation. Finally, if Reisman is correct that Article 3 has virtually been transformed into custom, a proposition that does not at this time reflect the U.S. view, then it would no longer seem appropriate to use the 3-mile limit and high seas freedom as the point of comparison for approval of UNCLOS—unless one were to spell out, as I believe is fully sustainable, an equivalent customary-historic right to freedom of navigation through, over, and under straits used for international navigation.

### *Innocent Passage*

In addition to establishing a separate regime for straits transit, the UNCLOS text updates and strengthens the regime for innocent passage through the territorial sea. This "Innocent Passage" section of the territorial sea chapter is rooted in the provisions of the 1958 Geneva Territorial Sea Convention but in important respects modernizes and improves it. These improvements include:

- The vague regulatory competence of the coastal state, reflected in Article 17 of the 1958 Geneva Convention, has been clarified in Article 21 of the ICNT in a balanced fashion and reasonably accommodates both coastal state concerns and navigational rights.

- Coastal state regulatory competence over pollution from vessels in innocent passage has been clarified to balance environmental concerns and protection of navigational rights. In particular, Article 21(2) makes it clear that no "[s]uch laws and regulations shall . . . apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."

- Coastal state duties not to hamper innocent passage have been strengthened in Article 24. Most importantly, the article includes new obligations not to "[i]mpose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage" and not to "[d]iscriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State."

- Balanced provision for sea lanes, traffic separation schemes, and nuclear-powered ships is made in Articles 22 and 23.

- The ambiguity associated with the concept of "innocent passage" has been somewhat reduced by limiting it in Article 19(2) to activities engaged in "in the territorial sea" and by defining it in the same article in terms of a specified list of 12 noninnocent forms of activity.

- Provision has been made in Article 296 for compulsory third-party settlement of innocent passage disputes, at least those concerning commercial vessels.

One of the major defects of the 1958 Territorial Sea Convention is that it did not deal with the environmental issues associated with innocent passage. As a result, it left doubts about competence genuinely needed by coastal



states, such as authority to establish traffic separation schemes (outside of straits), and risked their overreacting to environmental threats by trying to limit navigational rights as, for example, by establishing design or construction standards for vessels in transit. This issue was debated at length at UNCLOS and, in association with its treatment in the chapter on marine pollution, was resolved in a creative and balanced manner.

Failure to provide for assured recourse to third-party compulsory dispute settlement was also a significant weakness of the Territorial Sea Convention. Without it there was only halting opportunity to develop a reasonable jurisprudence of "innocent passage" based on the treaty. Provision for compulsory settlement of disputes, even if confined to commercial vessels, would be a significant strengthening of oceans law in this area.

Without mentioning the several important respects in which the UNCLOS innocent passage regime has been strengthened over the 1958 Geneva Convention currently binding on the United States, Reisman offers several criticisms of the updated regime that center on the definition of innocent passage. He is particularly concerned by what he interprets as both a removal of the Geneva limitation that the peace, good order, or security of the coastal state must be prejudiced and a broadening of the range of effects that can be determined to be noninnocent.<sup>73</sup> This interpretation is based exclusively on Article 19, paragraph 2 through 2(a), a portion of the article entitled "Meaning of Innocent Passage" that attempts an objective definition. That portion provides:

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

(a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations. . . .

While agreeing with Reisman that it is important to increase specificity and objectivity in an article so importantly relating to community navigational rights, I believe his concern is overstated and that the UNCLOS text makes some progress in defining innocent passage objectively.

First, while Reisman's argument that Article 19(2) abandons the Geneva limitation that prejudice must be to the coastal state for passage to be noninnocent is a possible interpretation, I believe that a better one and the conference's intention is that it does not change the Geneva Convention in this respect. Article 19(1) and the first paragraph of 19(2) specifically retain the requirement, "of the coastal State," which seems inconsistent with the interpretation that it has been eliminated. Moreover, 19(2)(a) itself retains the phrase, "of the coastal State," which can be read as easily, if not more easily, as modifying the "in any other manner" clause, just as this clause is modified by "threat or use of force" in the first half of 19(2)(a). That is, the "in any other manner" clause refers to and requires a threat

<sup>73</sup> *Id.*, text at notes 31-35.

or use of force against the coastal state. As a textual matter this interpretation is reinforced by the repeated use of "the coastal State" in limiting the noninnocent activities enumerated in Article 19(2). The phrase appears five times in the list of activities, whenever drafting suggests the need for a limiting factor. Most importantly, Article 19(2)(a) was taken from Article 2(4) of the UN Charter, and the phrase "any other manner" clearly refers back in that context to threat or use of force. The "coastal State" phrase is merely substituted for the "of any State" phrase in Article 2(4), and thus is intended in an obvious way to limit the broader applicability of the Charter usage to threats against the "coastal State" only. Moreover, why should a more serious threat against territorial integrity be limited to threats against the coastal state if lesser violations of Charter principles in the Article 19 enumeration were not so limited? As one who helped negotiate this provision, I certainly understood that it was modeled on the Charter prohibition against use of force in the manner I have just described.<sup>74</sup> Never was there any sign during the negotiations that Article 19(2) was to make the major change in the Geneva Convention framework that Reisman finds in it.

Second, Reisman understates the importance of the new Article 19(2) phrase requiring that activities to be noninnocent must be engaged in "in the territorial sea." Given the long background of this provision in oceans law, it seems more reasonable to interpret it as a limitation intended to avoid the expansive interpretations that Reisman rightly fears. McDougal and Burke point out in their encyclopedic study of oceans law that the failure of the 1958 Geneva Conference to include a weaker but similar phrase meant that it was "now open to the coastal state to take other factors into account, including, for example, the purpose of the projected passage, the cargo carried and destination in a third state."<sup>75</sup> In this respect a change from Geneva is intended by the ICNT.

Third, Reisman fails to take account of the explicit new duty in Article 24 that "in the application of this Convention . . . the coastal State shall not . . . [d]iscriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State." Such an obligation would seem to point against an expansive interpretation of 19(2) that sees it as permitting discrimination against third states, based on their alleged violation of Charter norms.

Fourth, under the overriding norms of the Charter any state, coastal or not, is free pursuant to Article 51 collectively to assist a state unlawfully attacked in violation of Article 2(4). But if such a determination is made

<sup>74</sup> A statement of the U.S. representative in the Second Committee at Caracas on July 22, 1974, lends some support to this interpretation of the limitation to forceful threats against the coastal state. Thus, it was said: "The convention should require that ships and aircraft in transit refrain from any threat or use of force, in violation of the Charter of the United Nations, against the territorial integrity or political independence of a State bordering the strait." Record of the 12th meeting of the Second Committee (July 22, 1974), 2 OFFICIAL RECORDS: THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 128 (1974).

<sup>75</sup> McDougal & Burke, *supra* note 15, at 258.

by a coastal state, it loses its neutral status and under the law of neutrality could itself be treated as a belligerent. This potential loss of neutral status should be a deterrent to such coastal state interventions against passage.

Fifth, Reisman may somewhat overstate the certainty of the linkage between prejudice and strait state interests in the Territorial Sea Convention. McDougal and Burke suggest this linkage was the principal reason for the separation between the first and second sentences in Article 14(4), but that "this supposed dichotomy between innocence of passage and conformity with international law cannot be taken as an absolute separation."<sup>76</sup> And with particular relevance to Reisman's concern about a possible new linkage to Charter norms, McDougal and Burke go on to say, "infringement of more fundamental prescriptions, such as those of the United Nations Charter, would clearly justify prohibition of passage as non-innocent."<sup>77</sup> Whether or not one accepts this interpretation if applied to a breach other than toward the coastal state, it points out yet again that the 1958 innocent passage regime was no model of clarity. By contrast, the textual thrust of the ICNT is to limit the determination of noninnocence to threats or use of force against the coastal state in violation of the Charter.

Finally, it is not true that "only when [the coastal state] has affirmatively [characterized a passage as appropriately innocent] is the passage insulated from lawful suspension by the coastal state," as Reisman suggests.<sup>78</sup> The provisions of the innocent passage regime do not in this respect either require affirmative action by the coastal state or assign complete discretion to it. Rather, they establish an objective normative standard that is binding on coastal and transiting states alike. Under Article 25 the coastal state may take steps to prevent passage "which is not innocent" (emphasis added), not which it deems not to be innocent. If passage is innocent, then the coastal state has no right under UNCLOS to prevent it, and transiting states presumably can be expected to defend their rights of passage. It should also be remembered that in a major improvement over the 1958 Geneva regime, third-party compulsory adjudication is available for determining noninnocence, at least with respect to disputes involving commercial vessels.

## VI. CONCLUSION

Despite the contemporary development of new uses of the oceans, their use as a global highway for trade and commerce remains economically the most important. Oceans commerce is an indispensable part of the highly interdependent global economy. If to this economic dependency is added the vital, and often interdependent, interests of many nations in the use of ocean space for strategic deterrence and defense, the protection of the community interest in navigational freedom throughout the world's oceans becomes of first-rank importance.

Fortunately, there is no necessary conflict between the extension of

<sup>76</sup> *Id.* at 257-58.

<sup>77</sup> *Id.* at 258.

<sup>78</sup> Reisman, *supra* note 4, at 65.

coastal state jurisdiction over resources and the full protection of community navigational freedoms. Navigational use can be repeated without depletion and most efficiently remains a shared freedom. In reaffirming that basic truth for the present era in oceans law, it is essential that it be clearly expressed in a functional separation of expanded forms of coastal state resource jurisdiction and full protection of navigational freedom. Dysfunctional claims to ocean space are not most usefully avoided by futile efforts to prevent all claims, but rather by allowing specialized resource competence and limited functional jurisdiction when in the common interest and simultaneously protecting navigational and other community freedoms fully and effectively in areas of expanded coastal state jurisdiction. For example, modern oceans law must provide for effective protection from vessel-source pollution. Any construct that fails to address itself to this environmental issue or the major trend toward expanding the resource jurisdiction of coastal states invites overreaction from those states, which would threaten the environment or navigational freedom, or even both. It is in establishing this careful functional division in the straits regime, which respects both legitimate coastal state needs and protection for navigational freedom, that UNCLOS has made a lasting contribution. That contribution is likely to be more enduring if UNCLOS succeeds in concluding a comprehensive treaty, but in any event it seems likely to have substantial influence on the development of oceans law.

Criticisms of the UNCLOS straits regime rooted in misperceptions of purported trade-offs or narrow analyses of national needs view the issues through a peephole on the world. Richard Darman's *Foreign Affairs* article denigrating the importance of straits transit misses the point. The real stake is not the strategic interests and national needs of any one nation, however important. Rather, it is no less than maintenance, indeed strengthening, of the common interest in navigational freedom in an age of increasingly complex oceans use and oceans politics. The regime of straits transit is the most essential element in that freedom. And in the real world of oceans politics, it is nonsense to believe that either the United States or the Soviet Union would accept a law of the sea treaty that did not fully protect freedom of navigation through straits.

Similarly, criticisms that do recognize the importance of straits transit but assert narrow interpretations of the work at UNCLOS, though correctly cautious in dealing with so important a community interest, overstate both the certainty of the existing international law of straits transit and the uncertainty alleged to be associated with the new UNCLOS regime. In my judgment, there is no reasonable doubt, based on either a purely textualist or a broader contextual interpretation of the UNCLOS text, that the straits regime protects freedom of navigation through, over, and under straits used for international navigation. Specifically for covered straits this protection includes:

- a right of overflight as a general right of oceans law;
- recognition of the separate needs of straits transit as opposed to passage through the territorial sea in general;

- a right of submerged transit;
- clear transit rights not subject to coastal state characterization of "innocence" or some other restrictive threshold standard;
- limited and balanced coastal state regulatory competence providing protection both for coastal states' environmental concerns and the community's navigational freedoms;
- no discrimination against military vessels or aircraft; and
- freedom of navigation through, over, and under archipelagic sea lanes.

These conclusions as to the UNCLOS straits regime are consistent with the excellent analysis by Burke<sup>79</sup> and, I believe, reflect a common interpretation at UNCLOS, including that of the United Kingdom as principal draftsman of the background text as well as those of the United States and the Soviet Union as principal affected nations. Indeed, I know of no interpretation to the contrary that has been advanced by any nation participating at UNCLOS.<sup>80</sup>

It is to be hoped that the major effort of over 10 years that has gone into UNCLOS by nations and leaders from all regional groups will result in a widely accepted "Caracas Convention on the Law of the Sea." For that to happen, the conference must still clear formidable hurdles such as deep seabed mining, continental margin delimitation, principles for resolution of continental margin boundary disputes, protection for marine scientific research, protection for cetaceans, final articles, and procedures for completing and adopting a package text.<sup>81</sup> With or without a new convention, however, the UNCLOS straits regime seems destined to serve as a powerful model for the development of a new customary law of straits transit.

<sup>79</sup> See Burke, *supra* note 26. See also Kuribayashi, *The Basic Structure of the New Regime of Passage Through International Straits—An Emerging Trend in the Third UNCLOS and Japan's Situation*, in a publication of the Japan Branch of the International Law Association at 29, 37-38 (1977); M. LEIFER, *INTERNATIONAL STRAITS OF THE WORLD: MALACCA, SINGAPORE AND INDONESIA* (1978), and Lapidoth, *Bab-Al-Mandeb*, 13 ISRAEL L. REV. 180, 189-90 (1978).

<sup>80</sup> On a topic as important as UNCLOS straits transit, the appearance of articles interpreting the text during the continuation of the conference may, of course, tempt disgruntled participants to attempt to reinforce revisionist interpretations.

<sup>81</sup> Acceptance—as a reasonable accommodation—of the UNCLOS straits regime reflected in the ICNT should not be assumed to extend to all other aspects of the ICNT, or even to all other navigational and security aspects of that text. In my judgment, the text remains seriously deficient on seabed mining, the "status of the economic zone," protection of cetaceans, delimitation of the outer edge of the continental margin, and marine scientific research. In its present form it could not obtain Senate advice and consent.

For specific recommendations on "status of the zone" and "marine scientific research," see Moore, *Some Specific Suggestions for Resolving Two Lingered Law of the Sea Problems: Packages of Amendments on "The Status of the Economic Zone" and Marine Scientific Research*, 19 VA. J. INT'L L. 401 (1979).

## LEGAL PROBLEMS OF THE GERMAN EASTERN TREATIES

*By Claus Arndt \**

During the current political era, which has been marked by the attempts of the two superpowers to abate the economic and political burdens of their intercontinental and other "military build-up" through mutual dialogue (*e.g.*, SALT, MBFR) and to achieve a certain détente in their relationship, a government came to power in the Federal Republic of Germany (FRG) after the 1969 parliamentary elections, whose declared goal was to make its own German contribution to help bring about a relaxation in international tensions, secure the peace in Central Europe, and make life there more tolerable for its inhabitants. The effort was all the more important because Germany was and is the only place on earth where the United States and the Soviet Union face each other directly. Initially, this political goal, securing the peace by relaxing tensions, was effected by the establishment of an extensive system of international treaties, usually between the Federal Republic of Germany on the one side, and the states of Eastern Europe with Communist governments on the other. Only to the extent that Berlin and the rights of the Allied powers of World War II were affected, were the three Western occupying powers (the United States, the United Kingdom, and France) included in the system of treaties, partly by exchanges of notes and partly directly (*e.g.*, the Berlin Quadripartite Agreement).

We refer here in particular to the following agreements:

(1) the Treaty of August 12, 1970, Between the Federal Republic of Germany and the USSR (the Moscow Treaty);<sup>1</sup>

(2) the Treaty of December 7, 1970, Between the Federal Republic of Germany and the People's Republic of Poland (the Warsaw Treaty),<sup>2</sup> which has been expanded and extended by the German-Polish agreements of 1975;<sup>3</sup>

(3) the agreement of September 3, 1971, between the Governments of France, the Soviet Union, the United Kingdom, and the United States on Berlin (the Quadripartite Agreement);<sup>4</sup>

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<sup>1</sup> [1972] BGBl.II 354.

<sup>2</sup> 830 UNTS 327.

<sup>3</sup> Treaty on Old Age and Accident Insurance ([1976] BGBl.II 393); Treaty on Credit Financing ([1975] BGBl.II 566); Long-Term Program for the Development of Economic, Industrial and Technical Cooperation ([1975] BGBl.II 1740); and Protocol on Emigration (Parl. Doc. 7/4184,4), all of October 9, 1975. Compare Arndt, *Zu einigen Rechtsproblemen der deutsch-polnischen Vereinbarungen von 1975*, 13 RECHT UND POLITIK 1 ff. (1977).

<sup>4</sup> 24 UST 283, TIAS No. 7551, reprinted in 10 ILM 895 (1971). See Doeker, Melzheimer, & Schröder, *Berlin and the Quadripartite Agreement of 1971*, 67 AJIL 44 (1973).

(4) the Agreement of December 17, 1971, Between the Federal Republic of Germany and the German Democratic Republic (GDR) on Transit Traffic of Civilian Persons and Goods Between the Federal Republic of Germany and Berlin (West) (Transit Traffic Agreement);<sup>5</sup>

(5) the Agreement of December 20, 1971, Between the Senate (of Berlin) and the Government of the German Democratic Republic on Easing and Improving Travel and Visiting Regulations;

(6) the Agreement of December 20, 1971, Between the Senate (of Berlin) and the Government of the German Democratic Republic on Settling the Question of Enclaves by Exchanging Territories;

(7) the Treaty of May 26, 1972, Between the Federal Republic of Germany and the German Democratic Republic on Traffic Questions;<sup>6</sup>

(8) the Treaty of December 21, 1972, on the Fundamentals of the Relationship Between the Federal Republic of Germany and the German Democratic Republic (the Fundamentals Treaty);<sup>7</sup>

(9) the Treaty of December 11, 1973, on Reciprocal Relations Between the Federal Republic of Germany and the Czechoslovakian Socialist Republic (the Prague Treaty); and

(10) the agreements of December 21, 1973, between the Federal Republic of Germany on the one hand, and the People's Republics of Hungary and Bulgaria on the other, on the establishment of diplomatic relations, together with a large number of supplementary agreements.

All of these treaties and agreements have generally been worked out along the same pattern, which is based on the following two principles.

(1) The contracting parties accept among themselves that they agree as little about their ultimate political goals as about the legitimacy of the present-day territorial divisions in Central Europe and their origins (including the circumstances of those origins): that is, they agree to disagree.

(2) Regardless of their opposing perceptions of political goals and legal situations, the parties agree that they want to cooperate in as many spheres as possible, improve their mutual relations, and, above all, base their policies on the principle that the application and threat of force should be forbidden. The practical point of departure for this cooperation shall be the actual ("real") situation as it currently exists—again, irrespective of the parties' judgments as to its legitimacy.

For the Federal Republic of Germany, the two most important issues (on which one of the parties persists in dissenting) are its legal identity and the right of the German people to achieve reunification as a nation by the free exercise of its right of self-determination. According to its Constitution (*Grundgesetz* or Basic Law), which was adopted in 1949 by those Germans residing in the American, British, and French occupation

<sup>5</sup> BAnz No. 174/72 (1972), reprinted in 11 ILM 5 (1972), together with the agreements numbered 5 and 6 in the text.

<sup>6</sup> [1972] BGBl.II 1449, reprinted in 11 ILM 726 (1972).

<sup>7</sup> [1973] BGBl.II 421, reprinted in 12 ILM 16 (1973).

zones, the Federal Republic of Germany identifies itself as a territorially<sup>8</sup> and temporally<sup>9</sup> limited component of the still-existent all-German nation, which was founded in 1867 as the *Norddeutscher Bund* ("North German Federation"), and from 1871 to 1945 bore the name *Deutsches Reich* ("German Empire").

The interpretation of the Constitution generally accepted by the Parliament (*Deutscher Bundestag*),<sup>10</sup> the Federal Government, and the Federal Constitutional Court<sup>11</sup> is that this German nation was not extinguished in 1945, or in 1949, or subsequently—and therefore exists even today. Undeniably, it is currently unable to act under International law—as, similarly, were Poland between its partition at the end of the 18th century and 1918, and Austria between 1938 and 1945—because it lacks state organs capable of functioning. The sovereignty of the Federal Republic is further limited by the Occupation Statute to the extent that the rights and responsibilities of the United States, France, and Great Britain with respect to Berlin and to Germany as a whole, which includes the questions of reunification and a peace treaty, are at issue. The Federal Republic expressly recognized this situation in Article 2 of the revised Treaty on the Relationship between the Federal Republic of Germany and the Three Powers (signed May 26, 1952, revised October 23, 1954, and hereinafter referred to as the Treaty of 1952/1954). Furthermore, under its internal constitutional law, all state organs of the Federal Republic are bound to refrain from any action that might legally impede the resolution of the German question by the exercise of the inalienable right of self-determination under international law (the so-called German option). Such a solution need not consist of a union of the two existing German states or even the annexation of one by the other. There are many conceivable constitutional solutions that could be based on the continued existence of the two states; the decisive factor is that the solution be consistent with the basic principle of the right of self-determination of peoples, i.e., that it be based on the freely expressed will of the German people in both the Federal Republic of Germany and the GDR. Or, to express it differently: West German constitutional law does not obligate the state organs of the Federal Republic to follow a definite political line toward reunification but rather merely commands them never to obstruct by law the free exercise

<sup>8</sup> Art. 23 and preamble of the Basic Law (Constitution). Here are listed the German territories in which the Constitution is effective "for the present."

<sup>9</sup> Article 146 of the Basic Law states that the Basic Law becomes ineffective on the day on which a new Constitution, freely concluded by the entire German people, becomes effective.

<sup>10</sup> Compare C. ARNDT, *DIE VERTRÄGE VON MOSKAU UND WARSCHAU* (Bonn 1973), hereinafter cited as *VERTRÄGE* (reviewed 72 AJIL 194 (1978)) and the following, also by Arndt: *Rechtliche und politische Aspekte der deutschen Ostpolitik*, 14 *ÖSTERREICHISCHE ZEITSCHRIFT FÜR AUSSENPOLITIK* 395 ff. (1974); *Les Aspects juridiques et politiques de la "Ostpolitik" Allemande de 1970 à 1976*, 41 *POLITIQUE ÉTRANGÈRE* 269 ff. (1976); and *De politiske og retslige sider af Tysklands "Ostpolitik" 1970/76*, 31 *FREMtiden* 24 ff. (No. 4, 1976).

<sup>11</sup> 36 BVerfGE 1 (1974); 40 BVerfGE 141 (1976).



of the right of self-determination by the entire German people (by, for example, entering into compromising international law relations) nor to do anything that might render such free exercise impossible. Notwithstanding this lack of a definite political line on reunification under West German constitutional law, the United States, the United Kingdom, and France agreed in Article 7, paragraph 2 of the Treaty of 1952/1954 on the goal, "to establish by peaceful means a reunified Germany, possessing a democratic constitution similar to that of the Federal Republic and integrated into the European community."

The Soviet Union, as spokesman for the European states with Communist governments, has for many years continually emphasized in official explanations, diplomatic notes, and other statements that it regards the German question as resolved and does not share the FRG's view on its identity. Therefore, when the West Germans were negotiating the agreements with the Soviet Union, Poland, and the GDR, they felt that in order to secure their identity under international law, it would not be sufficient to rely on the fundamental principles and goals of the UN Charter as the authoritative standard for the reciprocal relations being established, even though the right of self-determination of peoples is expressly included in those basic principles (Article I, paragraph 2). For that reason, and in order to ensure the maintenance of the West German position as required by its constitutional law, the Federal Government took a number of internationally relevant actions in connection with the conclusion of the treaties.

Three of these actions involved the Soviet Union and the conclusion of the Moscow Treaty. First, before signing the treaty, the German Government formally delivered to the Soviet Government a letter, signed by the Minister of Foreign Affairs, in which it was expressly stated that signing the treaty was not incompatible with the expressed political goal of the Federal Republic of Germany to bring about a secure peace in Europe that would permit the German people to attain its unity by the free exercise of its right of self-determination. The Soviet Union accepted this letter without objection.

Second, in a mutual exchange of declarations on August 6, 1970, the West German and Soviet Ministers of Foreign Affairs expressed agreement that the remaining rights of the four powers (the United States, the United Kingdom, the Soviet Union, and France) in Germany were not an object of the negotiations and would not be affected by the Moscow Treaty. Notes concerning these declarations were exchanged between the Federal Republic and the three Western powers, and were subsequently included in the FRG's internal ratification procedure.

The third action involving the Soviet Union took place at the ratification ceremony, when the Federal Government presented to the Soviet Ambassador in Bonn the text of a resolution interpreting the Moscow and Warsaw Treaties. This resolution had been passed by the Bundestag (Federal Parliament) and the Bundesrat (House of States) when the ratification law was enacted, and the Federal Government, as the official state organ constitutionally competent to represent the Federal Republic in its

international relations, had accepted it as its own. The most minute details of both the text and the manner of presentation had been discussed and cleared in advance with the Soviet Ambassador.<sup>12</sup>

The resolution begins by endorsing peace and renouncing force, and declares that the Moscow and Warsaw Treaties are important elements of a *modus vivendi* that the Federal Republic of Germany would like to establish with its Eastern neighbors. At the same time, the Federal Republic asserts its firm commitment to NATO and to the goal of European unity and reaffirms its intent to maintain and further develop its ties to Berlin (West) on the basis of the Quadripartite Agreement.

Paragraphs 2, 3, and 5, the most important under international law, read:

(2) The obligations assumed by the Federal Government in the treaties are accepted in its own name. The treaties assume as a basis the currently existing borders and preclude the unilateral changing of these borders. The treaties do not preclude a peace treaty for Germany and do not establish a legal foundation for the present-day boundaries.

(3) The inalienable right of free determination is not affected by the treaties. The policy of the Federal Republic to strive towards a peaceful restoration of the national unity of the German nation within the framework of Europe is not incompatible with the treaties and does not prejudice the solution of the German question. The Federal Republic raises, with its demand to exercise its right of self-determination, no territorial or border alteration claims.

(5) The rights and responsibilities of the four powers with respect to Berlin and Germany as a whole are not affected by the treaties. The German Bundestag regards the preservation of these rights and responsibilities as essential in view of the fact that the final settlement of the German question has not yet been achieved.<sup>13</sup>

In addition to these actions involving the Soviet Union, the Federal Republic took certain steps vis-à-vis the People's Republic of Poland. On the day after the signing of the Warsaw Treaty, the Federal Government informed the three Western powers in identical notes that it had made clear to the Polish Government during the negotiations that the treaty did not and could not affect the rights and responsibilities of the four powers. Furthermore, the Government indicated that it could act only in the name of the Federal Republic of Germany, and thus not for the entire German people. Finally, the above-mentioned resolution of the Bundestag and Bundesrat was also presented to the Government of Poland after prior consultations and without any expressed objection on its part.

In the last of this series of actions, on December 21, 1972, the day of the signing of the Fundamentals Treaty, the Federal Government presented

<sup>12</sup> The Soviet Ambassador in Bonn even presented changes in wording desired by his Government (for particulars, see VERTRÄGE, *supra* note 5, at 59; compare further the letter of May 9, 1972, from the German Minister of Foreign Affairs, Walter Scheel, to the member of Parliament, Dr. Barzel (Bundestag Minutes (186th mtg.), 6th Sess. 10,908-10,909 (1972)).

<sup>13</sup> Umdruck 287, Bundestag Minutes (187th mtg., Add. 6), 6th Sess. 10,960 (1972).

to the German Democratic Republic a letter identical in text to that given the Soviet Union on August 12, 1970.

Under international law the letters on German unity and the joint resolution of the Bundestag and Bundesrat are "instruments related to the treaty," in the sense of Article 31, paragraph 2(b) of the Vienna Convention on the Law of Treaties of 1969. The Vienna Convention had not yet been ratified by any of the signatories when the treaties listed above were concluded, but it can nevertheless be used for interpretive purposes because it was generally regarded in this respect as declaratory of existing law. This, however, does not mean that the texts of the letters concerning German reunification and the resolution have since then been accepted as bilaterally negotiated texts, binding upon both sides. Rather, the importance of these documents in international law is limited to their role as a shield: they estop the party on the other side from legally characterizing as incompatible with the treaties either the identity of the Federal Republic of Germany as described above or its constitutionally prescribed political goal, to reserve the question of the reunification of Germany legally and factually. Steinberger<sup>14</sup> considers the documents as qualifying the consent of the FRG, so that in concluding the treaties the Federal Republic does not assent to anything that contradicts the content of the documents.

This legal conception of the identity of the Federal Republic of Germany has some important consequences that ought to be understood on the international level. First, since the state organs that concluded the treaties on behalf of the Federal Republic represented only the three Western occupation zones organized as a state, they could legally bind only this portion of Germany and not the still-existing all-German nation. The latter, however, remains the object of the rights and responsibilities of the Allies. Furthermore, it follows from the relative (*i.e.*, especially temporally limited) sovereignty of the Federal Republic—in view of the continuing existence of the all-German nation—that the treaty obligations themselves must be temporary. Thus, the entire system of agreements produces not a final settlement for Central Europe but rather only a *modus vivendi*, which retains validity until a definitive settlement becomes effective. Until then, however, the signatories are fully bound under the principle of *pacta sunt servanda* to observe the terms of the treaties. The force of the bond derives solely from the relative sovereignty and existence as a state of the Federal Republic of Germany and must therefore share its destiny. The final resolution of the legal and territorial problems of Central Europe can be achieved in two ways: by a peace treaty or by some other means arranged with the freely expressed consent of all the peoples and states affected. If a peace treaty is concluded, until it becomes effective the three Western powers would retain their superior role because of

<sup>14</sup> *Völkerrechtliche Aspekte des deutsch-sowjetischen Vertragswerkes vom 12.8.1970*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 63, 113-14 (1971).

their responsibilities for all-Germany (Articles 2, 4, 5, and 7 of the Treaty of 1952/1954).

Also indicative that the treaties with the Soviet Union, Poland, and the GDR have the nature of a *modus vivendi* is a clause included in each of them stating that treaties earlier entered into by the individual partners and bilateral or multilateral treaties or agreements related to them are not hereby affected.<sup>15</sup> This clause not only exempts the Federal Republic's membership in NATO, the Western European Union, and the European Economic Community, and that of the GDR in the Warsaw Pact and the Council of Mutual Economic Assistance (COMECON), but above all the Allied regulatory competence for all-Germany and the divided city of Berlin, and corresponding agreements reached with the two parts of the German nation (*e.g.*, the Treaty of 1952/1954 relating to the Federal Republic of Germany):

It is clear that a definitive settlement (specifically by peace treaty) of the political and territorial consequences of World War II in Central Europe cannot be coerced. Such a settlement can and will eventuate only when and to the extent that all the powers in this region or vitally interested in it find a common denominator for agreement that takes account of the various interests involved. In this the law has only one function, to facilitate the accommodation of the respective interests at the appropriate point in the future by keeping all possible options open now.

The overriding object of all these treaties is to secure the peace in Central Europe. Therefore, the key clause always includes the legal renunciation of the threat and use of force. The renunciation indicates a willingness to resolve all still-existing conflicts of interest by peaceful means; it does not amount to a repudiation of political goals or legal positions, and therefore does not relate to the substance of policies but to how they are implemented. Because of its importance in this system of agreements, the Federal Government endeavored to insert the renunciation of force at the beginning of the treaties, and to articulate it in specific terms, together with an acknowledgment of the purposes and basic principles of the UN Charter (which includes the renunciation of force in Article 2, paragraphs 3 and 4). During the negotiations on the Warsaw Treaty, Poland regarded the question of its western boundary as the most important problem between the two countries and therefore insisted that it be dealt with in the first article. A compromise was worked out only after the Polish Government yielded to German entreaties to accept the renunciation of force as the paramount commitment by placing it in the preamble, even before Article I.

Although the Federal Republic considers the loss of the territory east of the Oder-Neisse line, which was part of Germany on December 31, 1937, primarily to be a consequence of its renunciation of force, it must be mentioned here that Article I of the Warsaw Treaty contains a broader commitment than the mere renunciation of a change in this border by

<sup>15</sup> Art. 4 of the Moscow Treaty, Art. IV of the Warsaw Treaty, and Art. 9 of the Fundamentals Treaty with the GDR.

force or threat of force. The Federal Republic committed itself not to raise the issue of this boundary for the duration of its existence, in keeping with its concept of its identity. In this way the Federal Republic indicated that it regards the territory as irretrievably lost and permanently separated from Germany, but that it is legally unable to articulate this position for the entire German nation because of its concept of its identity. In other words, the FRG has voluntarily done everything it could do, in compliance with its Constitution and its concept of its identity, to give Poland secure borders.

From a purely legal standpoint, Article I of the Warsaw Treaty merely states that from its effective date,<sup>16</sup> not retroactively, the territory east of the Oder and Neisse (Lausitz) Rivers will be regarded by the Federal Republic of Germany for the duration of its existence no longer as domestic but rather as foreign territory,<sup>17</sup> even though a peace treaty has not yet been made, and that consequently no decision has been reached as to whether the German nation as a whole must also legally regard this area as foreign.<sup>18</sup> Article I, paragraph 1 of the treaty is a statement, and its terms have been so chosen that the opposing viewpoints of the two countries could be reconciled with the legal meaning of the resolution of the Potsdam Conference, and that neither side could use the treaty to impose its legal viewpoints on the other. In this way, each of the partners preserves its legal position. The Federal Republic, of course, was not present at Potsdam; in its view the Potsdam Declaration, whose legal character is generally undisputed,<sup>19</sup> is *res inter alios acta* not binding on it and has

<sup>16</sup> June 3, 1972 (BGBl. II 651).

<sup>17</sup> Second item of the response of the Government of the Federal Republic of Germany of February 22, 1972 (Parl. Doc. VI/3172) to the *Kleine Anfrage* (minor request) from certain members of the opposition (Parl. Doc. VI/3112), as well as the first item in the Resolution of the Legal Committee of the Bundestag, Report of the Member of Parliament for Hamburg, Dr. Arndt (Parl. Doc. VI/3396).

<sup>18</sup> Therefore, the Polish authors who view the issue as legally resolved are in error and misconstrue exactly what the Federal Republic is legally capable of doing (e.g., Frelek, *Die Normalisierungsgrundlage*, in *VOLKSREPUBLIK POLEN—BUNDESREPUBLIK DEUTSCHLAND* 21 ff. (ed. Rachocki, Poznan 1972); Kokot, *Die Normalisierung der Beziehungen zwischen der VR Polen und der BRD*, id. at 78 ff.; Skubiszewski, *Die Westgrenze Polens aus der Sicht der Verträge vom Jahre 1970*, id. at 70 ff.; and Sułek, *Grundrichtungen der politischen und rechtlichen Interpretation des VRP-BRD-Vertrages vom 7.12.1970*, id. at 115 ff.). Compare also L. GELBERG, *NORMALIZACJA STASUNKOW PRL-RFN* 48, 67 (Warsaw 1978); Janicki, *Legal Problems Involved in the Realization by the Federal Republic of Germany of the Treaty with Poland dated 7th December 1970*, 18 *POLISH WESTERN AFF.* 76 (1977), and *Podstawowe Instytucje Prawa o Obywatelstwie w RFN*, *PRZEGLAD ZACHODNI* 2 ff. (1978); K. SKUBISZEWSKI, *DER DIPLOMATISCHE SCHUTZ DES STAATSBÜRGERS, STAATSANGEHÖRIGKEIT, SOZIALE GRUNDRECHTE, WIRTSCHAFTLICHE ZUSAMMENARBEIT* 112 (Opeln, Berlin, New York 1976) and *The Great Powers and the Settlement in Central Europe*, 18 *JAHRBUCH FÜR INTERNATIONALES RECHT* 92 (1976).

<sup>19</sup> Compare, e.g., D. P. O'CONNOR, *THE STATUS OF FORMOSA AND THE LAW* 50, 407 (1956) in which he refers to the declaration as "a policy statement"; on the other hand, A. VON DER HEYDTE & STRUPP-SCHLOCHAUER, 2 *WÖRTERBUCH DES VÖLKERRECHTS* (2d ed. Berlin 1961); J. HACKER, *SOWJETUNION UND DDR ZUM POTSDAMER ABKOM-*

no legal effect whatsoever on the Oder-Neisse boundary. Otherwise, the Potsdam Declaration would be, at least for the Federal Republic, an agreement burdening third parties without their consent, which is impermissible under international law (Articles 34 and 35 of the Vienna Convention on the Law of Treaties). Article I, paragraph 1 of the Warsaw Treaty leaves open the question whether the boundary line was determined at the Potsdam Conference or at some other time. The controversial issues, whether there is a legal basis for the Oder-Neisse line as a border at all, and if so what, are left unresolved, owing to the exclusive future orientation of the treaty.

In compliance with the definition of the term "renunciation of force" set forth in Resolution 2625 (XXV) of the General Assembly in October 1970,<sup>20</sup> the *Ostpolitik* of the Federal Republic of Germany is generally based on the assumption that renunciation of force is the guiding principle and that the following obligations, which are included in all the major treaties, are merely consequences of its application:

- (1) recognition of the territorial integrity of all European states within their current borders; and
- (2) recognition of the inviolability of these borders.<sup>21</sup>

These ideas add substance to the concept of the renunciation of force and reflect its meaning as set forth in Resolution 2625. In conformity with international law, paragraph 5 of the resolution expressly recognizes that this principle prohibiting the use of force applies to international demarcation lines such as armistice lines. It is stated that this principle shall not be construed to prejudice the positions of parties with respect to such lines. This "no prejudice" clause emphasizes the fact that a recognition of boundaries or territorial claims in Central Europe cannot be deduced as legal or legally created from the terminology of the treaties the Federal Republic of Germany has concluded with its neighbors in the East.

This conclusion is not weakened by the Final Act of the Helsinki Conference on Security and Cooperation in Europe. It is true that Principle III of the Declaration of Principles, entitled "Inviolability of Frontiers," declares that the participating states "regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers." In that same section they also agreed to refrain from any demand for any territory of a participating state. However, in Principle I on "Sovereign Equality" they declared that "their frontiers can be changed, in accordance with international law by peaceful means and by agreement." In order to give effect to this latter declaration, it is necessary to interpret Principle III as precluding only coercive, nonconsensual changes in frontiers. This inter-

MEN (2d ed. Cologne 1969); F. FAUß, *DAS POTSDAMER ABKOMMEN UND SEINE VÖLKERRECHTLICHE BEDEUTUNG* (Berlin 1964); and many more.

<sup>20</sup> UN Doc. A/RES/2625 (XXV) 1970.

<sup>21</sup> Art. 3 of the Moscow Treaty, Art. I, para. 2 of the Warsaw Treaty, Art. IV of the Prague Treaty, Art. 3, para. 2 of the Fundamentals Treaty.

pretation enables one to reconcile both declarations relating to frontier changes and thereby meets the requirement expressed in Principle X that "all of the principles will be equally and unreservedly applied, each of them being interpreted taking into account the others." Moreover, the Helsinki document does not create binding international law; it is a political declaration of principles, a model for mutual intercourse and peaceful coexistence that should aid states as different as the Communist-governed ones of Eastern Europe and the democratic ones of the West, and at such varying levels of power as the Soviet Union, Luxembourg, and the Vatican.

For the Federal Republic of Germany, the principle of the permissibility of peaceful and consensual border changes is important for two reasons:

- (1) to forestall erection of a legal barrier to reunification by means of the consensual abolition of the German-German border; and
- (2) to create conditions of legal preparedness for developments that may lead to at least a partial elimination of the national borders within the European community.

The point of departure for any such principle is the "real" situation, which in all contracts is in intended and expressed opposition to the legal situation. A renunciation of force is really credible only when it absolutely excludes force and threat of force as a political means, even as a means of imposing well-founded legal positions and claims. It loses its meaning as soon as it tolerates the most infinitesimal exception, however justified. In a region such as Central Europe, where few territories and borders are legally undisputed, it must necessarily proceed from the actual political realities. Hence, none of the treaties concluded by the Federal Republic with its Eastern neighbors can be interpreted as if one side had accepted either the status quo or the legal position of the other as legitimate. Since the Soviet Union and the other Eastern European states have endeavored from the beginning to achieve legal sanction for the currently existing realities in Central Europe, they have found it especially difficult to accept no more than a renunciation of violence which merely relates to the actual division of power in the region. Soviet Foreign Minister Andrei Gromyko expressly acknowledged as much in a declaration of July 29, 1970, which was published by the Federal Republic of Germany with his permission and officially inserted as an appendix to the treaty record during the ratification process in Bonn.<sup>22</sup> That the Federal Republic cannot accept the status quo as a legal status was made clear in the text of the treaties, not only in the wording of Article 1, paragraph 2 of the Moscow Treaty, but especially in the fifth paragraph of the preamble to the Fundamentals Treaty, which states that the treaty was concluded "based upon the historical facts and without prejudice to the differing standpoints of the Federal Republic of Germany and the German Democratic Republic on the basic issues, including the national question." The Soviet Union and

<sup>22</sup> Parl. Doc. VI/3397, at 14, Apps. 1 and 2.

the other treaty partners were forced in the course of the negotiations to recognize that the hoped-for goal of lessening the tensions in Central Europe could only be attained after they dropped their demands for something the Federal Republic was neither prepared, nor, under its Constitution, legally able to pronounce: a legal sanction of the status quo.

Along with the renunciation of force, a commitment was made in many of the agreements that transcends all of the above: the pledge not to assert any territorial claims now or in the future.<sup>23</sup> The Federal Republic regards this obligation as barring both the assertion of and the desire to assert such claims in its present legal and physical form; it has absolutely no desire for territorial alterations. However, this stance and obligation do not contradict the position—expressly agreed upon in Article 7 of the Treaty of 1952/1954—that the borders of the all-German nation will be finally determined only by a peace treaty or some other comprehensive final settlement for Central Europe. In other words, the Federal Republic of Germany, while aspiring to be a component of a reunited Germany, has for itself no territorial claims.

Naturally, the location and status of Berlin have been and still are an especially sore point in the relationship between the Federal Republic and the Soviet Union. In the Constitution of the Federal Republic,<sup>24</sup> as well as in that of the Federal State of Berlin,<sup>25</sup> Berlin (West) is a state within the Federal Republic of Germany. This German legal situation is presently superseded by reservations in favor of occupation law, *i.e.*, law of the occupying powers, within the meaning of the Hague Convention on the Law of War on Land.<sup>26</sup> These circumstances do not render the German law invalid, but merely suspend its current application, *i.e.*, for the duration of the validity of the occupation law. The Federal Government respects the occupation law, if for no other reason than that the freedom and security of the three Western sectors of Berlin can only be guaranteed by the presence there of the occupying powers. Because of this factual and legal situation, the problems of Berlin have not been dealt with in any treaty concluded between the Federal Republic and its Eastern neighbors under its own law. The agreements that have been reached, either by the Federal Republic or by the Senate of Berlin—especially those with the GDR—have been concluded in fulfillment of responsibilities based on occupation law and assigned by the Western occupying powers.<sup>27</sup> For

<sup>23</sup> Art. 3 of the Moscow Treaty, Art. I, para. 3 of the Warsaw Treaty, Art. IV, para. 2 of the Prague Treaty.

<sup>24</sup> Art. 23 of the Basic Law (Constitution).

<sup>25</sup> Art. 1, para. 2 of the Constitution of Berlin of September 1, 1950 (VOBl. I 443): "Berlin is a Federal State of the Federal Republic of Germany."

<sup>26</sup> Art. 2 of the Treaty of 1952/1954; item 4 of the Military Governors' Consent Declaration to the Basic Law of May 12, 1949 (VOBl. der Britischen Zone 216); Allied Kommandantura Ratification of the Berlin Constitution BK/O (50) 75, of August 29, 1950 (VOBl. for Berlin I 440); and pt. IIB of the Quadripartite Agreement of September 3, 1971, 127 BULLETIN DES PRESSE- UND INFORMATIONSAMTES DER BUNDESREGIERUNG 1360 (1971).

<sup>27</sup> *E.g.*, Transit Traffic Agreement of December 17, 1971, and Agreement on Travel and Visiting Regulations of December 20, 1971.



the same reasons, Berlin has not been included in the policies of relaxation and the renunciation of force by German organs but rather by the four powers acting as occupying powers under the four-power agreement of September 3, 1971 (the Quadripartite Agreement). Substantively, this treaty was based on the same principles that were applied to the treaties between the Federal Republic of Germany and its Eastern neighbors: it views the present situation in Berlin as a concomitant of the current division of powers; it was concluded "without prejudice to the different legal positions" of the participants;<sup>28</sup> it makes the renunciation of force the central point; and it settles practical problems in order to alleviate the burdens of the persons affected.

<sup>28</sup> Paras. 4 and 6 of the preamble to the Quadripartite Agreement.

## EDITORIAL COMMENTS

### INTERNATIONAL LAW AND THE INTERNATIONALIZED CONTRACT

The arbitral award in the *Texaco/Calasiatic* case,<sup>1</sup> rendered by Professor René-Jean Dupuy, acting as sole arbitrator, nearly 3 years ago, has received surprisingly little attention in American legal publications.<sup>2</sup> Whatever the exact reason for this neglect,<sup>3</sup> it seems undesirable to let such an important document pass unobserved. Of course, this comment can deal with only a few of the major issues involved and must leave to one side several important problems, in particular those of conflict of laws.

The arbitration concerned the nationalization by Libya of several petroleum concessions held by two American companies.<sup>4</sup> The award's line of reasoning may be sketchily summed up: It is held, at the very start, that international law governs the arbitration's procedure (paras. 11-16) and that the deeds of concession involved are contracts "within the domain of international law" (paras. 19-35). The entire contractual relationship is "internationalized" (paras. 36-52). Nationalization is held to be a breach of the contracts. This holding is supported by findings that (1) the contracts are not "administrative contracts" (paras. 54-57); (2) the nationalization measures, albeit sovereign acts, cannot "nullify" contracts that are internationalized (paras. 58-79); and (3) the UN General Assembly resolutions purporting to assert exclusive national competence in matters of nationalization are not positive international law (paras. 80-91). Accordingly, the Libyan Government is required "to perform and give full effect" to the concessions it has breached, *restitutio in integrum* (as contradistinguished from damages) being, both under Libyan law and under in-

<sup>1</sup> *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, award dated January 19, 1977, reprinted in 17 ILM 1 (1978) [Eng. trans.]. References hereinafter will be to the "Award," followed by paragraph numbers. For the authentic French text of part III of the award, see 104 J. DROIT INT'L (Clunet) 350 (1977).

<sup>2</sup> But see now the valuable discussion in broader context by K. Venkata Raman, *Transnational Corporations, International Law, and the New International Economic Order*, 6 SYRACUSE J. INT'L L. & COM. 17 (1978). The award was also cited and followed in the *Revere* arbitration, note 10 *infra*. For commentaries in French, see J. F. Lalive, *Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères*, 104 J. DROIT INT'L (Clunet) 319 (1977); Rigaux, *Des dieux et des héros*, 67 REV. CRITIQUE DROIT INT'L PRIVÉ 435 (1978); Cohen-Jonathan, *L'arbitrage Texaco-Calasiatic contre Gouvernement Libyen*, [1977] ANNUAIRE FRANÇAIS DE DROIT INT'L 452.

<sup>3</sup> Surfeit with the overabundant literature on state contracts with aliens may be one reason. References here are limited to those strictly necessary.

<sup>4</sup> The nationalization occurred in two phases in 1973 and 1974. Both Libyan decrees provided for eventual compensation of the companies; Award, paras. 6 and 7. Libya did not participate in the proceedings, except for a memorandum objecting to the arbitration.

ternational law, "the normal sanction for non-performance of contractual obligations" (paras. 92-109).

The principal thrust of the award should be apparent even from this bare-bones summary, which does less than justice to the skill and style of the master jurist who is its author. The essential points, debated at great length in the late 1950's and early 1960's,<sup>5</sup> concern first, the possibility of "elevating" contracts between a state and a foreign national to international status, and second, the legal effects of such internationalization. A third issue, rarely treated directly in international practice, is that of the place of *restitutio in integrum* (or specific performance) as a remedy in international law.

Once the possibility of some kind of internationalization of contracts between a state and a foreigner is admitted,<sup>6</sup> the question arises of the conditions under which it can be brought about. The instant award lists three possible manners, any one of which is said to suffice: The contract may refer to "general principles of law" as the applicable law, it may contain an arbitration clause, or it may be an "economic development agreement."<sup>7</sup> It is striking that the simplest and most obvious possibility, that of explicit reference to international law, is not on the list—perhaps because it is extremely rare, if not unheard of.<sup>8</sup> All three of the methods listed are founded on more or less distant inferences. Would it not be reasonable, however, to require that, for such a serious legal consequence to be brought about, an explicit statement of the intent of the parties should be needed? After all, the clauses and other indications listed are capable of being given effect in

<sup>5</sup> Among recent comprehensive studies, see the valuable survey and analysis in J. Kuusi, *State Contracts with Foreigners: Considerations on Law and Policy* (unpub. thesis, Oxford 1976), and the exhaustive comparative discussion of doctrine, legislation, and case law on the related issue of arbitration between states and private persons, in A. Vergopoulos-Michail, *Problèmes relatifs à l'arbitrage en matière d'investissements privés internationaux* (unpub. thesis, Paris-II 1978). An original theoretical approach is found in F. RIGAUX, *DROIT PUBLIC ET DROIT PRIVÉ DANS LES RELATIONS INTERNATIONALES* 366 ff. (1977). For an impressionistic review of eminent opinions on the subject, see the reports and discussions in *INSTITUT DE DROIT INTERNATIONAL*, 57 *ANNUAIRE* 192-265 (1977 I), *id.* at 318-25 (1977 II).

<sup>6</sup> The point is not conceded by several eminent jurists and by the great majority of Third World states. See, e.g., Wengler, *Les accords entre Etats et entreprises étrangères sont-ils des traités de droit international?*, 76 *REV. GÉN. DROIT INT'L PUB.* 313 (1972). There is a certain "bootstrapping" quality to the related argument in the award: Since, according to it, it is international law that authorizes the parties (particularly the state party to the contract, presumably) to choose freely the applicable law (para. 35), it must first be found that the contracts involved "are within the domain of international law" before proceeding to construe the relevant clause so as to declare international law the governing law. The assertion that the contracts are internationalized comes so early in the award (para. 22) that one is not certain how far each of the subsequent references to it justifies or merely qualifies (or describes) internationalization.

<sup>7</sup> Award, paras. 40-45. For critical analysis of this section of the award, see Cohen-Jonathan, *supra* note 2, at 459-66; Rigaux, *supra* note 2, at 443-44, 446-49; Vergopoulos-Michail, *supra* note 5, at 98-109.

<sup>8</sup> Compare J. Verhoeven, *Contrats entre Etats et ressortissants d'autres Etats*, in *LE CONTRAT ÉCONOMIQUE INTERNATIONAL: STABILITÉ ET ÉVOLUTION* 115, 141 (1975).

manners which would not trigger the contract's internationalization. As the award notes, the "general principles of law" are at best only one of the sources of international law; they are by no means coextensive with international law in its entirety.<sup>9</sup> The presence of an arbitration clause can hardly be construed as necessarily a sign of internationalization—are all charter parties entered into by states internationalized? In a way, it is the third, and vaguest, of the bases for a state contract's internationalization that gives away the game: For only where a developing country is the state party to the contract could this test ever come into effect.<sup>10</sup> Thus, existing presumptions against limiting the sovereign authority of states, a principle as fundamental in international law as it is widely accepted, are casually reversed; inferences (*i.e.*, presumptions) favoring such limitations to the benefit of private parties are now applied.

Internationalization of the contract, moreover, resolves nothing by itself. It provides no generally accepted answers to the quest for the legal rules applicable.<sup>11</sup> The only explicit rule the award appears to deduce is that the principle *pacta sunt servanda* is applicable, which does not help much. Any law of contracts, national or international, is bound to start with this principle. But it cannot just stop there. In reality, the most important consequence of internationalization is implicit. In simplest terms, once a contract has moved to the international level, it cannot lawfully be affected by unilateral, national legal action. Since states cannot invoke their

<sup>9</sup> Award, para. 41. In the case at hand, the contract referred to "the principles of the law of Libya common to the principles of international law and in the absence of such common principles . . . the general principles of law, including such of those principles as may have been applied by international tribunals." Award, para. 23. The award construed this clause as in essence a reference to international law. Libyan law was considered in 4 instances, at a high level of abstraction, and in no case was it found not to coincide with international law. Construing the same clause, Judge Lagergren, in the *BP* arbitration, emphatically rejected the general applicability of international law, insisting on the role of the general principles of law. See G. WETTER, 1 *THE INTERNATIONAL ARBITRAL PROCESS* 432, 437-39 (1979), and see *infra* notes 21, 26.

<sup>10</sup> The excessive looseness of the related argument, gently criticized in the otherwise favorable comment by Professor Cohen-Jonathan, *supra* note 2, at 466, and scathingly attacked by Rigaux, *supra* note 2, at 456-58, is confirmed by its use in the *Revere* arbitration, *Revere Copper, Inc. v. O.P.I.C.*, August 24, 1978, reprinted in 17 *ILM* 1321 (1978). The majority opinion in that award found it possible to hold that a state contract was internationalized, in the absence of either a reference to international law or to general principles of law or an arbitration clause, merely because it involved the exploitation of natural wealth and resources. This holding formed the basis for a finding that the alleged breach by the host Government of a tax stabilization clause (a clause held to be unconstitutional and therefore ineffective by the national Supreme Court concerned) constituted an "expropriation," under the terms of a guarantee contract between the company and the Overseas Private Investment Corporation. See, in this connection, the dissenting arbitrator's opinion, *id.* at 1372 ff.

<sup>11</sup> Compare Verhoeven, *supra* note 3, at 140-41. In fact, differing conceptions of the substantive rules to be applied underlie (and undermine) much of the apparent consensus among various writers on this topic. See Fatouros, *The Administrative Contract in Transnational Transactions: Reflections on the Uses of Comparison*, in *Jus PRIVATUM GENTIUM. Festschrift für Max Rheinstein* 259, 262 (1969).

sovereignty to abrogate an international treaty, it is argued, neither can they do so to alter an internationalized contract.

This last proposition is treated as self-evident in the award (paras. 66-68, 91), yet it involves an interesting transformation in the nature of the approach used. The possibility of internationalization is founded on affirmation of the diversity and multiplicity of the possible subjects and rules of international law. As the award points out, "treaties are not the only type of agreements governed by [international] law. . . . [C]ontracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: The international law of contracts" (para. 32). Once international law is thus opened up, however, its vaunted diversity somehow disappears. The rules actually applied are those of traditional international law, at its strictest; but if the "international law of contracts" is identical in content with the international law of treaties, why is it necessary to stress the distinction? If the multiplicity of subjects and kinds of international law is to have any meaning, there has to be at least a possibility of variation in legal outcomes. To fashion an appropriate body of law, based on "general principles of law" and on international practice, the relevant inquiry must be directed at the principles applicable in fact to state contracts in national law<sup>12</sup> and at the abundant recent experience with nationalizations and other types of interference with state contracts. The award at hand contents itself instead, in the first place, with a brief reference to the doctrinal notion of the *contrat administratif*, as elaborated in French law, concluding that such a precise notion is not found in other legal systems,<sup>13</sup> and, in the second place, with an offhand dismissal of recent practice as inconclusive, on the ground that it has "been inspired basically by considerations of expediency and not of legality."<sup>14</sup>

A disregard of state practice, in favor of doctrinal pronouncements and a small number of arbitral awards, marks much of the argumentation in the award<sup>15</sup> but is particularly noticeable in the paragraphs leading to

<sup>12</sup> This is not the place, of course, for an elaboration of other approaches to this by no means novel question. For earlier attempts, see Fatouros, *supra* note 11; A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 196-209, 261-301 (1962). And compare W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 200 ff. (1964); Weil, *Un nouveau champ d'influence pour le droit administratif français: le droit international des contrats*, [1970] ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 13.

<sup>13</sup> Award, para. 57. The sole arbitrator refers on this point to the discussion of "general principles of law" by the late Wolfgang Friedmann, citing page 196 of *The Changing Structure of International Law* (1964), while curiously failing to mention that a few pages later the same book strongly supports the application of the *contrat administratif* concept to concessions and similar state contracts (pp. 200 ff.). And see on the comparative law of public contracts, J. D. B. MITCHELL, THE CONTRACTS OF PUBLIC AUTHORITIES: A COMPARATIVE STUDY (1954); Langrod, *Administrative Contracts*, 4 AM. J. COMP. L. 325 (1955); Bolgar, *The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law*, 12 J. PUB. L. 13, 34-51 (1983).

<sup>14</sup> Award, para. 69. *Shades of Barcelona Traction!* Compare [1970] ICJ REP. 3, 40.

<sup>15</sup> See, e.g., Award, paras. 65-69, where citation of 2 earlier investment arbitrations,

its holding that *restitutio in integrum* is in international law the normal remedy for breach of contract (paras. 96-109). Earlier studies have pointed out that, while the common assertion in doctrinal writings has been that *restitutio* is the "normal" remedy and damages the "exceptional" one,<sup>16</sup> state practice, both diplomatic and judicial, "follows a pattern which is exactly the opposite of the one accepted in theory. In practice, compensation constitutes the principal remedy, *restitutio* being clearly an exceptional one."<sup>17</sup> In the relatively few contested cases where *restitutio* has been ordered or agreed, compensation generally would have been insufficient.<sup>18</sup>

While admitting that some of the better known judicial assertions of the principal character of *restitutio* are mere *obiter dicta*, the award invokes their manner of formulation and repeated citation to argue that they constitute "a principle of reasoning having the value of precedent" (para. 98). Major reliance is placed on a string of quotations from eminent authors, asserting in varying ways the primacy of *restitutio*, and on the findings of a single recent study favoring this position.<sup>19</sup> The award dismisses the cogent argumentation to the opposite effect of an earlier study<sup>20</sup> by labeling it "isolated" and by referring to the arguments in an unpublished legal opinion submitted by the plaintiffs (para. 102 *ad finem*). Surprisingly, there is no mention of a very recent award, in a case on all fours with the one here involved, where the sole arbitrator appears to have held that *restitutio in integrum* is not in international law the principal

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a quotation from the late Charles de Visscher, and certain inferences from a PCIJ judgment and a UN General Assembly resolution are capped by the bald assertion: "Such is the present state of international positive law."

<sup>16</sup> One should note that, in many instances, the relevant passages in doctrinal writings are subject to differing interpretations. References to the standards for the assessment of compensation (e.g., "monetary compensation must, as far as possible, resemble restitution," per Jiménez de Aréchaga, as quoted in the Award at para. 102) do not necessarily imply acceptance of the primacy of *restitutio* as a remedy.

<sup>17</sup> A. FATOUROS, GOVERNMENT GUARANTEES, *supra* note 12, at 311-12. There is, moreover, no cogent reason in theory or policy to accept the traditional position; *id.* at 312-13. The award honors my book with quotation of an earlier passage, which it construes as descriptive (*id.* at 310-11, quoted in Award, para. 103); it does not address itself to the conclusions reached a page or two later.

<sup>18</sup> See *infra* note 19.

<sup>19</sup> The study in question is, M. Bernad Alvarez de Eulate, *La "restitutio in integrum" en la práctica y en la jurisprudencia internacionales*, 11 TEMIS, REV. CIENCIA & TÉCNICA JURÍDICA 11-40 (Zaragoza, Nos. 29-32, 1971-72). The article is a summary of the author's doctoral thesis. In a prefatory footnote, Professor Dupuy, among others, is thanked for his help. Dr. Bernad goes over a long listing of cases, the overwhelming majority of which concern classical instances where compensation would have been manifestly insufficient: release of persons, delivery of ships, and restitution of works of art, documents (and sums of money (!)), and of territory. As to these, and as to some more problematic cases (involving, e.g., declarations of validity or invalidity of national measures), it is not clear from the necessarily brief summaries how far the outcome in each case was determined by the *compromis*, by the stipulations of the parties, etc. Apparently, none of the studies directly challenging the legal validity of the traditional formulation of the principle was available to Bernad.

<sup>20</sup> Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 AJIL 801 (1960).

remedy.<sup>21</sup> More important, there is no reference to the fact that what is involved here is what was called "the international law of contracts" rather than the law of treaties. Surely, if the imposition of the strict remedy of *restitutio* might possibly be justified in some cases, as between states, it is much harder to defend such a limitation on a state's freedom of action within its territory for the benefit of private persons. Better to understand this section of the award, one should keep in mind Professor Rigaux's astute observation that the holding as to *restitutio* was in fact what the entire arbitration was about, since Libya had already stated that it would compensate the companies concerned.<sup>22</sup>

The award's treatment of the UN General Assembly resolutions commonly associated with the proclamation of the "new international economic order"<sup>23</sup>—the award's second "unique" feature, according to counsel for the plaintiff<sup>24</sup>—faces a similar problem. We may leave to one side, for present purposes, the broader issue of the significance for international law of the Charter of Economic Rights and Duties of States and other related documents.<sup>25</sup> The issue here is more limited. It is settled legal learning that the impact of legal norms is relative: To reach a conclusion the comparative strength of the norms on each side of a given conflict must be assessed. Here, the legal effect of the NIEO instruments is to be considered, not as against the international law rules concerning the treatment of aliens, or those regarding the exercise of diplomatic protection, but as against the norms constituting the "international law of contracts." The latter is at best a fragile structure, based (according to its proponents) on the capacity of states to assume binding legal obligations toward private persons, as evidenced by some state practice, a handful of arbitral awards—in most of which only one party participated<sup>26</sup>—and,

<sup>21</sup> The award in question is *BP v. Libya*, G. Lagergren, sole arbitrator, award rendered October 10, 1973; supplementary award, August 1, 1974. The award has not yet been published in full; relevant information and excerpts are printed in G. WETTER, *supra* note 9, at 408–10, 432–40. See also *infra* note 26.

<sup>22</sup> Rigaux, *supra* note 2, at 439–40. It does not appear that the plaintiffs had claimed such compensation or had argued that whatever Libya offered or proposed to offer was unfair or inadequate. Several months after the award was rendered, a settlement for \$152 million in crude oil was agreed upon; see R. von Mehren, *Introductory Note*, 17 ILM 1, 2 (1978).

<sup>23</sup> UNGA Res. 3201 (S-VI), May 1, 1974, Declaration on the Establishment of a New International Economic Order, 13 ILM 715 (1974); UNGA Res. 3202 (S-VI), May 1, 1974, Program of Action on the Establishment of a New International Economic Order, *id.* 720; UNGA Res. 3281 (XXIX), Dec. 12, 1974, Charter of Economic Rights and Duties of States, 14 *id.* 251 (1975).

<sup>24</sup> R. von Mehren, *supra* note 22, at 1.

<sup>25</sup> On its "delegitimizing" impact, in the areas we are here concerned with, see Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 7–8 (1976); Castañeda, *La Charte des Droits et Devoirs économiques des Etats du point de vue du droit international*, in R. FLORES CABALLERO, J. CASTAÑEDA, ET AL., JUSTICE ÉCONOMIQUE INTERNATIONALE 75, 112–13 (1976); and more comprehensively, R. MEAGHER, AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER: A STUDY OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES (1979).

<sup>26</sup> Such one-sided proceedings are hardly likely to lead to full investigation of the

by no means least, a veritable mountain of legal writing, not all of it from impartial sources. Relevant authoritative instruments barely suggest the contents of its norms. Against this structure is arrayed another set of norms, consisting of formal and repeated assertions of exclusive and inalienable national jurisdiction over natural wealth and resources by a large majority of the world's states. The latter norms may not be (yet) positive international law, but is their total legal effect so minimal as not to counterbalance the gossamer rules of the "international law of contracts"?<sup>27</sup> One wonders.

Better to understand the *Texaco/Calasiatic* award, one must put it in historical perspective. It reflects a significant doctrinal (and to a far lesser extent practical) trend which started in the 1950's and peaked sometime in the mid-1960's. Based in major part, but by no means exclusively, on the concern of Western ("First World") lawyers for the protection of foreign investors in developing countries, and strengthened by the lack of legal sophistication in many of these countries at that time,<sup>28</sup> this trend soon also encompassed attempts at formulating moderate or compromise positions, international legal norms that would ensure the freedom of action of host countries as well as a minimum standard of protection for investors.<sup>29</sup> Such positions, however, were generally a minority. From the very start, the most forceful and vocal elements in support of the trend saw in it a means for removing state contracts from the domain of public law, which is generally sensitive to the heterogeneity of public and private interests, and applying to them instead principles appropriate for contracts between homogeneous parties. These principles were found, in the main, in the international law of treaties, a body of law intended to govern formal instruments concluded between public collective entities, deemed equal (and homogeneous) in the eyes of the law, and thus in fact stricter—in the sense of allowing fewer exceptions to general rules and imposing fewer "public order" requirements—than even the law of private contracts in developed national legal systems. In this manner, the qualitative differences between the public and private interests at stake on each side

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issues, however sensitive to the problem the arbitrator may be, as Professor Dupuy demonstrably was; see, e.g., Award, para. 74. The sole arbitrator's failure to mention the Lagergren award, *supra* note 21, which had reached differing conclusions on several of the issues raised in the *Texaco/Calasiatic* case, is best seen as an illustration of the inherent limitations of such proceedings. Indeed, if the arbitrator undertakes to consider too critically the plaintiff's submissions, by taking into account the possible legal arguments and approaches of the nonparticipating defendants, he runs the risk of being accused of overstepping the bounds of (nominally) adversary proceedings.

<sup>27</sup> A possible opening of an inquiry along such "relative" lines might be offered by the discussion of the right to nationalize in paras. 76-79 of the award.

<sup>28</sup> This element was stressed in a seminal article on the subject, McNair, *The General Principles of Law Recognized by Civilized Nations*, 23 BRIT. Y.B. INT'L L. 1 (1957).

<sup>29</sup> A standard, however, that would be genuinely minimal and not reflect the strictest property-protection norms of market economies, as the traditional "international minimum standard of treatment of aliens" tended to do, as far as the economic interests of aliens were concerned. The position here referred to is that associated with the late Wolfgang Friedmann and others.



were assumed away, and the "internationalization" of state contracts led, paradoxically, to their "privatization." In much of the doctrine and in the limited practice extant, the trend points to a pervasive limitation of the host state's sovereign authority within its own territory.

The predominance of such conceptions has combined with changing perceptions on the part of developing countries to limit acceptance of this approach. Conditions and attitudes have by now radically changed.<sup>30</sup> The willingness to reach substantive compromise on legal principles and norms has evaporated.<sup>31</sup> The contractual approach to development, which 15 years ago seemed to offer new possibilities for cooperative action, has been wrecked by the pace of economic and social change, which makes predictions (and promises) hazardous. Developed countries have frozen themselves in a maximalist position, symbolized by the "prompt, adequate and effective compensation" formula. Developing countries, through national and international action, have generally sought to ground their position on an unqualified assertion of national sovereignty and jurisdiction. Their effort to develop national legal and administrative structures and norms has led to a marked reversal of the earlier receptiveness to the "internationalized contract" approach.<sup>32</sup> In their actual practice on concrete issues both sets of countries are far more flexible than their formal postures suggest. Yet, efforts on the official level to give theoretical form to such practice have been few and far between.

These trends were clearer a few years ago. Since the mid-seventies, the impact of the world economic crisis and of long-range domestic problems has seriously undermined the will and vigor of both developing and developed countries in the pursuit of international development. The outcome is profoundly unclear. We may be moving toward another effort at compromise on principles and practices for development; witness the current negotiations for the international regulation of foreign investment (transnational corporations and technology transfers). Such a movement might even encompass a revival of the "internationalized contracts" approach, presumably in a form more responsive to developmental realities and needs. But there are few if any certainties left. By reviving an approach out of what now looks like a distant past, the *Texaco/Calasiatic* award has made evident the extent of the change that has taken place and has illuminated our present impasse.

A. A. FATOUROS

<sup>30</sup> For an excellent summary of the situation, see the conclusions in Kuusi, *supra* note 5, at 258-64.

<sup>31</sup> The UN General Assembly Resolution 1803 (XVII) of December 14, 1962, is the most durable remnant of these efforts at compromise, through linguistic ambiguity as much as through genuine concessions on all sides.

<sup>32</sup> See Kuusi, *supra* note 5, at 239-51. It is characteristic in this respect that several of the Iranian and other petroleum arrangements, whose references to "general principles of law" are cited in the award (e.g., paras. 41-42), have been amended so as to exclude such language since the early 1970's. See Kuusi, at 239-51; Vergopoulos-Michail, *supra* note 5, at 100-03. And see now, the revised version of the thesis by J. Kuusi, *supra* note 5, *The Host State and the Transnational Corporation. An Analysis of Legal Relationships* (1979).

## GETTING THE SENATORS TO ACCEPT THE REFERENCE OF TREATIES TO BOTH HOUSES FOR APPROVAL BY SIMPLE MAJORITIES

### DOES THE SENATE'S SENSE RESOLUTION IN THE 1979 FOREIGN RELATIONS AUTHORIZATION ACT POINT A WAY?

The plight of the United States, unable in the modern world to bring certain very important international agreements into effect as every other democracy does—and as “directed” governments do not even have to try to do—by normal rather than “qualified” voting procedures in the legislature, is exceedingly serious.

The dicey mess of the Panama treaties and the “Perils of Pauline” frights as to the fate of the implementing legislation (without which the treaties, as approved in the Senate by one vote, would have had the grossly undesirable effect of making the United States either an *ab initio* treaty breaker or a pleader of some bizarre sort of *force majeure*) are still fresh in the minds of those concerned about America's capacity to commit itself by international agreement as other states do. This country is unique among states in this regard. Americans either do not know how strange the American Way with Treaties is, or they blandly assume that the rest of the world had jolly well shape up to our ways, slow and strange though they might be.

The unusual American Way with Treaties has moved on now, to the difficulties of getting two-thirds of the Senate to approve SALT II and how to prevent the four human rights multipartite conventions eventually submitted<sup>1</sup> by the President from joining the Genocide Convention either

<sup>1</sup> The International Covenant on Civil and Political Rights and the companion Covenant on Economic, Social and Cultural Rights were opened for signature on December 16, 1966. They were signed by the President on October 5, 1977, and referred to the Senate for its advice and consent on February 23, 1978. Senate hearings began in November, 1979.

The American Convention on Human Rights was opened for signature in 1969 but not signed by a President until June 1, 1977. It, too, was referred to the Senate on February 23, 1978.

There has been over the past 25 years increasing use by states, where multipartite treaties are involved, of a “three-step” procedure for validation: (1) signing the final act at the end of the negotiation, which is nothing more than an undertaking to consider going forward nationally; (2) signing by the executive *ad referendum* to legislative ratification; and (3) promulgation by the executive following appropriate legislative approval. Step (1) postpones commitment to refer to the legislature, and in the case of the United States the above examples show that the delays between steps (1) and (2) may exceed a decade. It is likely, moreover, that the use of step (1) tends to soften the rigor of the negotiation of the original “agreed” text, leaving issues not there resolved as hostages to later inaction, later “executive” reservations, and very slow movement toward national commitment. Note the executive's recommended reservations to the 4 human rights conventions recently submitted, S. EXEC. DOCS. C, D, E, and F, 95th Cong., 2d Sess. (1978).

in the Senate's graveyard of treaties—or in its Chamber of Moldering.<sup>2</sup>

Meanwhile, a few members of Congress have run to the courts with their claims that their individual rights as legislators have been violated, even when they have not been able to persuade majorities in the Congress to support their positions. And the courts have not yet made it clear<sup>3</sup> that the "Least Dangerous Branch" will exercise a strong sense of self-restraint as to the working out of legislative-executive relationships in modern times—times in which a congressional "Will to Participate [More]"<sup>4</sup> in United States foreign affairs decisionmaking and, let us face it, in foreign affairs operations is strongly manifest. Perhaps it would be improper for the other two branches to suggest limitations upon the extent to which the third branch's self-extrapolated power "to say what the law is" should be carried. But perhaps also the third branch should note that it has the capacity, if it intervenes too much, to make the United States Way with Treaties even more exotic and uncertain than it now is.<sup>5</sup>

These are the dimensions of an international agreements crisis that involves not only this country but the effectiveness of international order's major instrumentality, state commitment by *vertrag*.

From outside the administration it is difficult to determine why the executive has not more often relied upon—*nurtured*—the viable and generally effective alternative to an outmoded<sup>6</sup>—if ever really desirable—two-

<sup>2</sup> By analogy to the place at El Escorial where the bodies of Spain's royalty lie until suitably diminished in bulk for burial in the walls of the Hall of Kings. My translation softens the Spanish term, "*Sala de Pudredia*."

<sup>3</sup> Compare *Goldwater v. Carter* (D.D.C. June 6, 1979), reprinted in 125 CONG. REC. S7050 (daily ed. June 6, 1979), Amended, 48 U.S.L.W. 2278 (Oct. 17, 1979), rev'd, 48 U.S.L.W. 2388 (D.C. Cir. Nov. 30, 1979), vacated and remanded with directions to dismiss, 48 U.S.L.W. 3402 (Sup. Ct. Dec. 13, 1979).

<sup>4</sup> Oliver, issue paper for A Bicentennial Conference on the Constitution, American Academy of Political and Social Science, Topic IV: The Constitution and Foreign Affairs in America's Third Century, *The United States and the World*, 426 THE ANNALS OF THE AAPSS 166 (1976); Leech, *Report of Committee IV*, id. at 204.

<sup>5</sup> Specifically because of the uncertain contours of the court-discovered individual federal legislator's separation of powers-based (?) cause of action to appeal to the courts to redress an asserted executive deprivation of the legislator's "right to vote" on a measure. Compare *Kennedy v. Sampson* (511 F.2d 430 (D.C. Cir. 1974)) and its progeny and the district court decision in *Goldwater*, supra note 3. These are not cases in which prior resort has been made by the claimant to support, by enacted bill, joint resolution, or concurrent resolution of the two chambers of the Congress. In *Goldwater* the district court found a textual (not practice) gap in the (written) Constitution on the power to end a treaty in accordance with its own termination clause, and at the behest of plaintiff legislators proceeded to fill the gap on grounds that are not clearly developed and without taking into account governmental practice under the evolving Constitution.

<sup>6</sup> The Framers gave the Senate a power to deny treaties by one-third plus one vote as a part of a set of political compromises between the larger and the small 13 original states. The Senate was used because each state legislature had 2 votes there. A motion to reduce the Senate vote to a simple majority failed by 1 vote. With the addition of 37 more states—many out of the western lands claimed by even small original states—and the direct election of senators under the 17th Amendment, the inward-looking compromise in Article II has become nothing more than a traditional prerogative of the Senate which now interferes with effective foreign affairs operations and is essentially undemocratic.

thirds rule in the Senate, the "executive-legislative" (or congressional-presidential) agreement. But it is reasonably inferable that one major reason is that key senators might strongly object.

When for the fiscal year 1979 the foreign relations institutions of the United States were "reauthorized" (in a way that some other ministries are not), the Report of the Committee of Conference, in dealing with the tightening amendments to the Case-Zablocki Act, contained this:

The Senate amendment expressed the sense of the Senate that the President should have prior consultations with the Senate Foreign Relations Committee as to whether particular agreements between the United States and other countries *should be a treaty or an Executive agreement* [emphasis added].

The House bill did not contain a comparable provision.

The conference substitute contains no provision on this issue.<sup>7</sup>

The fact that the Senate made the effort may show that something more than reporting "all-presidential" executive agreements is in play. The executive could probably make some pretty good bargains with the committee as to which way to go in regard to particular types of international agreements.

At least the sense resolution gives the executive a basis for frank discussion of which way to go, which may defuse potentially heated objections in the Senate and, if well done, ensure a majority of the Senate will more often approve a legislative-executive agreement as an alternative to a Senate-consented (by two-thirds) "treaty." In time this new dimension for consultation might even be expanded to include the House Committee on International Relations.

An institutionalized structure of the sort envisaged also has the virtue of removing executive-legislative collaboration in this field from the rule—whatever it is—of *Buckley v. Valeo*,<sup>8</sup> about separation of powers.

A collaborative evolutionary growth to diminish the disadvantages of an archaic, perhaps even originally unfortunate, arrangement would avoid, also, the great problems inherent in changing the text of the Constitution by formal amendment, particularly in times when talk of an "open convention" to deal with proposed ceilings on the taxing power is having a chilling effect.

COVEY T. OLIVER

#### TERMINATION OF THE USSR'S TREATY RIGHT OF INTERVENTION IN IRAN

Political developments in Iran have renewed attention on a Soviet-Iranian treaty<sup>1</sup> purporting to grant the Soviet Union a discretionary right of military

<sup>7</sup> Joint Explanation of the Committee of Conference, H. CONF. REP. No. 95-1535, 95th Cong., 2d Sess. 64, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2480, 2505.

<sup>8</sup> "The Federal Elections Commission case," 424 U.S. 1 (1976), states that as Congress cannot "manage," it cannot be authorized by statute to appoint a congressional quota of managers to the commission.

<sup>1</sup> Treaty of Friendship between Persia and the Russian Socialist Federal Republic,

intervention in Iran, should Moscow conclude that certain interests are menaced.<sup>2</sup> Iran had long chafed under the treaty.

[I]n 1958 and 1959, the Shah had sought to secure Soviet agreement to the annulment of the same articles. . . . [T]he Soviet government offered to discuss the question with Iran but only in connection with Soviet demands at the time that Iran get out of the U.S.-sponsored Baghdad Pact, refrain from signing a military agreement with the United States, and conclude a new non-aggression treaty with the Soviet Union. None of these took place and the Soviets from time to time have pointedly emphasized the continued validity of the 1921 treaty.<sup>3</sup>

On November 5, 1979, authorities in Iran announced the abrogation of the two articles in the treaty providing for Soviet intervention. To date, the USSR has not indicated its response.<sup>4</sup>

It takes at least two to make valid treaties and two may terminate them lawfully; but a treaty may also be terminated unilaterally in the event of invalidity or breach, among other reasons. Comments in the United States and Western Europe have assumed the continuing validity of the treaty and hence the need to contemplate the possibility of a lawful Soviet intervention in Iran. Such an assumption can only stiffen Soviet resistance to the loss of a most attractive political option. The assumption of the treaty's validity and the prospective diplomatic acquiescence it has generated may be too hasty. The purport and validity of the treaty are open to a number of questions. Its original terms were restrictively amended in an exchange of notes before ratification; hence, if the treaty is properly interpreted, there may be no authorization of intervention in the current context. Moreover, some fundamental conditions that the treaty contemplated have changed. Most significant, subsequent changes in international law may have rendered parts of the treaty void, so that an intervention on its purported authority would be an act of aggression in violation of the United Nations Charter. All of these grounds may allow Iran to terminate key provisions of the treaty, despite Soviet objections.

## I.

The "Treaty of Friendship" was signed in Moscow on February 26, 1921. In broad language, it nullified "the whole body of treaties and conventions concluded with Iran by the Tsarist Government,"<sup>5</sup> as well as those con-

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signed at Moscow, February 26, 1921, 9 LNTS 384. LNTS published the treaty in Farsi and Russian; both original and equally authentic languages according to Article 25, and, in addition, published French and English translations. The treaty refers to Iran as Persia and to the USSR as the Russian Socialist Federal Republic and Russia. For purposes of consistency and clarity, this comment will use the name "Iran" for all references to Persia and "USSR" for all references to the Russian Socialist Federal Republic or Russia.

<sup>2</sup> Art. 6, *id.* at 403.

<sup>3</sup> SOVIET WORLD OUTLOOK, November 15, 1979, at 2 (published by Advanced International Studies Institute, University of Miami).

<sup>4</sup> *Ibid.*

<sup>5</sup> Art. 1, Treaty of Friendship, *supra* note 1, at 401.

cluded between the Tsarist Government and other states with respect to Iran. The treaty purported to repudiate the sphere of influence strategies that had been part of tsarist policy.<sup>6</sup> Tsarist economic imperialism was renounced,<sup>7</sup> and the USSR terminated its territorial concessions and consular capitulations in Iran,<sup>8</sup> while Iran promised not to cede them to a third power.<sup>9</sup> Russian religious missions were to be suspended and their property given to Iran.<sup>10</sup> But the treaty also reaffirmed some of the key aspects of the ancien régime. The boundaries that had been established by a treaty in 1881<sup>11</sup> were affirmed; certain sectors seized after that date were retroceded to Iran, while Iran renounced claim to other territories claimed by Russia.<sup>12</sup> Thus, Russian reduction of Iranian territory in the 19th century by almost a third was largely confirmed; in addition, a concession for Caspian Sea fishing in favor of the USSR was to be executed.<sup>13</sup>

Article 4 of the treaty expressed a mutual commitment "to abstain from any intervention in the internal affairs of the other." Article 5 provided:

The two High Contracting Parties undertake

(1) To prohibit the formation or presence within their respective territories, of any organisations or groups of persons, irrespective of the name by which they are known, whose object is to engage in acts of hostility against Persia or Russia, or against the Allies of Russia.

They will likewise prohibit the formation of troops or armies within their respective territories with the afore-mentioned object.

(2) Not to allow a third Party or any organisation, whatever it be called, which is hostile to the other Contracting Party, to import or to convey in transit across their countries material which can be used against the other Party.

(3) To prevent by all means in their power the presence within their territories or within the territories of their Allies of all armies or forces of a third Party in cases in which the presence of such forces would be regarded as a menace to the frontiers, interests or safety of the other Contracting Party.<sup>14</sup>

Article 6 of the Friendship Treaty provided:

If a third Party should attempt to carry out a policy of usurpation by means of armed intervention in Persia, or if such Power should desire to use Persian territory as a base of operations against Russia, or if a Foreign Power should threaten the frontiers of Federal Russia or those of its Allies, and if the Persian Government should not be able to put a stop to such menace after having been once called upon to do so by Russia, Russia shall have the right to advance her troops into the

<sup>6</sup> Art. 2, *id.* at 401.

<sup>7</sup> Arts. 8 and 9, *id.* at 405.

<sup>8</sup> Arts. 9, 10, 11, 12, and 16, *id.* at 406-08. <sup>9</sup> Art. 13, *id.* at 407.

<sup>10</sup> Art. 15, *ibid.*

<sup>11</sup> The treaty incorrectly referred to the treaty of 1881 as a Boundary Commission, and the Persian Government clarified this matter in the exchange of notes on December 12, 1921, which is discussed below. For the texts, see 9 LNTS 411-13.

<sup>12</sup> Art. 3, Treaty of Friendship, *supra* note 1, at 403.

<sup>13</sup> Art. 14, *id.* at 407.

<sup>14</sup> *Id.* at 403.

Persian interior for the purpose of carrying out the military operations necessary for its defence. Russia undertakes, however, to withdraw her troops from Persian territory as soon as the danger has been removed.<sup>15</sup>

Article 7 reaffirmed the principles of Article 6 and gave the USSR "the right to require the Persian Government to send away foreign subjects, in the event of their taking advantage of their engagement in the Persian navy to undertake hostile action against Russia."<sup>16</sup> But Article 7 did not augment the interventionary authority of Article 6.

Articles 5 and 6 were far-reaching, even in terms of the *realpolitik* of the day and, in the course of the internal ratification procedure, aroused some concern in the Persian Mejlis or Parliament. On December 12, 1921, the two Governments exchanged documents that constituted clarification and perhaps amendment of the draft treaty. The Persian Government wrote in relevant part:

The Persian Government and the Mejlis have observed that Articles 5 and 6 of the Treaty concluded between our two countries are worded vaguely; the Mejlis moreover, desires that the retrocession of Russian concessions to the Persian Government should be made without reserve or condition, and, that Article 20 should be so worded as to allow the Persian Government full powers for the transit of imports and exports. Conversations have taken place with you on these questions, and you have given explanations with regard to Articles 5 and 6 and promises concerning Articles 13 and 20, to the effect that if the Treaty were passed by the Mejlis you would give all the assistance in your power to ensure that the two Articles in question should be revised on the lines desired by the Mejlis and the Persian Government. The Persian Government and the Mejlis are most desirous that friendly relations should be re-established between our two Governments, and that the Treaty, which is based upon the most amicable sentiments, should be concluded as soon as possible.<sup>17</sup>

The Soviet response of the same date stated in relevant part:

In reply to your letter dated 20th day of Ghows, I have the honour to inform you that Articles 5 and 6 are intended to apply only to cases in which preparations have been made for a considerable armed attack upon Russia or the Soviet Republics allied to her, by the partisans of the regime which has been overthrown or by its supporters among those foreign powers which are in a position to assist the enemies of the Workers' and Peasants' Republics and at the same time to possess themselves, by force or by underhand methods, of part of the Persian territory, thereby establishing a base of operations for any attacks—made either directly or through the counter-revolutionary forces—which they might meditate against Russia or the Soviet Republics allied to her. The Articles referred to are therefore in no sense intended to apply to verbal or written attacks directed against the Soviet Government by the various Persian groups, or even by any Russian émigrés in Persia, in so far as such attacks are generally tolerated as between neighbouring Powers animated by sentiments of mutual friendship.<sup>18</sup>

<sup>15</sup> *Ibid.*

<sup>17</sup> *Id.* at 411.

<sup>16</sup> Art. 7, *id.* at 405.

<sup>18</sup> *Id.* at 413.

The precise objections of the Mejlis to the original text of Articles 5 and 6 are not expressed in the Persian statement of December 12, though the Soviet response suggests that a key issue was whether mere propaganda—"verbal or written attacks"—would warrant Soviet intervention. It is quite likely that the anxieties of some members of the Mejlis went to the real core of the issue, the unilateral right of characterization of menace and intervention; the interpretation of the Persian concern volunteered in the Soviet response of December 12 indicated Soviet unwillingness to yield on its insistence of a treaty right of intervention. Despite the usual fraternalistic language, the parties were hardly in a position of power parity and the nonreciprocal character of Article 6, the heart of the agreement, raises the suspicion that this was quite an unequal treaty.

The regime that emerges from the texts of Articles 5 and 6 in the light of the clarification of December 12, 1921, is complex in parts that are essentially superfluous but extraordinarily simple at its core. Article 5 establishes a pattern of reciprocal claims as between the parties: to prohibit the formation or presence of groups intending hostile acts against the other state, to prohibit transshipment by third parties with hostile intentions against the other state, and to prohibit the presence of "forces" of a third party that would be recognized "as a menace to the frontiers, interests or safety of the other Contracting Party."

Article 6, the key operative provision, is nonreciprocal. It permits only the Soviet Government to intervene and to carry out military operations in Iranian territory if, in the unilateral opinion of the Soviet Government, certain broadly defined activities occur and, in the Soviet view, the Iranian Government is unable to stop the activities after having been called upon to do so by the USSR. The characterization of the activities as a menace, the conclusion that the Iranian Government is unable to stop them, and the determination that the danger has been terminated and that the USSR may then withdraw are all matters of Soviet unilateral competence.

In sum, Article 6 accords the Soviet Government a unilateral right of intervention in Iran for reasons, purposes, and durations to be determined solely by it. The conditions include seizure of territory by a "third party," desire to use territory by such a party as a "base of operations against Russia," and menace by a foreign power of frontiers of Russia and its allies. Apparently only in the final contingency must the USSR first call upon Iran to put a stop to the offending activities. For the first two contingencies, the Soviets may act without prior attempt at exhausting "local remedies." The apparent limitation of the third contingency may be quite illusory, since only the Soviet Government determines the threat and the adequacy of the Iranian response. Since Article 6 refers to third parties as well as "Foreign Powers," we may assume that the intention was to include activities by nonstate groups, not excluding those of Iranian origin.



## II.

But the terms of the treaty were revised in the ratification process. In the letter of December 12, 1921, which appears as an annex to the treaty, the Soviet Government, in response to objections raised by the Mejlis, indicated that it understood Articles 5 and 6 as applying

only to cases in which preparations have been made for a considerable armed attack upon Russia or the Soviet Republics allied to her, by the partisans of the regime which has been overthrown or by its supporters among those foreign powers which are in a position to assist the enemies of the Workers' and Peasants' Republics and at the same time to possess themselves, by force or by underhand methods, of part of the Persian territory, thereby establishing a base of operations for any attacks—made either directly or through the counter-revolutionary forces—which they might meditate against Russia or the Soviet Republics allied to her.<sup>19</sup>

The annex, which may be considered an integral part of the treaty, seems to introduce substantial limitations on the regime in Article 6. The broad unilateral competence to characterize events as menacing, to assess, where pertinent, the adequacy of the Iranian response to a Soviet demand to terminate the offending activity and to decide when to withdraw, remains exclusively Russian. But the actual precipitating event is now stated with more precision than in Article 6: preparations for a "considerable armed attack" on socialist or allied territory by partisans or foreign power supporters of the defunct tsarist regime. As for the latter, the preparation must include acquisition of Iranian territory.

Hence, one line of interpretation suggests that the intervention contemplated by the treaty was limited to a most restricted set of circumstances. But, even as revised by the annex, Article 6 is a broad privilege; the vagueness of the conditions for intervention gives great discretion to the USSR, the only party authorized to implement it. Yet it is the beginning of a limitation and, given some of the changes in subsequent circumstances, the annex may now operate to defeat the treaty.

## III.

If the 1921 treaty is read with the annex, it is quite probable that changes in circumstances provide the Iranian Government with strong grounds for termination. Article 62(1) of the Vienna Convention on the Law of Treaties<sup>20</sup> provides:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

<sup>19</sup> *Id.* at 411.

<sup>20</sup> UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

The Soviet clarification of December 12, 1921, indicates that its major concern was the possibility of activities by antirevolutionary groups that might use Iranian territory to mount attacks on Russia itself. Such a concern was realistic in 1921, for the USSR had just survived a brutal civil war and its domestic and international position was still parlous. Implementation of this concern through Article 6 of the treaty would have appeared reasonable in the context and, perhaps most important, of limited concern to Iran if the privilege in Article 6 were exercised in good faith. The fundamental circumstances that animated the 1921 treaty were Soviet domestic and international politics in the earliest and most unstable years after the Bolshevik Revolution.

Diehard anti-Soviet groups flourish in some parts of the world, if not in Iran, but even the most paranoid of Soviet security specialists can appreciate that the period of peril in 1921 is past. The Soviet Union is one of the giants of contemporary international politics. Moreover, the nature of warfare has changed and the importance of territorial propinquity has diminished. Indeed, one superpower has learned to live with its adversary's agent close by. Given the fundamental changes of circumstance, continuation of Article 6 of the Treaty of Friendship would, in the language of Article 62(1) of the Vienna Convention, "radically . . . transform the extent of obligations still to be performed under the treaty." A privilege, in its original context related to the most urgent matters of governmental survival, would in the new context be available for interventions that can no longer be related in any plausible manner to national self-preservation. In this new political context, Iran would be entitled to invoke fundamental change of circumstances as a ground for the termination of Article 6 of the treaty.

#### IV.

If the annexes of the 1921 treaty are ignored and the treaty is read primarily with the text of Article 6 in mind, its continuing validity must be scrutinized in the light of intervening international norms from which derogation is not permitted. Two, of post-1945 vintage, are of special importance. The first is Article 103 of the UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Thus, a commitment, antedating or postdating the Charter, that is in conflict with a Charter obligation cannot be used to justify action in violation of the Charter.<sup>21</sup> An effort by a party to the older agreement to enforce

<sup>21</sup> Article 103 is much more than an application of the principle of *lex posterior derogat priori*. That principle is expressed in Article 59 of the Vienna Convention on the Law of Treaties; indeed it may, by its operation, effect termination of Article 6 of the 1921 treaty because of inconsistency with the UN Charter. Article 59 of the Vienna Con-

it would be delictual after 1945 and might even be deemed a breach of the peace or act of aggression within the meaning of Charter Article 39.

A second exception to the continuity of agreement is the emergence of a new peremptory norm or *jus cogens*. Article 53 of the Vienna Convention on the Law of Treaties provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 of the convention provides: "If a new peremptory norm of general law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Thus, a new peremptory norm may also defeat the intertemporal principle.

In 1921, at the time of its conclusion, the Soviet-Iranian Treaty of Friendship may well have been lawful. Though an incipient collective security system existed in the League of Nations, the Soviet Union was not party to it and, in the context, would have had scant reason to rely on it. Moreover, the League of Nations, as opposed to the United Nations, would not have prohibited per se the sort of interventionary rights envisaged in the 1921 treaty. Article 21 of the Covenant of the League provided that "[n]othing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace." Even in the absence of Article 21 or of questions about its applicability, it is probable that in the second decade of the century an otherwise lawful agreement would not have been invalidated because it granted discretionary rights of intervention to an outside state.

But in the period after 1945, there is substantial reason to doubt the continuing lawfulness of the regime contemplated in Article 6 of the Friendship Treaty. Article 2(4) of the UN Charter provides: "All Members shall refrain in their international relations from the threat or use

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vention provides:

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Charter Article 103, in contrast, does not superordinate Charter obligations because of a temporal factor (most recent in time prevailing) but because of the legal superiority of those obligations with regard to any others. Hence it can override agreements concluded after 1945.

of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." However a use of force under Article 6 might be rationalized, it necessarily infringes the territorial integrity of the target, and insofar as it is not invited by that state in that particular instance, it impairs its political independence.

There is wide recognition of the fundamental quality of the norm expressed in Article 2(4) of the Charter. The International Law Commission's commentary on *jus cogens* remarks that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."<sup>22</sup> The principle has been illuminated in a number of provisions by the Declaration of Friendly Relations.<sup>23</sup> Moreover, the collective security system established by the UN Charter and vesting primary competence in the Security Council<sup>24</sup> for response to threats or breaches of

<sup>22</sup> OFFICIAL RECORDS, UN CONFERENCE ON THE LAW OF TREATIES, DOCUMENTS OF THE CONFERENCE 67, UN Doc. A/CONF.39/11/Add.2 (1971).

<sup>23</sup> GA Res. 2625 (XXV), Oct. 24, 1970, 25 UN GAOR, Supp. (No. 28) 121 *et seq.* Pertinent provisions are:

*The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations*

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues. . . .

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. . . .

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

<sup>24</sup> Charter Art. 24. *But compare* "Uniting for Peace," Res. 377A (V), November 3, 1950; Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), [1962] ICJ REP. 151; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] ICJ REP. 4.

the peace or acts of aggression would appear both to preempt and to render caducous the regime of Article 6 of the Friendship Treaty. Any other interpretation would invite stronger states to intervene "by treaty" in the affairs of relatively weaker states, a practice which would be utterly incompatible with the principles of the Charter.

*Jus cogens* and the principles of the United Nations Charter do not render invalid all bilateral defense agreements. The decisive issue is the ongoing *participation* of a government in decisions about prospective interventions in its territory. Thus, one may contrast the 1959 U.S.-Iranian Agreement of Cooperation with the 1921 Soviet-Iranian treaty. Article I of the 1959 agreement provides:

The Imperial Government of Iran is determined to resist aggression. In case of aggression against Iran, the Government of the United States of America, in accordance with the Constitution of the United States of America, will take such appropriate action, including the use of armed forces, *as may be mutually agreed upon* and as is envisaged in the Joint Resolution to Promote Peace and Stability in the Middle East, in order to assist the Government of Iran at its request [emphasis added].<sup>25</sup>

The critical difference here is the condition of mutual agreement, which serves as a case-by-case protection against unauthorized intervention and renders each entry into Iran by the United States a response to an invitation by Iran. The Iranian termination of the 1959 treaty with the United States may provide a certain symmetry with termination of the Soviet treaty. But, in fact, the United States loses nothing, while Iran loses a potential deterrent factor.

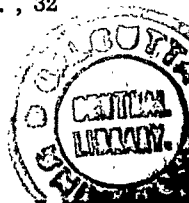
Nor does *jus cogens* deprive the USSR or any other state of rights of self-defense or, where appropriate, of humanitarian intervention under international law. But those rights are different from the regime of Article 6; the contingencies are more sharply defined, authorized procedures often incorporate international institutions, and the justification for unilateral coercive action in the territory of another state must meet considerably more stringent tests. The rights acquired under Article 6 of the 1921 treaty do not survive innovations in international law after 1945.

## VI.

Judge Hutcheson's "just opinion" of "lawminded nations and peoples"<sup>26</sup> may appear too diffuse a sanction, but no state yearns to be stigmatized as an international lawbreaker. General recognition that Articles 5 and 6 of the 1921 Soviet-Iranian Friendship Treaty are no longer valid and cannot be used to justify a unilateral Soviet intervention in Iran and that the Iranian termination is lawful can itself serve a deterrent function. The

<sup>25</sup> Agreement of Cooperation Between The Government of the United States of America and The Imperial Government of Iran, 1959, TIAS No. 4189, 10 UST 314, 327 UNTS 277.

<sup>26</sup> Report and Decision of the Arbitrator in the *Claim of Edward J. Ryan* . . . , 32 AJIL 593, 613 (1938).



effectiveness of the deterrence can be enhanced by authoritative clarification of the legal status of the controverted provision. Article 65 of the Vienna Convention on the Law of Treaties provides for a notification procedure by the party claiming a ground for termination, termination becoming effective, absent urgency, in no less than 3 months. If the other party should object, the Vienna Convention directs the parties to seek a solution through the means indicated in Article 33 of the UN Charter. Presumably, the policy expressed in Article 18 of the Vienna Convention—no more than an illumination of the general principle of bona fides—would preclude the Soviet Union from exercising the disputed right pending authoritative clarification. One hopes that Iranian authorities will act with dispatch and the Soviet Government with restraint and a spirit of cooperation to clarify a matter of international law on which regional and international peace may depend.

W. MICHAEL REISMAN \*

\* Myres S. McDougal, Leon S. Lipson, Eugene V. Rostow, Oscar Schachter, and Firuz Kazemzadeh contributed useful comments and criticisms which are gratefully acknowledged.

## CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters shall be published and to edit any letters printed.

### TO THE EDITORS-IN-CHIEF:

In his recent editorial comment on the UN Civil and Political Covenant,<sup>1</sup> Oscar Schachter takes a number of nations to task for making blanket assertions that they are in compliance with the Civil and Political Covenant when thoughtful observers might well conclude that they are not. Without benefit of transition, he then proceeds to criticize the United States for following the opposite policy. When the President sent the Covenant to the Senate in 1978, his message enclosed a systematic evaluation of where U.S. domestic law stood in comparison to the Covenant.<sup>2</sup> When one considers the broad range of subjects covered by the Covenant, it should not be surprising that a country with a complex legal system like the United States would choose to submit approximately six understandings and reservations. Compared to the scope of the Covenant they are relatively minor. The Covenant was, after all, based on documents like our own Bill of Rights. However, in terms of acceptance by the United States, the reservations touch on issues of importance domestically such as free speech, the death penalty, and allocation of responsibility between the federal and state governments.

In the comment, Schachter states that it is one thing to make reservations "on their own merits" and another thing to make them based on problems presented by domestic law, and that the latter approach violates international law. This suggests that if the President had been less candid in his presentation, the reservations would have presented no problem. As a practical matter, the individual parties to the Covenant will separately judge the reservations. It is the prerogative of each party to the Covenant to accept or reject the proposed reservations and understandings based on whether it believes that the reservations are compatible with the object and purpose of the Covenant.<sup>3</sup> Presumably, the parties would accomplish this by weighing the significance of the reservations in terms of the purpose of the Covenant as a whole and the importance of having the United States as a party to the Covenant rather than whether the reservations have domestic legal implications.

The closest precedent for the Covenant is the European Convention on Human Rights. Article 64 of the European Convention expressly permits states to make reservations "to the extent that any law then in force in its territory is not in conformity" with a treaty provision. The pattern of reservations submitted by European democracies, such as Austria, Finland,

<sup>1</sup> *The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights*, 73 AJIL 462 (1979).

<sup>2</sup> Message from the President of the United States, transmitting four treaties pertaining to human rights, S. EXEC. DOCS. C, D, E, and F, 95th Cong., 2d Sess. (1978).

<sup>3</sup> Vienna Convention on the Law of Treaties, Art. 19; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] ICJ REP. 15.

and Italy, to the UN Covenant show a comparable concern for domestic legal problems. One might expect that the difficulty in reconciling legal systems of the entire UN membership through the UN Covenants would produce a tolerance for reservation and compromise that might not, in fact, be necessary among the more homogeneous parliamentary democracies of Western Europe. It is thus difficult to assert, as the comment suggests, that reservations designed to accommodate domestic legal problems are per se incompatible with the Covenant or with international law. The proposed U.S. reservations show respect for the principle of international law that prevents states from citing domestic law as justification for failure to perform a treaty.<sup>4</sup> Without reservations, the United States would, upon ratification, be in violation of the Covenant's terms. By proposing appropriate reservations, the United States, like other democratic states, is demonstrating the importance of taking international obligations seriously.

JACK M. GOLDKLANG \*  
Office of Legal Counsel  
Department of Justice

*Oscar Schachter replies:*

Mr. Goldklang both misses the point of my comment and puts words in my mouth. I did not suggest that reservations "based on problems presented by domestic law" violate international law nor did I object to the number of proposed reservations. What I questioned was a policy on reservations expressly designed to avoid any change *whatsoever* in existing U.S. law. To call that "minor" is surely disingenuous. To say that this policy is merely intended to "*accommodate domestic legal problems*" is playing with words. Would we want other states to use their existing law as the standard of compliance with Article 2? That the U.S. administration has been frank about its intention only makes it easier for others to follow suit.

Article 64 of the European Convention is cited as a "precedent." But the Covenant does not have a similar provision; a proposal for such a provision was rejected in the preparatory stage. Moreover, Article 64 of the European Convention refers to reservations "in respect of any particular provision" and expressly excludes "reservations of a general character." It is precisely the general character of the proposed U.S. policy on reservations that is objectionable. No party to the European Convention has adopted a similar policy.

Mr. Goldklang fears that without reservations the United States, upon ratification, would be in violation of the Covenant's terms. Every treaty allows a party a reasonable time to implement it. Were that not so, the United States could never adhere to non-self-executing treaties that require legislation to implement them. In fact, the legislative history of the Covenant shows clearly that parties are not required to have their legislation in complete harmony with the Covenant at the time of ratification. It was recognized that states may need time to take the necessary legislative or other measures required by Article 2 (UN Doc. A/2929, at 17, para. 8).

<sup>4</sup> Art. 27, Vienna Convention on the Law of Treaties. Prof. Schachter cites Article 2 of the Covenant which requires parties to take necessary steps to implement its provisions. The Covenant nowhere suggests, however, that the rights specified cannot be modified by reservation.

\* The views expressed do not necessarily represent the views of the Department of Justice.



If, as is suggested, only a few relatively minor reservations are required, why propose an open-ended policy which proclaims to the world that, no matter what, the United States will accept no obligations to modify its existing law? Is that not a strange way for an administration that has rightly been proud of its leadership in promoting human rights to support the main treaty in the field?

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN L. NASH \*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

### ALIENS

(U.S. *Digest*, Ch. 3, §3)

#### *Employment—Treaty Provisions*

In further correspondence (see 73 AJIL 281 (1979)) from the Equal Employment Opportunity Commission, March 14 and June 21, 1979, about applicability of title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e *et seq.*) to American subsidiaries of foreign corporations in the light of FCN treaty provisions regarding employment of executive, professional, and other specialist personnel, Lutz A. Prager, Assistant General Counsel of the commission, asked the Department of State to comment upon recent court rulings that were at variance with part of its previously stated views. Deputy Legal Adviser James R. Atwood replied on September 11, 1979:

. . . [T]he Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in *Spiess v. C. Itch & Co.* (Civ. No. 75-H-267, S.D. Tex.) [469 F.Supp. 1 (1979), *infra* at 195] and two other cases more recently decided in the district court in New York (*Avigliano v. Sumitomo Shoji America, Inc.*,<sup>1</sup> 77 Civ. 5641 (S.D.N.Y.) [473 F.Supp. 506 (1979)] and *Linskey v. Heidelberg Eastern, Inc.*, 77 Civ. 833 (E.D. N.Y.)).

The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. On further reflection on the scope of application of the first sentence of paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII(1) and (4), which respectively provide for national and most-favored-

\* Office of the Legal Adviser, Department of State.

<sup>1</sup> For excerpts from the Department of State's previously stated views on *Avigliano*, submitted to the Equal Employment Opportunity Commission on October 17, 1978, see *infra* at p. 197. The views can be found in their entirety in 73 AJIL (1979) at pp. 282-84.

nation treatment of the activities of such subsidiaries. While we do not necessarily agree with all points expressed by the Court in deciding the *Itoh* case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1.<sup>2</sup>

<sup>2</sup> Dept. of State File No. P79 0150-2305 and 2306.

In its decision in *Itoh*, the court referred to the following provisions of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, signed Apr. 2, 1953 (TIAS No. 2863, 4 UST 2063, 206 UNTS 143):

#### ARTICLE VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

#### ARTICLE VIII

1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

2. Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.

3. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party.

#### ARTICLE XXII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability

## ASYLUM

(U.S. *Digest*, Ch. 3, §4)*Right of Privacy*

By its note No. 54, September 7, 1979, the Soviet Embassy complained to the Department of State about the meeting the Department had arranged, at the Embassy's request, in New York on September 5, between Embassy representatives and Aleksandr B. Godunov, who had defected from the Soviet Union on August 22. The Soviet note claimed that

for two weeks, the Embassy was essentially impeded in its attempts to clear up the circumstances of the disappearance of the above-mentioned Soviet citizen, which is a flagrant violation by the American side of generally recognized norms of international relations and of the relevant provisions of the Soviet-American Consular Convention.<sup>1</sup>

The note charged that the United States had violated "assurances given by it concerning the conditions which would preclude coercion and would permit clarification of whether or not A. B. Godunov acted on his own will." It also alleged that the American representative in charge had done "everything" to prevent Embassy representatives from conducting a discussion with Godunov "under normal conditions," had interrupted "absolutely legitimate questions" put to Godunov, and in the end, had broken off the discussion.

The Department of State "firmly" rejected all the Soviet assertions in a reply note, dated September 28, 1979, which set forth "the following facts to clarify this matter":

On August 22, 1979, Mr. Godunov—of his own free will—informed U.S. officials of his desire to remain in the United States.

The Department was not under any obligation according to the terms of the U.S./U.S.S.R. Consular Convention to arrange a meeting between the Embassy and Mr. Godunov because he was not at any time under arrest or otherwise in the custody of U.S. authorities. The Consular Convention thus does not apply.

The Department never sought to deny the Embassy an opportunity to interview Mr. Godunov. Indeed, though the Department was under no obligation to the Embassy to arrange the requested interview, it did so in deference to the Embassy's expressed wishes. From

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and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies of Japan shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.

<sup>1</sup> For the Consular Convention and the Protocol thereto between the United States and the Soviet Union, signed June 1, 1964 (entered into force July 13, 1968), see TIAS No. 6503, 19 UST 5018.

the very beginning of this case the Department repeatedly informed the Embassy that we would make every effort to persuade Mr. Godunov to agree to meet with Soviet consular representatives. It should be noted that the Department offered to arrange the requested meeting at John F. Kennedy airport following the completion of the interview with Mr. Godunov's wife on August 27. Mr. Makeyev, Deputy U.S.S.R. Representative to the United Nations, rejected this proposal, requesting instead that the meeting be postponed until a later time.

As to the conduct of the meeting, the Department understood that the interview would be held in accordance with customary procedures used in the past. The Department instructed its representative to conduct the meeting accordingly. He acted in accordance with his instructions in doing so. The Department never provided any assurances to the effect that the meeting with Mr. Godunov would be conducted under any special procedures. In this connection, the Department must draw the Embassy's attention to the uncooperative, abusive and intemperate conduct of its representative, who contested throughout the meeting the Department's right to conduct it, as well as the customary procedures employed to do so. The Department protests this behavior on the part of the Embassy representative.

The meeting with Mr. Godunov was terminated after it had lasted for more than one hour and only at the request of Mr. Godunov himself. Despite the crude conduct of the Embassy representative, discussion was permitted to continue so that the Embassy representative would have every opportunity to question Mr. Godunov. Mr. Godunov expressly and clearly requested the Department representative to terminate the meeting.

The Department finds the Embassy's demand for another meeting to be groundless and considers the matter closed.<sup>2</sup>

#### EXTRADITION

(U.S. Digest, Ch. 3, §5)

#### *United States-Italy*

On June 10, 1978, Jacques René Berenguer, a French citizen, was extradited from the United States to Italy to stand trial on charges of murder and aggravated robbery. Berenguer had been arrested for narcotics offenses in New York City on August 18, 1976. He had pleaded guilty to two felonious narcotics offenses under United States law, had been convicted on November 19, 1976 (*United States v. Berenguer et al.*, No. 76-2829 (S.D.N.Y.)), and had been sentenced to the federal penitentiary in Lewisburg, Pennsylvania.

In the meantime, the Embassy of Italy had submitted a request to the Department of State on August 20, 1976, for his provisional arrest, pursuant to Article 13 of the Treaty on Extradition with Italy, signed January 18, 1973 (TIAS No. 8042, 26 UST 493, entered into force March 11, 1975), predicated upon unexecuted warrants of arrest issued by various Italian courts or authorities in 1974, 1975, and 1976, for homicide, double

<sup>2</sup> Dept. of State File Nos. P79 0129-0787 and P79 0140-0037.

aggravated homicide and robbery, complicity in kidnapping, and kidnapping for purposes of extortion.

On April 18, 1977, the Embassy had submitted a formal request for Berenguer's extradition, with supporting documentation, and had asked for him to be kept in custody pending completion of extradition proceedings. On April 6, 1978, Chief Judge William J. Nealon of the U.S. District Court for the Middle District of Pennsylvania held an extradition hearing, and on April 13, 1978, issued a certificate of extraditability and order of commitment for murder and aggravated robbery (proceedings No. 78-32, Misc., U.S.D.C., M.D., Pa.), covered by sections 1 and 10, respectively, of Article II of the 1973 treaty. After reviewing the finding of the court, Deputy Secretary of State Warren Christopher issued a warrant for Berenguer's delivery and surrender to the Government of Italy on May 25, 1978, and on June 10 his extradition was effected.

On November 13, 1978, the Embassy of Italy requested the Department of State, pursuant to Article XV of the 1973 treaty (which provides in paragraph 3 for waiver of the rule of speciality by consent of the surrendering state), to consent to Berenguer's being tried also on offenses set out in a warrant issued by an investigating judge of the Tribunal of Rome on September 15, 1976.

Additional documentation and information communicated by Italian officials during ensuing discussions with the Departments of State and Justice were considered sufficient to establish probable cause to conclude that Berenguer had committed the offense of illegal possession of a military firearm (covered in section 29 of Article II of the 1973 treaty). The Embassy of Italy submitted its request on December 21 to cover that specific offense, and the Department of State conveyed U.S. consent in a note of the same date reading in part:

The Department of State and the Department of Justice have carefully reviewed the documents transmitted by the Embassy in connection with this request. On the basis of these documents, it has been determined that the offense of possession of a military firearm is punishable under the laws of both the United States and Italy and is an offense covered by the Extradition Treaty, that there is sufficient evidence to establish probable cause to believe that Jacques Rene Berenguer was involved in the commission of that offense, and that the individual sought to be tried is the person to whom the evidence relates.<sup>1</sup>

#### FUNCTIONS OF CONSULS

(U.S. *Digest*, Ch. 4, §2)

#### *Protection of Nationals*

On September 4, 1979, the Department of State released to all Foreign Service posts the first chapter, "Welfare and Whereabouts Services," of revised Volume 7, *Consular Affairs* (including overseas citizens services),

<sup>1</sup> Dept. of State File Nos. P76 C130-1551, P76 0135-0265, P79 0108-1329, P78 0100-2090, P79 0108-1331, P79 0108-1336, and P79 0096-0753.

of the *Foreign Affairs Manual*, the internal operating instructions of the Department of State and the Foreign Service of the United States. Chapter 100 supplements regulations set out in title 22, *Code of Federal Regulations*, principally in Part 71, Protection and Welfare of Citizens and their Property, Subpart A, General Activities. It covers, among other matters, resources that may be used, procedures in specified types of cases, Privacy Act requirements and restrictions, child custody and child abuse cases, incompetent persons, hospitalized Americans, and fugitives from justice. Excerpts from Transmittal Letter OCS-1, September 4, 1979, follow:

### 113 *Entitlement to Emergency and Protection Services*

Any person seeking emergency or protection services from the United States Government must first reasonably establish that he or she is in fact a United States citizen or national and is entitled to these services.

#### 113.1 *Establishing U.S. Citizenship or Nationality*

Evidence to establish U.S. citizenship or nationality may consist of: a U.S. passport; a card or certificate of identity; naturalization certificate; consular registration or the basic documentary evidence normally sufficient to obtain any of these proofs of citizenship. The Foreign Service officer must be reasonably satisfied that the individuals have not lost their claim to American citizenship or nationality prior to providing any services.

Should a person be unable to provide adequate evidence of citizenship, the officer must forward to the Department . . . for action a request for verification of citizenship. . . .

In cases where the person is unable to provide satisfactory evidence of U.S. citizenship and is in dire need of service, the consular officer must use discretion and judgment in deciding whether, and to what extent, to provide services pending reply from the Department. . . .

#### 113.2 *Dual Nationals*

Confusion arising out of the concept of dual nationality is the cause of occasional difficulty between the United States and another nation. A United States citizen who has dual nationality and who resides in the United States is considered to owe paramount allegiance to the United States as opposed to the country of the other nationality. It is the policy of the United States Government to provide all emergency and protection services to dual nationals when the facts clearly indicate that the habitual residence of the individual in question over a period of years has been the United States, and that the person is temporarily visiting in the country of the other nationality.

Conversely, an American citizen with dual nationality who resides in the country of the concurrent nationality, and who is traveling or residing abroad based upon identity documents issued by that other nation, is considered to owe paramount allegiance to the other state. Should such a person request emergency or protection services, and should the provision of such services involve the possibility of conflict with the host government, the post must request guidance from the Department . . . prior to providing the requested service.

### 113.3 *Permanent Resident Aliens*

Permanent resident aliens generally are not entitled to emergency and protection services provided by the United States Government. Such persons should normally be referred to the nearest diplomatic representative of the country of which they are a national or citizen. However, when the permanent resident alien has such close and strong ties to the United States that his or her primary allegiance could be said to lie with the United States, and when there are overriding humanitarian and compassionate grounds, the consular officer may request guidance from the Department . . . as to the propriety of providing the service.

### 113.4 *Persons Other than United States Citizens*

Persons with no ties or allegiance to the United States may not be provided emergency or protection services except under the most extraordinary circumstances and then only with the prior consent of the Department.

### 115 *Local Resources*

The tools of the consular function abroad are the contacts and lines of communication which the consular section nurtures and develops in the local society. Many of the various situations in which Americans traveling abroad entangle themselves can only be solved or mitigated through favorable action by a local official or influential community leader. . . .

Outside of governmental channels, the consular officer should make an effort to become acquainted with prominent local figures, as well as the leaders of the foreign community. Many situations arise in which action by a consular officer might be resented but an expression of interest or other similar action by someone not connected with the post might be more effective. Furthermore, in many parts of the world where travel is not easy or rapid, Americans or other nationals living in remote areas can prove to be invaluable in making preliminary inquiries or providing services until the consul is able to make more formal arrangements. The consul should not overlook any person or connection that might be able to assist in performing consular duties. . . .

## 120 *Americans Missing Abroad*

### 121 *Introduction*

The Department fully recognizes the increasing demand on Foreign Service posts to locate United States citizens believed to be missing abroad, many of whom have been out of contact with the inquirer for only a short period of time. . . .

. . . [T]here are numerous cases in which the person truly is missing or in trouble, and this fact demands that each request, regardless of its apparent merit, absolutely must be treated as a serious concern and given the complete attention of the officer assigned to such duties. The fact that most cases resolve themselves cannot be taken as justification for giving less than full attention to any missing person report. . . .



### 122 *Initial Request*

The consular section may receive the initial request concerning an American believed to be missing abroad directly from a concerned party in the United States, from a concerned party in a consular district, from another Foreign Service post, or from the Department. . . .

The Department honors only requests from family members, attorneys and close personal friends. Requests initiated by bill collectors, private investigative firms, and casual acquaintances are not accepted. . . .

### 125 *Privacy Act Requirement*

Under the provisions of the Privacy Act of 1974 (PL 93-579), no information may be released from United States Government files without the prior written consent of the individual in question. This places a tremendous burden on consular officers in welfare and whereabouts work because it often is not possible to obtain this prior written consent. Consular officers must be aware of this strict legal requirement and adhere exactly to it except in the most unusual circumstances.

In the unusual circumstances where it is impossible for a consular officer to obtain the prior written authorization, positive oral authorization may be considered to meet the requirements of the Privacy Act. Unusual circumstances which might be considered sufficient to warrant oral authorization include: those in which the host government restricts travel so that the consular officer and American citizen could not physically exchange the written consent and mail service is unreliable or non-existent; those in which travel facilities prevent easy access and where mail facilities are inadequate; and instances in which the time requirements of the particular emergency are such that written consent would delay the information to such an extent as to render it useless. . . .

## 130 *Emergency Messages*

### 131 *Introduction*

The expeditious handling of requests to pass along emergency messages is given the highest priority by the Department. Accordingly, the officer charged with the responsibility of seeing that such messages are passed must immediately attend to this task.

### 132 *Initial Request*

As with reports of U.S. citizens missing abroad, the initial request to pass on an emergency message may be received by the post directly from the party in the United States or abroad, from another Foreign Service post, or from the Department. . . .

### 133 *Post Action*

. . . If the post knows or can obtain the telephone number of the person sought, the officer should contact that number as soon as possible and convey the message. If a local address is available without a telephone, the officer should either send a domestic telegram or send someone with the message. . . .

### 134 *Reporting*

In most, if not all, emergency message cases received initially by the Department and referred to a post for action, the telegram containing the request will also instruct the post how to notify the inquirer of the results of the search. . . .

### 135 *Privacy Act Restriction*

Requests to pass emergency messages also have some Privacy Act implications. The Act has been interpreted to prohibit the passing of information concerning an individual's whereabouts without that individual's prior written consent. . . .

## 140 *Child Custody*

### 141 *Introduction*

Child custody cases are the most sensitive and frustrating of the welfare and whereabouts cases. . . . The Department cannot accomplish what is really expected of it, that is, the return of the child. . . .

To be able effectively to assist any American citizen who calls upon the consul for assistance in a child custody dispute, the post should have available as much general information as possible concerning the custody laws and procedures in its district. The Department is aware of no instance where United States court custody orders are enforceable or valid outside the United States. Foreign courts may give the American custody order evidentiary weight, but the U.S. decision will by no means be binding on the foreign court.

In addition, the post should be able to describe the general nature of the legal process which the inquirer must pursue to recover the child. . . . The consul must be helpful but certain that the inquirer understands that: (a) the post cannot act as attorney; (b) local legal counsel must be retained to pursue the return of the child; and (c) that the consul, as the representative of the United States Government, cannot intervene in what is basically a civil dispute or attempt to influence any decision by the local courts.

### 142 *Initial Request*

The initial request for assistance in a child custody dispute will generally come from the Department . . . after it has been contacted by the American parent or a congressional office. Usually the parent has been trying to trace the child's movement, only to discover that the child has been taken from the United States. With no other place to try, the parent turns to the Department for help. The Department, in turn, notifies the appropriate Foreign Service post. . . .

### 143 *Post Action*

Upon receipt of a request for assistance in a child custody case, the post's responsibility is to attempt to locate the child and determine the child's state of health and circumstances. In locating the child, the post has the obligation to use any and all of the tools available . . . in any search for a missing American (see Section 120) unless directed otherwise.

In many instances the parent in the United States will ask that any investigation be low-key or as discreet as possible to avoid frightening or alerting the person with the child. When the child is located, the consul must make every effort either to interview the child personally or to have an appropriate local official residing near the child pay a personal call. In making such a request, the post should point out to the local authorities that the interest of the United States Government is not necessarily in the return of the child but in the health and welfare of a minor United States citizen, which is an internationally recognized function of a nation's diplomatic and consular service.

However accomplished, the post must satisfy itself as to the health and well-being of the child as part of its responsibility to the inquirer and the child. Should there be serious allegations of child abuse, the post must make strong representations to the local authorities for a thorough investigation and, if necessary, removal of the child into the protective custody of the local courts or child welfare service.

Besides searching for the child and determining its welfare, the post must be responsive to other legitimate requests from the American citizen parent or parents. . . . The consul can provide the attorney's list, generally outline custody procedures, meet with the parents and be as helpful as possible without acting as a legal adviser or intervening in the judicial process.

#### 144 *Reporting*

. . . The post must report in full detail the steps taken to locate the child, conditions in which they found the child, and any direct contacts with either party in the dispute. In addition, the post should monitor the court procedures and report fully on the process and results. . . .

#### 145 *Privacy Act Implications*

It has been determined that the Privacy Act of 1974 permits release of information regarding the welfare and whereabouts of children under the age of eighteen to either parent regardless of legal custody. Posts may therefore include in any direct relay telegram to either parent any information concerning the child which falls within the general welfare and whereabouts category. This includes the address where the child is residing. It does not include the name or relationship of the person with whom the child is residing if that person is an American citizen. . . .

#### 146 *Passport Policy*

The information provided below is the general passport policy regarding child custody cases. . . .

a. In the absence of a local court order granting sole custody of the minor child to one parent (or a court order restraining a parent from removing the child from the country, or a written request for denial from the parent having sole custody), both parents are considered to have legal control of the minor. A passport will be issued to the minor on the application of either or both parents. This means that if one parent has obtained a passport for the minor child, and refuses to permit the other parent to use the passport to travel with the child, the other parent may obtain another passport for the child. This exception to the general rule that a person may have only one

valid passport at a given time is necessary because of the exceptional circumstances of child custody cases.

b. A parent who wishes to obtain a passport for a minor child abroad must have physical custody of the child (the child must physically appear for the passport) and must have the proper documentation (such as, citizenship evidence for the child and identity evidence for the parent).

c. An authorized representative of a parent or legal guardian may execute an application on behalf of a minor child if proof of custody is presented. An authorized representative must have a notarized power of attorney.

d. Occasionally a post is given official notice that a court in the host country has awarded sole custody to one parent, or has issued a restraining order preventing removal of the child from the country. If the other parent (even though a United States citizen) then applies for a passport for the child, the application should be disapproved pursuant to 22 CFR 51.71(d). The Department honors custody orders in the country where issued.

If, however, the court order was issued in a country other than the host country, that court order may be disregarded. This includes American custody orders. A court order issued in the United States cannot serve as a basis for denial of passport by a Foreign Service post unless that American court order has been recognized by a court of competent jurisdiction in the host country and the post has official notice of that recognition.

e. Although a U.S. passport has been issued, the issuance does not guarantee that the child will exit the country, especially if the child is a dual national with concurrent citizenship in the host country. The objecting parent may contact the local officials and request the officials to bar the child from leaving the country. Should such a situation arise, the parent seeking to take the child out of the country should be provided an attorney's list and be advised to retain local counsel. The consul should not take sides in the matter or attempt to intercede with the local authorities (other than to find out the reason for the ban) without the express approval of the Department.<sup>1</sup>

#### 150 *Emergency and Disaster Situations*

##### 153 *Privacy Act Requirements*

During hijackings, kidnappings and other disasters involving American citizens the Department passes information which is not classified and which concerns an individual to the immediate family without Privacy Act consent. Section 3 of the Privacy Act of 1974 amends the United States Code, Section 552(b)(8), authorizing Federal

<sup>1</sup> The Department of State revised its regulation governing passport issuance in cases where custody of a minor is in controversy, by a final rule issued June 28, 1979, effective August 17, 1979. In such instances, the passport-issuing office may refuse to issue a passport to the minor if it receives a court order from a court within the country in which passport services are sought, either giving custody of the minor to the objecting parent, legal guardian, or person in loco parentis, or forbidding the child's departure from the country in which passport services are sought without the court's permission (44 Fed. Reg. 41,777 (1979), to be codified in 22 C.F.R. §51.27(d)).

agencies to divulge information about an individual without prior consent in instances of "compelling circumstances affecting the health and safety" of an individual. We cannot provide information concerning United States citizens involved to friends or the media. We can explain the Department's action in such cases and that we are monitoring the situation. . . .

#### 180 *Miscellaneous*

##### 181 *Child Abuse*

Traditionally the role of the consular officer in protection or welfare cases has been primarily to safeguard American citizens against violations of their . . . rights by officials of another government. United States Foreign Service posts have avoided becoming involved in the private domestic problems of American citizens. Nevertheless, a Chief of Mission, principal officer or a consular officer cannot and should not ignore substantiated inhumane acts perpetrated against American citizens by other American or foreign citizens, especially if the victim is a defenseless American child.

Only as a last resort and after the advice of the Department has been sought, should posts raise child abuse problems within the local American community, with local social agencies, or with the host government. . . .

If no suitable American community organization can be identified, an approach might be made to the American resident head of the firm employing the American citizen child abuser. If the company head shows no interest, the Embassy should so report to the Department for possible communication with the parent company in the United States.

As child abuse cases are of a highly sensitive nature, they must be handled with utmost discretion. Above all, before any of the above listed steps are taken, the fact of the abuse must be substantiated. The post cannot be placed in a position of making approaches on the basis of mere hearsay or rumor. If the abuse is substantiated and all local efforts to remedy the situation have failed, posts should seek the advice of the Department.

##### 182 *Minors and Incompetents*

In providing emergency and protection services to an unmarried person under the age of eighteen, or for an incompetent of any age, the right of the parent or legal guardian to be informed must be respected. Should the post be asked for assistance by a minor or by the local authorities or another interested party on behalf of a minor or incompetent, it must report fully the details of the request, and the Department will make whatever notification is necessary. The post must not be placed in the situation of shielding a minor or incompetent from the parent or legal guardian.

##### 184 *Armed Forces Personnel*

###### 184.1 *Assistance to Navy and Coast Guard Personnel*

For procedures applicable when Navy or Coast Guard personnel, other than deserters or stragglers, become stranded in a consular dis-

strict or are placed ashore in emergencies, see Shipping and Seamen, Chapter 700.

#### 184.2 *Deserters and Stragglers*

The return of a deserter or straggler to the jurisdiction of the appropriate branch of the Armed Forces can generally be accomplished through the nearest U.S. military facility in the consular district competent to accept custody of the individual. Where no such facility is available, the problem should be referred to the Military Attache of the U.S. Embassy. A case involving application of a treaty provision or special agreement, or involving another factor of international significance, should be reported to the Department with a request for special instructions.

#### 185 *Fugitive from Justice*

The post should report to the Department for the attention of the Office of Security . . . the presence in its consular district of a person known or believed to be a fugitive from U.S. justice. The Department will then inform the appropriate state or federal agency.<sup>2</sup>

#### 186 *Charitable Organizations*

Posts are encouraged to cooperate as fully as possible with representatives of the American Red Cross and other internationally recognized humanitarian organizations. Normally requests from foreign governments for the assistance of the American Red Cross or similar organizations should be forwarded through non-official channels. Should the local circumstances render the normal methods of communication impossible, the post may use official channels to request such assistance.

Consular officers should not advise private inquirers of the financial status or reputation of U.S. charitable or benevolent organizations. Likewise, official channels should not be used to transmit funds to charitable or benevolent organizations in the United States except where normal banking facilities are not available.

. . . .

#### 188 *Pitfalls to be Avoided by Consular Personnel*

188.1 Avoid being placed in the position of a fiduciary agent, attorney or legal representative.

188.2 Avoid cashing checks, loaning money unofficially or serving as an intermediary in the transfer of funds, except as provided for in Chapter 400, Financial and Medical Assistance. The post is not a bank.

<sup>2</sup> The rule referred to in note 1 *supra* revised the Department's regulation prohibiting issuance of passports, except for direct return to the United States, in cases where the applicant is subject to a court order, conditions of probation, or conditions of parole, any of which forbid departure from the United States, to apply to criminal cases also where the applicant's departure could subject the applicant to the Federal Fugitive Felon Act (18 U.S.C. §1073) (to be codified in 22 C.F.R. §51.70(a)(2)).

Title 22, C.F.R., part 71, subpart B sets out regulations covering emergency medical-dietary and other assistance for U.S. nationals incarcerated abroad who are otherwise unable to obtain such services. They were established pursuant to Pub. L. 95-45, §3, June 15, 1977, 91 Stat. 221, 22 U.S.C. §2670(j).

188.3 Avoid making personal loans on compassionate or other grounds. Such loans are not reimbursable by the U.S. Government.

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### *Death of American Citizens Abroad*

On September 28, 1979, the Department issued the second chapter in its revision of Volume 7, *Consular Affairs* (including overseas citizens services), of the *Foreign Affairs Manual*. Chapter 200, "Death of American Citizens Abroad," supplements regulations set out in title 22, *Code of Federal Regulations*, Part 72, Deaths and Estates, and covers responsibilities and services of consular officers connected with the confirmed, or presumed, death of an American citizen abroad (except military and civilian personnel of the Department of Defense and of the Coast Guard, unless no representatives of those services are present in the consular district or in the host country in which the death occurred). Chapter 200 contains information about action required in cases of death under unusual circumstances and of unverified citizenship of a deceased person. It also includes directions about disposition and shipment of remains and special handling requirements, costs involved, and disposition of nationality documents. Excerpts from Transmittal Letter OCS-2, September 28, 1979, follow:

#### 210 *Authority and Responsibility*

##### 211 *Statutory and Regulatory Authority*

211.1 The statutory authority for an American consular or diplomatic officer to act in the event of the death of an American citizen abroad is contained in 22 U.S.C. 1175. . . .

211.2 Based upon this statutory authority, Title 22 of the Code of Federal Regulations (22 CFR 72.1-72.55) expands upon the consular officer's duties and authority.

211.3 The extent to which a consular officer can exercise the authority granted by U.S. statute and carry out the responsibilities outlined in the regulations, or otherwise be of assistance, is in all cases subject to the consent of the local authorities of the foreign country in which the American died.

211.4 A consular agent has no authority by either statute or regulation to act independently in the event of the death of an American abroad. Any actions taken by a consular agent in this area must be under the close and direct supervision of a consular officer.

##### 212 *Responsibility*

212.1 A consular officer (or a diplomatic officer) is responsible for reporting to the Department, to the legal representative, and to the closest known relative the death of all American citizens occurring in that consular district (see Section 220).

212.2 A consular officer is responsible for the proper completion and distribution of Optional Form 180 (formerly FS-192). This form officially reports the death of an American abroad to the Secretary of State, the legal representative of the deceased and the closest known

relative of the deceased. Notification of death by telegram or other means does not eliminate the requirement for reporting the death, using Optional Form 180 (see Section 230).

212.3 When a legal representative or next of kin is not present at the place of death, the consular officer is to exert all reasonable efforts to carry out the express wishes of the deceased (if known) or the next of kin as to disposition of the remains (see Section 250).

## 220 *Notification of Death Abroad*

### 221 *Policy*

The Department has a statutory obligation to make notifications of death. Notification by friends, traveling companions, and others, does not relieve the Department of the responsibility of notifying the closest relative to ensure that all proper notification has been made and that all available information has been disseminated. The consular officer must be certain that the proper person is notified and that the wishes of the closest relative with regard to disposition of the remains are carried out.

#### 221.1 *Death under Suspicious Circumstances*

The death of an American under unusual circumstances, for example, when foul play is suspected, must be promptly reported to the Department by separate cable, giving as many of the pertinent details as possible. The post should immediately request host government law enforcement authorities to undertake a full investigation of the cause of death and, provided NOK [next-of-kin] grant permission, a post mortem if such action is not routine. It must be noted, however, that there are no United States Government funds to pay for such a post mortem examination. Posts facing this problem should not hesitate to seek the Department's advice and guidance.

### 236 *Deaths at Sea*

#### 236.1 *Vessels Proceeding to Foreign Ports*

a. *General.* Death on the high seas is regarded as having occurred on the territory of the nation of the ship's registry. American law (46 U.S.C. 201) requires masters of all vessels traveling to and from ports in the United States to make, or cause to be made, a log entry concerning every death which happens on board that vessel, including the cause of death. Other maritime nations have similar laws. At each port of call where there is an American consular office, the masters of American vessels customarily report all deaths of American citizens having occurred en route and not having been reported to a consul at an earlier port of call.

Evidence of the death is furnished by the master in the form of a certified copy of the log entry recording the death of the American. Masters of foreign vessels likewise usually furnish certified copies of log entries concerning the deaths of American citizens when the foreign master delivers to the consul the personal property of the deceased Americans or when the consul has been asked by the families of the deceased to arrange for disposition of the remains.

b. *Preparation of Optional Form 180.* In most cases, a consular



officer who has been officially notified of the death of an American citizen on the high seas or who verifies such death learned through unofficial sources must prepare a Report of Death. The Report must be prepared in accordance with Section 232. Information for the Optional Form 180 can be obtained from various sources, including:

(1) Master's Log Entry

The master's log entry concerning the death should contain sufficient information concerning the fact and cause of death and the identity of the deceased to permit completion of the Report. A copy of the log entry, bearing the certification of the master if possible, should be retained by the post with the post's copy of the Report.

(2) Records of Port Authorities

Local vital statistics registrars, or other competent shore authorities will have procedures for recording deaths which occur in the territorial waters of that country or which occur on the high seas on a vessel whose next port of call is that country. A consular officer can obtain from such officials evidence of the fact and cause of the death and of the identity of the deceased.

(3) Central Records of the Nation of the Ship's Registry

In the event neither the master's log nor the port records provide enough information to prepare Optional Form 180, a consular officer in the country of the ship's registry can obtain from central government records an extract of the voyage log as deposited in the official repository for ship's records or a copy of an entry made by a central registrar of vital statistics. In this case, Optional Form 180 is prepared by the consular post whose district includes the city where such central records are maintained instead of the post having jurisdiction over the seaport of call of the vessel on which death occurred.

236.2 *Vessels Proceeding to Ports in the United States*

Consular officers have no responsibility for preparing Reports of Deaths for American citizens when the vessel's next port of call is in the United States. Records of such deaths are maintained by the United States Coast Guard or by the State in which the port of call is located (in the latter case action depends on State law).

237 *When Citizenship is Unverified*

Since a completed Optional Form 180 is acceptable as proof of the citizenship of the deceased, as evidence of that person's citizenship at the time of death, the consular officer may accept as verification of that person's citizenship only those documents which are considered as acceptable for passport issuance or registration as an American citizen (see 8 FAM 243.2 and 243.3). Consular officers must exercise due care in confirming the citizenship of the deceased.

In unresolvable cases, the consular officer should prepare Optional Form 180 and transmit the Report to the Department under cover of a memorandum, with subject heading of "DEATHS," stating that the citizenship of the deceased has not been verified. The Department will then investigate the citizenship status of the deceased, make a determination and notify the consular officer of the action taken. Note that most Americans who die abroad will have applied at one time or another for a passport. Prior to sending to the Department Op-

tional Form 180 with citizenship unverified, the post should make all efforts to determine the citizenship of the deceased, including telegraphic checks with the Passport Office, with relatives, or acquaintances.

....

#### 240 *Disposition of Nationality Documents*

##### 241 *Passport*

Unless the passport is claimed by a person having a legitimate interest, the passport of a deceased American citizen must be cancelled by a consular officer as required by 8 FAM 455.4 and returned directly to CA/PPT [passport office]. If the cancelled passport is delivered to a person having a legitimate interest in that document, the date and place of death should be noted in the cancelled passport. . . .

##### 242 *Certificate of Naturalization*

Unless the certificate of naturalization of a deceased American citizen is claimed by any person having a legitimate interest in the document, the consular officer must take possession of the certificate of naturalization and forward it to the Immigration and Naturalization Service, Department of Justice, 425 Eye Street, N.W., Washington, D.C. 20536. When the certificate of naturalization is claimed by a person having a legitimate interest (such as a spouse or child), the certificate must be endorsed by the consular officer with the date and place of death of the person to whom it was originally issued. . . .

#### 250 *Disposition of Remains*

##### 251 *Consular Responsibility*

A consular officer has no independent responsibility or authority with regard to the disposition of the remains of an American who died abroad. Responsibility for the disposition of the remains, including all fiscal responsibility, rests with the next-of-kin (NOK) or legal representative. Only in the absence of the NOK or legal representative or other person authorized to dispose of the remains does a consular officer obtain any responsibility for the remains. This responsibility is to carry out as closely as possible the express wishes of the deceased, NOK, or legal representative, taking care that the legal requirements of the country in which death occurred are met.

Looking at this aspect of consular work from a slightly different perspective, the consular officer can only act as the agent of the deceased's NOK, or legal representative. When notification of the death was made to the legal representative and closest living relative, information concerning the costs and local legal requirements for the various methods of disposing of the remains was also provided. The persons notified were asked for instructions as to the disposition of the remains and told how much money was required and where to send the funds.

Until the money has been deposited and the consul has received instructions, the consular officer has no legal authority to make any arrangements for disposition. There are no official funds for this purpose and a consular officer who makes commitments to local mortuaries or funeral homes without authority and funds from the NOK can be held personally liable for those commitments. . . .

Once the post receives notice that sufficient funds have been deposited (either locally or with the Department) and instructions as to the disposition of the remains, the consular officer has the authority and responsibility to see that the desires of the NOK as expressed in the instructions are carried out as quickly as possible. In following these instructions, the consular officer must comply with all local requirements and any pertinent United States regulations. This service must be performed as expeditiously as possible to minimize the distress of the family and friends of the deceased.

## 252 *Local Burial*

### 252.1 *On Instructions from NOK*

The consular officer may be instructed to have the remains buried locally. In such a case the consular officer should follow as closely as possible the express instructions of the NOK, or legal representative. Whenever possible the funeral services should be conducted in accordance with the religious rites of the deceased, if known. Local friends or acquaintances of the deceased should be notified in advance of the services and, where practicable, the services should be attended by a member of the consular staff. A letter describing the services should be sent from the principal consular officer to the person who designated local burial.

If requested, the consular officer should arrange for a marker to be placed at the grave site, taking care to arrange for only such marker as is indicated by the NOK. Likewise, when specifically requested by the NOK, the consular officer may make arrangements for the upkeep of the grave. In this instance, the consular officer should assure that the NOK understands that the consular officer personally cannot be responsible either for the upkeep itself or for the quality of care provided by the cemetery or other agency. The consular officer's role is strictly facilitative.

### 252.2 *Without Instructions from NOK*

When the NOK or other authorized person cannot be reached or does not respond within the period of time provided by local law for the interment or preservation of dead bodies, the consular officer should attempt to find local American organizations or charities that would provide funds for burial. Appropriate sources for such funds might be the local American Society, American Chamber of Commerce, or American Legion. Another potential source of funds might be local charities or welfare agencies.

Note that the consular officer is authorized to use the cash resources of the personal estate of the deceased taken into possession by the consular officer (namely, money found among the personal effects, proceeds of the sale of the perishable property, funds received through the collection of debts owed the decedent), and to sell at auction such portion of the personal estate as may be necessary to pay the debts and expenses. When the decedent has a local bank account, the consular officer might also explore the possibility that local banking laws would permit local burial expenses to be paid directly by the bank to the funeral home.

Other sources of funds, although they cannot be authorized in advance of the burial, are:

a. *Social Security*. Upon the death of a person insured under the Social Security Act the widow or widower is entitled to a lump-sum payment equal to the sum of 3 monthly payments, not to exceed \$255, but only if living in the same household as the decedent at the time of death. If there is no widow or widower, or if such person is not living in the same household as the decedent, the person paying the funeral expenses may submit the receipted funeral bills to the Social Security Administration and receive reimbursement for the actual costs or the lump-sum, whichever is the lesser (7 FAM Chapter 500).

b. *Veterans Burial Expenses*. Reimbursement for expenses actually incurred in connection with the preparation for burial, transportation to the place of burial, and the actual burial or funeral of a deceased veteran will be allowed in an amount not to exceed \$250, provided claim for such expenses is filed within two years from the date of permanent burial or cremation of the veteran by the undertaker or the person who pays the expenses. The claim for reimbursement shall be made on Veterans Administration Form VB 21-530, Application for Burial Allowance (7 FAM Chapter 500).

If unsuccessful in obtaining private funds from any of these sources or from identifiable family or friends, there is no alternative but to accept disposal of the remains by local authorities in accordance with local law or regulations. In this instance, the consular officer should try to determine as exactly as possible the method of disposal and the eventual resting place, in case the NOK is located and inquires as to the actual disposition.

### 253 *Cremation*

In the case of cremation the consular officer must be certain that all local laws and regulations are followed. Once the cremation occurs, disposition of the ashes must also be in accordance with the instructions from the NOK. If shipment to the United States is requested, only the health regulations in the country of cremation must be met; there are no sanitary requirements for entry of ashes into the United States. The container with the ashes must be accompanied by the following documents:

- a. An official death certificate.
- b. Cremation certificate.
- c. Certificate from the crematorium stating that the container contains only the cremated remains of the deceased.
- d. A permit to export (if required locally). Note that United States postal regulations permit the shipment of ashes into the U.S. via parcel post if securely packaged and properly labeled. Shipment via parcel post requires no bill of lading. Posts having access to APO may find this method of returning the remains preferable to air or sea shipment.

### 254 *Shipment of Remains to the United States*

#### 254.1 *Arrangements*

Whenever the consular officer is instructed by the NOK or other authorized person to ship the remains back to the United States, it be-

comes the consular officer's responsibility to ensure that the remains are properly prepared and encased to meet local requirements, any requirements of the carrier, and any state or federal requirements in the United States. Such requirements might include the method of preservation of the remains, the type of container, whether the container must be sealed, and any documentary requirements. Since it cannot be assumed that the foreign funeral home or other establishment caring for the remains will be fully familiar with any state or federal requirements, it is the responsibility of the consular officer to ascertain those requirements from the funeral home in the United States receiving the remains and to pass them to the foreign funeral home, or to place the two funeral homes in direct contact, if it has not been established that the foreign funeral home is conversant with the U.S. requirements.

.....

#### 254.2 *Documents to Accompany the Remains*

The following documents should accompany the remains:

a. *Consular Mortuary Certificate.* A consular mortuary certificate should be prepared as shown in Exhibit 254.2.a. This certificate indicates how the shipment is marked, the means of transportation to the United States, the name of carrier, the date, place and scheduled time of arrival of the remains and the port of entry. The other documents should be ribboned to the consular mortuary certificate, which must be signed by the consular officer and sealed with the consular press seal.

b. *Certificate of Death.* A certificate of death should accompany the remains to the United States. This certificate should be issued by the local registrar of deaths or similar local authority. It should identify the remains by name and give the place, date and cause of death as certified by the attending physician. The cause of death should conform as nearly as possible with the terminology of the International List of Causes of Death (see 7 FAM 200 Appendix B) [not reproduced here].

c. *Affidavit by the Local Undertaker.* An affidavit or sworn declaration by the undertaker or person responsible for packing the body for shipment should be attached to the consular mortuary certificate. This affidavit must state that the casket contains only the body of the deceased and the necessary clothing and packing. When necessary to comply with any state regulations, the affidavit should also contain a statement that the body has been embalmed or otherwise prepared. If practicable, the affidavit should be executed before a consular officer; when not practicable, it must be executed before a qualified local official whose signature can then be authenticated by a consular officer. . . .

d. *Transit Permit.* In addition, a transit permit should accompany the remains. This permit should authorize export of the body and should be issued by the health authority at the port of embarkation. The permit should be dated and state the name, sex, race, and age of the deceased and the cause and date of death.

#### 254.3 *United States Entry Requirements for Remains*

a. *Quarantine Requirements.* The local certificate of death which is attached to the consular mortuary certificate accompanying the re-

mains will satisfy United States quarantine requirements. The United States quarantine regulations provide that the remains of a person dead from a quarantinable disease shall not be brought into a port under the control of the United States unless (1) the remains are properly embalmed and placed in a hermetically sealed casket, or (2) cremated. Quarantinable diseases include cholera, yellow fever, smallpox, plague, louse-borne typhus and louse-borne relapsing fever. . . . Should the cause of death as shown on the certificate of death be one of these quarantinable diseases, the remains would have to be placed in a hermetically sealed container for shipment.

b. *Customs Requirements.* Dead bodies transported to the United States are considered as part of the carrier cargo and record of the shipment should appear in the carrier's manifest. The affidavit of the undertaker which is attached to the consular mortuary certificate complies with the customs requirement that the casket and case contain only the corpse. If the remains are accompanied by a passenger, the casket may be entered on that passenger's baggage declaration, provided the requirements of the Quarantine Service have been met. If the remains are not accompanied by a passenger, a bill of lading must be issued by the carrier to cover the shipment. The custom house permit for entry into the United States is obtained by the carrier at the port of debarkation.

c. *Transit Label.* A transit label must be affixed to the outer container. On this label should be the date, the name of the deceased, the date of death, the name of the consignee or escort, any points of transshipment and a reference to the transit permit authorizing the export of the body from the country in which death occurred.

#### 255 *Remains Requiring Special Handling*

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##### 255.3 *Seamen*

Assistance in the disposition of the remains of an American seaman deceased abroad must be in accordance with 7 FAM Chapter 700.

##### 256 *Fees*

No fees are prescribed for services in connection with the disposition of remains (22 CFR 72.14).

#### FUNCTIONS OF CONSULS

(U.S. Digest, Ch. 4, §2)

#### *Performance of Consular Function as Requirement of Consular Status*

It came to the attention of the Department of State that some Israeli security guards for El Al Airlines at various airports in the United States had been notified to it as "consular clerks," presumably because the Department had agreed in 1975 to grant them nonimmigrant "A-2" visas (accredited foreign government officials and employees other than ambassadors, public ministers, or career diplomatic or consular officers). Based upon such notifications, the Department had accorded the individuals in question consular employee status. In a note to the Embassy of Israel on September 19, 1979, which referred to recent discussions of

the matter between Embassy and Department officers, the Department confirmed its view

that it is inappropriate to grant consular employee status to persons performing non-consular functions, such as providing security guard services at an airport. Consequently, the Department will no longer accept as consular employees persons who perform these services. Henceforth, airport security guards will be regarded as miscellaneous foreign government employees and will have no more immunity than an American guard or policeman carrying out comparable functions. Israeli security guards should be notified to the Department of State as such.<sup>1</sup>

TRANSNATIONAL CORPORATIONS  
(U.S. *Digest*, Ch. 10, §4)

*Antitrust Laws*

In a letter dated September 18, 1979, to Senator Edward M. Kennedy, Chairman of the Senate Committee on the Judiciary, Assistant Attorney General John H. Shenefield addressed concerns that had been expressed about international ramifications of S. 1246, the proposed Energy Antimonopoly Act of 1979, subsequent to the administration's submission to the committee of proposed amendments to the bill (by Mr. Shenefield's letter to Senator Kennedy of July 31, 1979). As amended by the administration's earlier proposals, the bill would have restricted large acquisitions of foreign, as well as domestic, companies by major American petroleum producers and their affiliates (then defined to include all companies "controlling, controlled by, or under common control with," major producers).

Mr. Shenefield's letter of September 18 discussed the two issues presented by the "foreign affiliate" question. In regard to coverage of acquisitions by foreign firms which themselves controlled major American producers and by the producers' sister subsidiaries, Mr. Shenefield proposed altering the definition of "affiliate" to include only firms "controlled by" major American producers. On the second issue, coverage of acquisitions by American-controlled foreign firms, while he considered wholesale exemption of such acquisitions inappropriate, he had no objection to the statute's providing on its face that applicability to foreign acquisitions was to be interpreted in accordance with the principles of international law and comity.<sup>1</sup>

The Department of State was asked to provide its views on the international application of S. 1246, in the light of the administration's proposals for amendments set forth in Assistant Attorney General Shenefield's letters to Senator Kennedy of July 31 and September 18, 1979, and in particular to expand on the discussion of principles of international law and comity contained in the latter. The Department's views were set out in a letter of September 27, 1979, from J. Brian Atwood, Assistant Secretary of State for Congressional Relations, to Senator Kennedy, which read

<sup>1</sup> Dept. of State File No. P79 0132-2117.

<sup>1</sup> Dept. of State File No. P79 0150-2330.

in part:<sup>2</sup>

The need for clarification is particularly compelling in view of the possibility that a broad prohibition on foreign conduct would in many instances come into conflict with the laws and public policies of the countries in which the conduct would occur or in which the acquiring or acquired firms are organized or do business. Sometimes these conflicts might well be inadvertent or unnecessary. There are categories of foreign transactions which, though within the literal scope of the bill as now drafted, would not necessarily impede any of the bill's purposes. An example given in Mr. Shenefield's September 18 letter is a merger of two foreign firms which does not entail any drain on the U.S. producer's revenues, is supported entirely by foreign-generated profits, and would result in important benefits under the policies of the foreign state. Other examples could include transactions approved, encouraged, or even compelled under foreign law.

We would not advocate a mechanical rule for carving out certain categories of transactions from the statute's scope. For example, as Mr. Shenefield's September 18 letter correctly notes, a blanket exemption for transactions through foreign subsidiaries would be both unwise and unnecessary. We believe his letter takes the correct approach by suggesting that the application of the statute should be viewed in the light of well-recognized principles of international law and comity.

What, then, are those principles? They are general, and their applicability to a given case is not always clear. International law establishes the circumstances under which one state has jurisdiction to prescribe or enforce a rule of conduct.<sup>a</sup> Clearly a state may exercise jurisdiction over conduct occurring within its borders. Where conduct occurs outside a state's territory but has effects within its territory, the exercise of jurisdiction is also proper, at least where the effects are

<sup>2</sup> Footnotes to Assistant Secretary Atwood's letter are as follows:

<sup>a</sup> The jurisdictional analysis generally follows the approach taken by the American Law Institute's Restatement (Second) of the Foreign Relations Law of the United States.

<sup>b</sup> Examples of the use of the nationality principle are provisions of U.S. statutory law relating to collection of internal revenue, treason, selective service, and the subpoena power, which are applicable and can be enforced against U.S. nationals wherever they are found.

<sup>c</sup> *United States v. Aluminum Company of America*, 148 F.2d 416, 443 (2d Cir. 1945).

<sup>d</sup> *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 609 (9th Cir. 1977).

<sup>e</sup> Restatement (Second), Foreign Relations Law of the United States, §40; see also *Timberlane Lumber Co. v. Bank of America*, *supra*.

<sup>f</sup> See discussion in K. Brewster, *Antitrust and American Business Abroad*, at pp. 339-349, 446-448 (1958).

<sup>g</sup> Preamble and Article 45 of the Agreement on an International Energy Program, signed November 18, 1974, 27 UST 1685, TIAS 8278.

<sup>h</sup> See, e.g., paragraphs I.2 and III.2 of the IEA's Long-Term Cooperation Program, adopted by the Governing Board on January 30, 1976, 27 UST 231, TIAS 8229.

<sup>i</sup> Declaration of OECD Member Governments on International Investment and Multinational Enterprises, June 21, 1976.

<sup>j</sup> Decision of the OECD Council on International Investment Incentives and Disincentives, June 21, 1976; Revised Decision of the OECD Council on Inter-Governmental Procedures for Multinational Enterprises, June 13, 1979.



direct and substantial. A state may also exercise jurisdiction over the conduct of its nationals wherever located, though in United States practice the use of this "nationality" principle is not frequent.<sup>b</sup>

Applying these international law concepts to S. 1246, we find that there could well be cases falling within the literal prohibition of the bill where under international law the exercise of U.S. jurisdiction would be questionable. A merger of two non-U.S. firms outside the United States might be barred by the bill's terms, even if it had no significant effect within the United States, simply because one firm of foreign nationality was affiliated with a U.S. major producer and the other had assets of over \$100 million. However, such an expansive reading would be unwise. As Judge Learned Hand stated in ruling on the jurisdictional reach of the Sherman Act, "we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers. . . . We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."<sup>c</sup> Similarly here, Congress should make clear that it intends the bill to apply in a manner consistent with the international law limitations on extraterritorial control of conduct by non-nationals without effects in the United States.

Even where there is a basis in international law for exercising jurisdiction, principles of comity often suggest that forbearance is appropriate. Under these principles, states are obliged to consider and weigh the legitimate interests of other states when taking action that could affect those interests, and should leave the regulation of conduct to the state with the primary interest. Thus, our foreign partners expect that in general they have the right to regulate the climate for investment within their territories and to establish energy and competition policies for their own economies and firms. They expect that the United States will not intrude upon these spheres more than is necessary. We can avoid many unnecessary foreign relations frictions by observing these sound principles, which our enforcement agencies and courts recognize and apply. As one federal court recently stated, "it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction."<sup>d</sup>

Sometimes, however, U.S. interests and foreign interests in the regulation of certain conduct are both significant. In these circumstances, international law establishes standards for reconciling conflicts of jurisdiction. These standards are not mechanistic or inflexible, but require a good deal of judgment in their application.

Where the rules prescribed by two states may require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderation in the exercise of its enforcement jurisdiction. In that regard, each state should take into account relevant factors such as the vital national interests of the states involved, the extent and nature of the hardship created by inconsistent enforcement actions, the extent to which the conduct takes place in another state's territory, the nationality of the persons involved, the relative significance of the effects in each territory, the extent to which adverse effects on the enforcing state are explicitly intended or reasonably foreseeable, and the extent to which enforcement action can reasonably be expected to achieve compliance.<sup>e</sup>

This "jurisdictional rule of reason,"<sup>f</sup> or "balancing test," is a common-sense rule, and of course states may differ in their judgments of how it should be applied in a given instance. The international legal obligation is not necessarily to give precedence or deference to another state's interests, but rather to consider these interests in good faith and, where appropriate in light of all circumstances, to temper the exercise of enforcement jurisdiction.

How might these principles be applied by prosecutors and courts in implementing S. 1246? First, they would come into play in many categories of transactions with a foreign impact. Perhaps the acquiring firm or the acquired firm is incorporated in a foreign country or has its principal place of business there; perhaps the merger or acquisition is to take place in full accordance with the laws of the state with primary interest in the transaction; perhaps the transaction, if consummated, would further some important public interest of one or more foreign states, in areas such as energy, investment, trade, or competition policy; perhaps the foreign state affirmatively encourages or even compels the transaction. The presence of these factors should trigger the jurisdictional analysis discussed above.

I would like to say a word about the particular problems of regulating the conduct of foreign subsidiaries of American corporations. Many foreign governments have vigorously objected to U.S. assertion of extraterritorial jurisdiction where a firm doing business abroad and organized under foreign law happens to be owned or controlled by U.S. nationals subject to U.S. law. Britain, Canada, France, and other valued allies and trading partners have taken exception to extraterritorial controls over foreign subsidiaries in areas such as exports to countries embargoed by the United States but not by the country of origin of the export. The United States has taken the position that foreign subsidiaries can be subjected to extraterritorial control in accordance with international law, and we have justified our actions in these instances as needed to prevent adverse effects on U.S. commerce or evasion of an important U.S. policy. To the extent that there is a global consensus in enforcing a particular embargo or other policy, these potential conflicts with other countries are reduced. The present bill, however, is an innovation in energy and competition policy and does not, to our knowledge, have any analogues abroad. Thus its application to U.S.-owned or controlled corporations incorporated and doing business abroad will be a matter of concern to other countries, particularly since such a vital product as energy is involved. There is no easy way to resolve the conflicts that are likely to arise. However, by judicious application of the principles discussed above, we can mitigate these conflicts and minimize the possible foreign relations frictions.

Finally, we should not ignore the commitments the United States has made in international agreements and other statements to take the interests of other states into account where matters of energy policy, competition policy, or investment policy are concerned. We and the other participants in the International Energy Agency are each committed to "give full consideration to the needs and interests of other oil consuming countries, particularly those of developing countries."<sup>g</sup> We are also committed within the framework of the IEA to create a favorable climate for energy investment and to avoid actions which impair or distort the efficient functioning of the world energy market.<sup>h</sup> In the area of international investment and multi-

national enterprise, we have recognized "the need to give due weight to the interests of Member countries [of the Organization for Economic Cooperation and Development] affected by specific laws, regulations, and administrative practices. . . ."<sup>1</sup> We have also agreed to consult with OECD Member countries which consider that their interests may be adversely affected by measures affecting the flow of investment, with the object of reducing adverse effects to a minimum.<sup>2</sup> The application of a measure which restricts investment opportunities in the interests of energy and competition policy must be weighed in light of these commitments.

In today's integrated global economy, measures taken to promote United States energy, competition, or investment policies will have effects throughout the world. The principles and rules I have discussed provide an appropriate framework for taking into account these effects on the interests of other countries. The amendments suggested by Mr. Shenefield's September 18 letter, coupled with a clarification of Congressional intent in the bill's legislative history, will help resolve concerns about the bill's international ramifications without prejudicing its effectiveness or enforceability.<sup>3</sup>

<sup>3</sup> Dept. of State File No. P79 0150-2322.

## JUDICIAL DECISIONS

ALONA E. EVANS

*Aliens—control over admission—consular nonreviewability—equalization of admission of aliens from Western and Eastern Hemispheres*

MARTINEZ v. BELL. 468 F.Supp. 719.  
U.S. District Court, S.D.N.Y., April 5, 1979.

Plaintiffs were minors born in the United States of alien parents who were nationals of Western Hemisphere states. Plaintiffs brought an action for a judgment declaring that section 212(a)(14) (8 U.S.C. §1182(a)(14)) of the Immigration and Nationality Act of 1952, as amended by Public Law No. 94-571 (90 Stat. 2705 (1976)), violated the Equal Protection Clause of the Fifth Amendment, for injunctive relief, and for a writ of mandamus ordering the grant of an exemption from the certification requirements of the statute. According to section 212(a)(14), an alien who received a certificate from the Secretary of Labor prior to entry would be permitted to enter the United States in order to work. Aliens from Western Hemisphere states who were the parents of American nationals were exempted from this certification requirement, and they also received priority status on consular visa waiting lists. Congress repealed this exemption in 1976 but with the proviso that persons previously entitled to it should establish their right to it before January 1, 1977, the effective date of the amendment. The parents of two of the plaintiffs maintained that they had filed the necessary forms before this date. The forms, however, had not been received at the appropriate American consulate until after this date. The parents of the other plaintiffs had not filed the forms.

Plaintiffs contended that they each had "an 'inborn' and 'inalienable' right"<sup>1</sup> to have their parents enter the United States pursuant to the exemption in section 212(a)(14). They argued that the possible deportation of their parents for unauthorized entry would violate plaintiffs' constitutional rights. They also contended that the amendment repealing the exemption should apply only to children born after the effective date. The district court denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss the complaint. The court granted a subsequent motion of defendants, ordering the remand of the case to the Department of State for a hearing on the question of whether certain exemption forms had been sent before the effective date of the amendment.

With regard to plaintiffs' request for a writ of mandamus, District Judge Goettel held that mandamus could only be granted for ministerial acts, not for discretionary acts such as the issuance of a visa or the grant of an immigration priority date.

Defendants had questioned the jurisdiction of the court to review the

<sup>1</sup> 468 F.Supp. 719, 724.

authority of the Secretary of State to issue regulations concerning consular visa lists and priority dates (section 104(a); 8 U.S.C. §1104(a)). The court found, however, that plaintiffs were not seeking review of the Secretary's regulations or the consul's action pursuant to them, but rather of the constitutionality of the statute authorizing the discretionary acts. The doctrine of consular nonreviewability was not at issue. Admittedly, Congress had broad authority over the admission of aliens.<sup>2</sup> An examination of the legislative history of the amendment at issue showed that Congress's purpose was to equalize admission requirements for immigrants from the Western and Eastern Hemispheres, which was an appropriate exercise of congressional authority. That such legislation might result in the deportation of a citizen child's parents and the de facto departure of the child has not been found to be a deprivation of the child's constitutional rights.<sup>3</sup> The court observed that "[w]hile the plaintiffs may at one time have had a statutory privilege whereby they could obtain priority status for their parents, the fact that such privilege once existed did not thereafter vest in them a constitutional right embodying the terms of that statutory grant."<sup>4</sup>

The court was not impressed by plaintiffs' assertion that the amendment created two classes of citizen children, those born before January 1, 1977, and those born afterward, and thereby violated the Equal Protection Clause. District Judge Goettel pointed out that the law before and after the amendment applied equally to all Western Hemisphere parents of children born in the United States. To plaintiffs' contention that their parents should not be penalized for not understanding the terms of the law as amended, the court observed that the legislative history of the amendment made no provision for an exception when an alien failed to understand its meaning.<sup>5</sup>

The court directed the Immigration and Naturalization Service to hear the complaint that some forms had been filed before the deadline.

*Aliens—permanent residents—exemption from military service as bar to naturalization—Treaty of Friendship and General Relations with Spain of 1902*

TORRES V. IMMIGRATION & NATURALIZATION SERVICE. 602 F.2d 190. U.S. Court of Appeals, 7th Cir., July 17, 1979.

Petitioner, a Spanish national, was admitted into the United States as a permanent resident alien in 1963. After registering with the local Selective Service Board and being classified I-A in 1965, petitioner requested exemption from military service pursuant to Article V of the Treaty of Friendship and General Relations with Spain of 1902 (33 Stat. 2105, TS

<sup>2</sup> See, e.g., *Galvan v. Press*, 347 U.S. 522 (1954).

<sup>3</sup> Citing *Gonzalez-Cuevas v. Immigration and Naturalization Service*, 515 F.2d 1222 (5th Cir. 1975), *inter alia*.

<sup>4</sup> 468 F.Supp. 728.

<sup>5</sup> Citing *Ramos-Hernandez v. Immigration and Naturalization Service*, 566 F.2d 638 (9th Cir. 1977), 72 AJIL 673 (1978).

No. 422, 11 Bevans 628), thereby waiving his right to become a naturalized citizen (8 U.S.C. §1426). The local board granted the exemption in 1966. The present action arose out of petitioner's desire to be naturalized and was based on the theory that in seeking exemption from military service, petitioner did not knowingly or intelligently waive his right to naturalization.<sup>1</sup> He argued that he had not understood the choice he had made and that he had been informed by the clerk of the local board that he would be eligible for naturalization if he married an American national or served in the armed forces. The district court denied petitioner's application for naturalization on the ground that he had knowingly and intelligently waived his right thereto and that there was no convincing evidence that the local board had given him erroneous information about the waiver. On appeal, the court of appeals affirmed this decision.

Senior District Judge Campbell, sitting by designation, observed that for section 1426 to govern, the alien must apply for exemption from military service, which petitioner had done, and that he must be "relieved or discharged from such . . . service." On appeal, petitioner argued that after 1956 there was no provision in the Selective Service Act or regulations relative to the status of a permanent resident alien exempt from military service pursuant to a treaty; consequently, he asserted that he had always been, in effect, in the I-A class, and had not been completely exempted from military service, so that section 1426 did not apply. In the opinion of the court, "the I-A classification was a consequence of petitioner's square-pegged status as a permanent resident alien with a right to exemption from military service under the terms of a treaty not fitting into any of the round-holed classifications of deferment and exemptions established by the Selective Service regulations."<sup>2</sup> The fact remained that despite this confusion over the classification of petitioner, he had applied for and had received exemption from military service. Pointing out that a treaty may not be considered to have been abrogated or modified by a statute unless Congress has so indicated, and that the treaty with Spain was not mentioned in the legislative history of the 1951 amendments to the Selective Service Act, the court said: "We conclude that the 1951 amendments to the Selective Service Act of 1948 are not inconsistent with and do not abrogate petitioner's right under Article V of the Treaty of Friendship and General Relations between the United States and Spain to be exempt from military service in this country."<sup>3</sup> As petitioner had been exempted from military service, he had also waived his right to naturalization.

*Citizenship—denaturalization—failure to disclose service as concentration camp guard during Second World War*

UNITED STATES V. FEDORENKO. 597 F.2d 946.

U.S. Court of Appeals, 5th Cir., June 28, 1979.

The Government brought an action to revoke the citizenship of de-

<sup>1</sup> Citing *Moser v. United States*, 341 U.S. 41, 47 (1951), 45 AJIL 592 (1951).

<sup>2</sup> 602 F.2d 190, 194.

<sup>3</sup> *Id.*, 195.

defendant on the grounds that he had concealed and misstated material facts in his applications for a visa and for citizenship (8 U.S.C. §1451(a)). Defendant, a Russian national, had entered the United States under the Displaced Persons Act of 1948 (62 Stat. 1009) and had been naturalized in 1970. The Government contended that in his applications defendant had concealed the fact that during the Second World War he had served as a guard at the notorious concentration camp in Treblinka, Poland. He had admitted that he had been captured by the Germans in 1941 while serving in the Russian army, but had stated that he had worked for the Germans as a laborer during the war years. The district court, finding for defendant, held that his failure to disclose the facts of his wartime activity did not constitute a violation of section 1451(a) and that equitable considerations warranted a judgment in his favor (455 F.Supp. 893 (S.D. Fla. 1978)). On appeal, the court of appeals reversed this decision and remanded the case with directions to enter judgment for the Government and to cancel defendant's certificate of naturalization.

The Government argued on appeal that defendant's concealment of his wartime activities was "material" within the terms of section 1451(a). Both parties agreed that the standard for materiality was to be found in *Chaunt v. United States* (364 U.S. 350 (1960)), in which the Supreme Court held:

[A] misrepresentation or concealment was material only if the government proved "either (1) the facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355, 81 S.Ct. at 151.<sup>1</sup>

Circuit Judge Wisdom pointed out that there was disagreement among courts of appeals as to the meaning of these tests. The Court of Appeals for the Ninth Circuit took the view that "a fact suppressed or misstated is not material unless the truth would have justified denial of citizenship."<sup>2</sup> On the other hand,

the Court of Appeals for the Second Circuit held that a fact suppressed or misstated that would not, in and of itself, have warranted denial of citizenship is material nonetheless if its disclosure would have led the government to conduct an inquiry that might have uncovered other facts justifying denial of citizenship.<sup>3</sup>

In the instant case, the district court had relied upon the first test, as interpreted by the Court of Appeals for the Ninth Circuit, and had taken the view that under the second test "the government must first prove the existence of ultimate facts warranting denial of citizenship and then prove that disclosure of the suppressed or misstated facts might have led to the discovery of the ultimate facts."<sup>4</sup> Circuit Judge Wisdom said:

We hold that the district court's interpretation of the second ma-

<sup>1</sup> 597 F.2d 946, 949-50.

<sup>2</sup> *Id.*, 950.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

teriality test of *Chaunt* was an error of law. That interpretation destroyed the utility of the second *Chaunt* test, since it would require, as does the first *Chaunt* test, that the government prove ultimate facts warranting denial of citizenship. We read the second test to require only that the government prove by clear and convincing evidence that disclosure of the true facts would have led the government to make an inquiry that might have uncovered other facts warranting denial of citizenship.

Our interpretation comports with the language of the *Chaunt* opinion. The phraseology of the two tests adopted in *Chaunt* does create some ambiguity about the meaning to be accorded the second test. In an earlier portion of the *Chaunt* opinion, however, the [Supreme] Court cited two unambiguous ways in which nondisclosure would be material: "Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship." 364 U.S. at 352-53, 81 S.Ct. at 149. This passage parallels the Court's later statement adopting the two materiality tests. The passage indicates that the key to the second test is whether disclosure would have led the government to make an inquiry that might have resulted in denial of citizenship. Indeed, the decision in *Chaunt* was grounded in this analysis. . . .<sup>5</sup>

In the opinion of the court,

[t]he approach adopted by the district court would allow an applicant for a visa or for citizenship to lie about his background and thereby prevent the government from investigating his fitness at a time when he has the burden of proving eligibility. If his deception is later discovered, the district court's approach would require the government to carry out three difficult tasks: to conduct an investigation into the past, discover ultimate facts warranting disqualification, and prove those facts in court by clear and convincing evidence. As the government properly contends, if that were the law, an applicant with something to hide would have everything to gain and nothing to lose by lying under oath to the INS.<sup>6</sup>

In the instant case, ample evidence had been brought out in the proceedings before the district court about defendant's wartime activities and his later failure to disclose same.

With regard to the district court's conclusion that a denaturalization proceeding was a suit in equity and that equity demanded the weighing of the rights of the parties in light of all the circumstances, Circuit Judge Wisdom held that the lower court was in error. The court of appeals said:

There is a crucial distinction between a district court's authority to grant citizenship and its authority to revoke citizenship. In the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets such requirements for naturalization as good moral character and an understanding of the English language, basic American history, and civics. See 8 U.S.C. §§1423, 1427. The district courts must be accorded some discretion to make these determinations. See, e.g., *Petition of R*, 1944, D.Mass., 56 F.Supp. 969. Once it has been determined that a

<sup>5</sup>*Id.*, 951.

<sup>6</sup>*Ibid.*



person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship. *United States v. Ginsburg*, 1917, 243 U.S. 472, 474, 37 S.Ct. 422, 61 L.Ed. 853. The denaturalization statute, 8 U.S.C. §1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship.<sup>7</sup>

*Consuls—issuance of visas—violation of fiduciary duty*

UNITED STATES v. KING. 469 F.Supp. 167.  
U.S. District Court, D.S.C., April 3, 1979.

The Government brought an action (28 U.S.C. §1345) to recover some \$72,000 which had been paid to defendant, a former U.S. vice consul, in a scheme to sell nonimmigrant visas to Haitian nationals who were not eligible to enter the United States. Defendant had used the proceeds to purchase property in the United States. The district court found for plaintiff.

District Judge Simons was of the opinion that the United States was entitled to recover funds received secretly by its agent through a breach of fiduciary duty, and that it could benefit by a constructive trust upon the property purchased by defendant with such funds.

*Extradition—double criminality—political offenses—role of court in extradition proceeding—Extradition Treaty with Switzerland of 1900*

In the Matter of the Extradition of LOCATELLI. 468 F.Supp. 568.  
U.S. District Court, S.D.N.Y., March 6, 1979.

The Government of Switzerland requested the extradition of the accused, a Swiss national, on various charges of fraud, forgery, default on loans, and nonpayment of credit card charges. Finding that probable cause for the charges against the accused had been established and that there was no merit in his argument that the charges were politically motivated, the district court granted the extradition request.

In the opinion of District Judge Duffy, the double criminality requirement of Article I of the Treaty of Extradition with Switzerland of 1900 (31 Stat. 1928, TS No. 345, 11 Bevans 904) was clearly met in this case, and there was ample evidence to sustain a finding of probable cause to believe that the accused had committed the offenses charged. As for the accused's allegation that his extradition was sought for political reasons, the court said:

It is true that under the treaty extradition is not permitted for offenses of a political character or where the request for extradition has been made with a view to trying or punishing the person for an offense of a political character. It is equally as clear, however, that whether particular charges fall within the political offense exception is a question to be determined by reference to the circumstances attending the alleged crime at the time of its commission and not by reference to the motives of those who subsequently handle the prosecution. *Sindona v. Grant*, 461 F.Supp. 199 at 207 (S.D.N.Y. 1978); *Garcia-Gillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971),

<sup>7</sup> *Id.*, 953-54.

*cert denied*, 405 U.S. 989, 52 S.Ct. 1251, 31 L.Ed.2d 455 (1972) [66 AJIL 629 (1972)].

It is apparent that quite apart from any political motives of the Swiss Government in vigorously seeking Locatelli's extradition, the crimes charged were not political in nature when allegedly committed. I am simply without jurisdiction to look behind the charges as propounded by the Swiss Government and must, in this respect, yield this inquiry to the Secretary of State. *Sindona, supra*, at 207; *Garcia, supra*, 450 F.2d at 1192.<sup>1</sup>

*Foreign judgments—enforcement—revenue rule—reciprocity*

HER MAJESTY *the* QUEEN IN RIGHT OF *the* PROVINCE OF BRITISH COLUMBIA  
v. GILBERTSON. 597 F.2d 1161.

U.S. Court of Appeals, 9th Cir., Mar. 23, 1979. Rehearing denied, June 21, 1979.

The Province of British Columbia, Canada, sought to enforce a judgment of \$195,929.50 against defendants, American nationals residing in Oregon, for taxes, penalties, and interest due on certain logging operations in British Columbia. Noting that this was a case of first impression, the district court dismissed the action on the ground that the courts of one country do not enforce the revenue laws of another country (revenue rule) except on the basis of reciprocity. On appeal, the court of appeals affirmed this decision.

Circuit Judge Anderson observed at the outset that the question of whether Oregon law or federal law should be followed here<sup>1</sup> was not significant, as both appeared to lead to the same conclusion. The court said:

Generally, judgments from a foreign country are recognized by the courts of this country when the general principles of comity are satisfied. Two often-stated exceptions to comity occur when the judgment is based on either the tax (the revenue rule) or penal laws of the foreign country. Before comity may be extended, generally there is a requirement of reciprocity, which is the principle that the courts of one jurisdiction will recognize a judgment from a second jurisdiction only if the courts of the second jurisdiction would recognize a judgment from the first jurisdiction's courts. An analysis of both the revenue rule and reciprocity requirement supports our ultimate conclusion that British Columbia failed to state a claim upon which relief could be granted.<sup>2</sup>

The court supported this conclusion by quoting from Judge Learned Hand's concurring opinion in *Moore v. Mitchell* (30 F.2d 600, 604 (2d Cir. 1929), *aff'd other grounds* 281 U.S. 18 (1930)):

"To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incom-

<sup>1</sup> 468 F.Supp. 568, 574-75.

<sup>2</sup> Citing *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), 58 AJIL 779 (1964).

<sup>3</sup> 597 F.2d 1161, 1163-64.

petent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."<sup>3</sup>

Although the United States and Canada were bound by two tax treaties,<sup>4</sup> neither provided for the enforcement of tax judgments. The court pointed out that both Oregon and Congress, acting for the District of Columbia, permitted the enforcement of tax laws of other states in their courts on a reciprocity basis and suggested that the same could be done as between two foreign countries. Here, however, the court was faced with the fact that the courts of British Columbia invoked the revenue rule (and Judge Hand's reasoning) when they were asked (and refused) to enforce the tax judgment of a United States court.

*Jurisdiction—protection of wildlife—interpretation of foreign law—the laws of Fiji and Papua New Guinea*

UNITED STATES V. MOLT. 599 F.2d 1217.

U.S. Court of Appeals, 3d Cir., May 29, 1979.

Defendants were indicted on six indictments for conspiracy to smuggle snakes and other reptiles into the United States from Fiji and Papua New Guinea in violation of the Lacey Act (18 U.S.C. §43), which forbids the importation of wildlife in violation of federal, state, or foreign laws designed for the conservation of wildlife. The district court dismissed the indictments, finding that the Fiji law at issue was a revenue statute rather than a conservation statute and that the Papua New Guinea law did not specifically pertain to conservation of wildlife (452 F.Supp. 1200 (E.D. Pa. 1978), 73 AJIL 145 (1979)). On appeal, the court of appeals affirmed the decision below with regard to the Fiji law but reversed on the nature of the Papua New Guinea law and remanded the case for trial.

District Judge Dumbauld, sitting by designation, took the view that the Papua New Guinea law, which prohibited the export of "[f]auna other than animal products of the pastoral or fishing industries,"<sup>1</sup> was clearly directed to the conservation of wildlife, a point attested to by plaintiff's expert witness. The district court had been concerned with the scope of the regulatory power of the local government outlined in this law. District Judge Dumbauld said:

However, such broad language, akin to the generality of the Preamble to the United States Constitution, while obviously including

<sup>3</sup> *Id.*, 1164 (quoted by court).

<sup>4</sup> Convention and Protocol for the Avoidance of Double Taxation and Prevention of Fiscal Evasion in the Case of Income Taxes of 1942, 56 Stat. 1399, TS No. 983, 6 Bevans 244, 124 UNTS 271; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Estate Taxes and Succession Duties of 1944, 59 Stat. 915, TS No. 989, 6 Bevans 353, 124 UNTS 297. (There are other tax treaties and agreements between the United States and Canada.)

<sup>1</sup> 599 F.2d 1217, 1219 (quoted by court).

within its scope the particular area of wildlife protection, does not detract from the specific provisions of the applicable regulations relating to protection of fauna. Those regulations should therefore be deemed to be foreign law of the sort referred to in the Lacey Act.<sup>2</sup>

*Jurisdiction—sovereign immunity—Foreign Sovereign Immunities Act of 1976*

EAST EUROPE DOMESTIC INTERNATIONAL SALES CORP. v. TERRA. 467 F.Supp. 383.

U.S. District Court, S.D.N.Y., March 13, 1979.

Plaintiff, a New York corporation, brought an action to recover compensatory and punitive damages from defendant, a Romanian state-owned company, for interference with a contract between plaintiff and a third party and for wrongful interference with plaintiff's trade and business. Plaintiff asserted that the court's jurisdiction was established under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1601-1611) (Act). The district court dismissed the suit for want of personal jurisdiction.

District Judge Cooper pointed out that the Act was a long-arm statute which required that personal jurisdiction be based upon the systematic and continuous contact of the defendant with the forum (*see International Shoe Co. v. Washington*, 326 U.S. 310 (1943)). An examination of defendant's association with the United States in terms of the Act's requirements indicated that prior to this litigation defendant had dealt with American companies from abroad usually by telex, that it had not conducted any business within the United States, and that its business activities could not be described as having had a "direct effect in the United States" (28 U.S.C. §1605(a)(2)). The fact that plaintiff had dealt with defendant through the office of the Romanian Economic Counselor in New York did not create a basis for personal jurisdiction as the Counselor was not defendant's agent but served only to promote commercial relations with Romania.

In the opinion of the court, there was no merit in plaintiff's contention that defendant's alleged tortious interference with its trade and business provided a basis for personal jurisdiction. The alleged injury took place abroad and the only association with the United States alleged was that plaintiff was domiciled or did business in the United States, which did not suffice to establish the necessary contact for purposes of jurisdiction.

*Jurisdiction—tort action—choice of foreign or United States law—"most significant contacts" test*

MELTON v. BORG-WARNER CORP. 467 F.Supp. 983.

U.S. District Court, W.D. Tex., March 23, 1979.

Plaintiffs, American nationals, brought an action for damages on a theory of products liability for injuries sustained by one plaintiff in the crash in the Federal Republic of Germany of a helicopter of which he was the

<sup>2</sup> *Id.*, 1220.

copilot. Plaintiffs were domiciled in Texas. Defendants were Delaware corporations, having their principal places of business in Rhode Island and Illinois, respectively. Plaintiffs argued that Texas law was applicable in this suit. Defendants asserted that West German law, the *lex loci delictus*, should apply, and since that law was so unlike that of Texas (the law of the forum), the case should be dismissed. In a memorandum opinion, the district court denied defendants' motion.

At the outset, the court observed:

There are three conflicts of laws in this case. First, privity is a requirement for any recovery under any theory of breach of warranty under German law, whereas, it is not under Texas law. Second, there is no theory of strict products liability recovery under German law, whereas, there is under Texas law. Third, a defendant in a products liability action under a negligence theory may defend by proving that he was not at fault, or his employees were not at fault, and that negligent employees or agents, if they were negligent, had been selected and supervised with all due care under German law, whereas, it is not a defense under Texas law.<sup>1</sup>

In a diversity case, the court was governed by the rules of Texas as to choice of law, which traditionally in a tort action would be the *lex loci delictus*.

But as plaintiffs contended, a 1975 amendment to Texas law had replaced the *lex loci delictus* rule with the place of "most significant contacts" rule, and as the accident occurred in 1976, the latter rule should govern. Examining the relevant contacts, Chief Judge Spears found that the only connection with West Germany was the fact that the accident had occurred there. It was shown that both plaintiffs and defendants had substantial contacts with Texas, so that Texas law clearly applied in this case.

*Territories—status of Puerto Rico—extension of federal law to Puerto Rico—general federal maritime law*

GARCIA v. FRIESECKE. 597 F.2d 284.

U.S. Court of Appeals, 1st Cir., April 18, 1979.

Plaintiffs, four employees of independent stevedoring contractors and an employee of an independent trucking contractor, brought an action for damages for injuries they had sustained while doing longshoring on defendants' vessels in Puerto Rican territorial waters. They ascribed their injuries to defendants' negligence and to the unseaworthiness of their ships. Defendants said that plaintiffs could not sue under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§901-950) (Longshoremen's Act), which provided a remedy against shipowners for negligence but not for unseaworthiness, because the act did not apply to Puerto Rico. Nor could plaintiffs base their action upon general federal maritime law because it had been superseded by the Puerto Rico Workmen's Accident Compensation Act (11 L.P.R.A. §1 *et seq.*) (PRWACA).

<sup>1</sup> 467 F.Supp. 983, 985.

Defendants' motion for summary judgment was granted by the district court. The court of appeals affirmed the decision below with respect to the four employees of the stevedoring concerns and reversed and remanded with respect to the employee of the trucking concern for reconsideration of his special circumstances.

On appeal, plaintiffs asked the court to reconsider its earlier decision that the "Longshoremen's Act does not apply to Puerto Rico and that the Puerto Rican legislature may validly enact legislation inconsistent with the general maritime law."<sup>1</sup> In *Guerrido v. Alcoa Steamship Co.* (234 F.2d 349 (1st Cir. 1956)), the court had taken the view that

"the general rules of maritime law as understood in the United States [had] followed the flag to Puerto Rican waters," *id.* at 354, and were enforceable there with the following qualification: Congress, by the Organic Act of 1917, Pub. L. No. 368, c. 145, 39 Stat. 951, had conferred upon the Puerto Rican legislature "general legislative power concerning Puerto Rican waters" which included "full power to provide compensation for marine workers injured in Puerto Rican waters to the exclusion of the remedies against their employers provided by the American maritime law."<sup>2</sup>

The court found in *Guerrido* that Puerto Rico had adopted no legislation relative to actions against shipowners for negligence and unseaworthiness, so that plaintiffs could recover under section 31 of PRWACA and under general federal maritime law. A recent decision of the Puerto Rican Supreme Court, however, appeared to interpret the Puerto Rican Workmen's Accident Compensation Act as barring recovery for negligence and unseaworthiness under general federal maritime law, *i.e.*, allowing recovery only under workmen's compensation coverage by the independent subcontractors and not against the principal contractors.

Circuit Judge Campbell observed that although case law limited

Congress' power to delegate legislative power to the states in this maritime area [it did not] prevent Congress, acting under the broad power to legislate for national territories, U.S. Const. art. IV, §3, cl. 2, from conferring on the government of Puerto Rico power to make its workmen's compensation law applicable to injuries sustained by employees while at work on its territorial waters.<sup>3</sup>

The court pointed out that under the Organic Act Puerto Rico was authorized to legislate in regard to local matters, which would include legislation making workmen's compensation available to longshoremen injured in Puerto Rican territorial waters. The Longshoremen's Act, for its part, was designed to remedy certain problems within the United States that were not present in Puerto Rico; therefore, it did not apply to Puerto Rico. The court saw nothing in the legislative history or subsequent amendments to the Longshoremen's Act to indicate that Congress had intended it to apply to Puerto Rico.

Circuit Judge Campbell found no merit in plaintiffs' argument that not

<sup>1</sup> 597 F.2d 284, 286.

<sup>2</sup> *Id.*, 287.

<sup>3</sup> *Id.*, 290.

having access to the Longshoremen's Act violated their rights under the Fifth Amendment. The court noted that "Congress, however, need not extend every federal program to Puerto Rico. . . . A rational basis for the exclusion exists in the disruption the federal benefits could reasonably be thought to work on the Puerto Rican economy."<sup>4</sup>

*Treaties—commercial—interpretation—application of local laws to wholly owned American subsidiary of foreign corporation—Treaty of Friendship, Commerce and Navigation with Japan of 1953—Department of State position*

SPIESS v. C. ITOH & CO. (AMERICA), INC. 469 F.Supp. 1.

U.S. District Court, S.D. Tex., March 1, 1979. On motion to amend judgment and for certification for immediate appeal, April 10, 1979.

A suit alleging racially discriminatory employment practices was brought by the non-Japanese employees of defendant, a New York corporation that was a wholly owned subsidiary of a Japanese corporation. Plaintiffs invoked title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e and 42 U.S.C. §1981. Defendant asserted that according to the Treaty of Friendship, Commerce and Navigation of 1953 (4 UST 2063, TIAS No. 2863, 206 UNTS 143) (Arts. VII and VIII) (Treaty), a Japanese corporation could establish subsidiaries in the United States and could staff such subsidiaries with managerial and other specialized personnel on its own terms without regard to American legislation regarding employment. Plaintiffs took the position that any immunity from United States employment legislation that the Treaty might contain applied only to the parent corporation and not to its American subsidiaries; that the latter could not raise the parent corporation's rights; and that in any event it was the subsidiary's practices that were being challenged, not those of the parent company. Plaintiffs argued further that even if the American subsidiary could enjoy such immunity, the United Nations Charter's provision for freedom from racial discrimination superseded the Treaty in this regard. The district court denied defendant's motion to dismiss.

In a memorandum opinion, District Judge Bue limited his examination to the issue of defendant's rights under the Treaty; thus, he did not have to deal with the matter of the parent corporation's rights thereunder or the effect of the UN Charter upon Article VIII.

The question before the court was whether the American subsidiary could be relieved from the strictures of American law by invoking the Treaty's terms. The court pointed out that in *United States v. R. P. Oldham* (152 F.Supp. 818 (N.D. Cal. 1957)), a case involving this same treaty but arising out of an antitrust violation, it was held that an American subsidiary, incorporated in the United States, had no more rights or immunities than would other American corporations and had no standing to invoke an article of the Treaty as a defense to an antitrust indictment. Defendant argued that *Oldham* was in error as to the nature of corporate nationality and that *Oldham* had been overruled by later decisions. De-

<sup>4</sup> *Id.*, 293.

defendant maintained that "the same test used to determine corporate nationality for purposes of assaying the 'treaty-trader' status of aliens desiring to enter this country—nationality of majority stockholders—should be used."<sup>1</sup> The Department of State used this test rather than place of incorporation. In the opinion of the court,

[r]esort to the treaty trader guidelines to determine corporate nationality for purposes of interpretation of the Treaty provisions is unwarranted in the face of the clear definitional provisions included in Article XXII(3) of the Treaty itself. Article XXII(3) unequivocally states that for the purpose of the Treaty the nationality of a corporation is determined by the place of incorporation. The fact that nationality is determined by a different standard for other purposes cannot alter the clearly stated test of the treaty itself.

Such a result, far from absurd, is entirely consistent with the purpose of the Treaty as stated in the preface: "[to promote] mutually beneficial investments [by] establishing mutual rights and privileges . . . based in general upon the principles of national and of most-favored-nation treatment. . . ."<sup>2</sup>

The court observed that any other conclusion would render meaningless section 2 of the Protocol to the Treaty "providing for the payment of compensation . . . to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party."<sup>3</sup> The court also noted that the legislative history of Article VIII did not appear to support defendant's views.

With regard to the standing of the American subsidiary to invoke the rights of the Japanese parent corporation under the Treaty, the court said:

Given the clear language of the Treaty and the facts in dispute in the instant case the Court concludes that a detailed analysis of the standing issue is unnecessary. Even assuming that Itoh-America has standing to raise the rights of its foreign parent corporation, a question upon which the Court expresses no opinion, no exemption from employment discrimination laws is provided. Any latitude in hiring provided to Itoh-Japan by Article VIII(1) extends to employees whom Itoh-Japan itself hires. The hiring questioned by plaintiffs in the instant case is that of Itoh-America.<sup>4</sup>

The court distinguished *Calnetics Corp. v. Volkswagen of America, Inc.* (532 F.2d 674 (9th Cir. 1976), cert. denied 429 U.S. 940 (1976)), upon which defendant relied, from the instant case, saying:

In *Calnetics* the Court of Appeals determined that the import ban ordered by the trial court might discriminate against the products of VW-Germany in contravention of that company's Treaty rights. By contrast, given this Court's interpretation of the Treaty involved in the instant case, Itoh-Japan has no Article VIII(1) right to staff Itoh-America. Accordingly, as stated above even if Itoh-America has standing to invoke the Treaty rights of Itoh-Japan, it can claim no

<sup>1</sup> 469 F.Supp. 1, 5.

<sup>2</sup> *Id.*, 6 (bracketed sections in second paragraph by court).

<sup>3</sup> *Id.*, 7 (quotation by court).

<sup>4</sup> *Id.*, 8.



shield against application of Title VII to its own employment practices.<sup>5</sup>

In a subsequent motion, defendant requested certification of the issue to the court of appeals (28 U.S.C. §1292(b)). The motion was granted in view of the fact that the case was one of first impression and that it involved the interpretation of a treaty. The court noted that following its dismissal of the case, it had been notified that a similar case was pending in the Southern District of New York (*Avigliano v. Sumitomo Shoji America, Inc.*, 77 Civ. 5641). In this case, the Department of State, in response to a request from the Equal Employment Opportunity Commission, had said:

"Article VIII is addressed to 'nationals and companies of either Party . . . within the territories of the other Party.' Article XXIII defines 'companies' as 'corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.' In determining the scope of Article VIII, we see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form."<sup>6</sup>

Acknowledging the conflict between his opinion and the views of the Department of State on the issue, District Judge Bue said:

Application of these rules of construction [of treaties enunciated in *Kolovrat v. Oregon*, 366 U.S. 187 (1961), and in *Sullivan v. Kidd*, 254 U.S. 433 (1920)] to the present case dictate[s] that this Court reconsider its earlier decision in light of the opinion letter of the Department of State, since that opinion is entitled to great weight. After careful consideration and analysis, and with all due respect and deference to the Department of State opinion letter, the Court concludes nonetheless that the March 1 Order should stand as written. The Department of State letter contains a very brief analysis of the corporate nationality question and its bearing on the applicability of Article VIII(1) of the Treaty. No mention whatsoever is made of the Article XXIII(3) provision which provides that corporate nationality is determined by the place of incorporation and which, when construed with Article VIII(1), led the Court to conclude that Itoh America is not entitled to whatever benefits are conveyed by Article XIII(1) [VIII(1)]. Similarly, no reference is made to the case of *United States v. R. P. Oldham*, 152 F.Supp. 818 (N.D. Cal. 1957), which interprets corporate nationality under the Treaty the same way as this Court.

Despite the contrary conclusion reached by the Department of State, the Court cannot "abdicate" its judicial function and ignore fundamental rules of legal construction which require "that all parts of a treaty are to receive a reasonable construction with a view to

<sup>5</sup>*Id.*, 9.

<sup>6</sup>*Id.*, 10 (quoted by court). The Department's views, dated October 17, 1978, were reprinted in 73 AJIL (1979), at pp. 282-84. For a recent statement modifying those views in part, see pp. 158-59 *supra*.

giving a fair operation to the whole." *Sullivan, supra* at 439. Such an analysis compels the conclusion that Itoh-America is a company of the United States under the terms of the Treaty and that its employment activities in this country are not the activities of a company of Japan within the meaning of Article VIII(1). Accordingly, the Court concludes that the Department of State opinion letter does not warrant a reversal of the Court's earlier order denying defendant's motion to dismiss.<sup>7</sup>

*Treaties—Convention with Canada for Protection of Sockeye Salmon Fishery of Fraser River System of 1930—political question*

UNITED STATES V. DECKER. 600 F.2d 733.

U.S. Court of Appeals, 9th Cir., May 2, 1979. Rehearing denied, July 9, 1979.

Appellants, non-Indian commercial fishermen, were convicted on charges of fishing for salmon in the waters of the Fraser River on days restricted to Indian fishermen (16 U.S.C. §776a). Fishing in the Fraser River system was controlled by the Convention with Canada for the Protection, Preservation and Extension of the Sockeye Salmon Fishery of the Fraser River System of 1930 (50 Stat. 1355, TS No. 918, 6 Bevans 41, 184 LNTS 305)(Convention) and regulations issued by the International Pacific Salmon Fishery Commission (Commission), which had been established pursuant to the Convention. The regulations of the Commission are "subject to the approval of the two Governments with the exception . . . of emergency orders required to carry out the provisions of the Convention."<sup>1</sup> To meet the requirements of *United States v. Washington* (384 F.Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086 (1976)), the United States, with the permission of the Canadian Government, proposed to allow treaty Indians to fish in these waters for a longer period of time than non-Indians. When the Commission objected to this distinction and issued regulations applicable to all American fishermen equally, the United States announced that it "approved the Commission's regulations (except as to treaty Indians exercising treaty-secured fishing rights . . .)."<sup>2</sup> The United States then issued its own regulations giving the Indians a longer fishing period each week. Thereupon, the Commission issued an "emergency order" providing that its regulations applied to all American fishermen without exception. The United States, however, ignored that order and proceeded to enforce its regulations giving more fishing time to Indians. On appeal from the conviction of the defendants (non-Indians) for fishing on days permitted only to Indians, the court of appeals affirmed the decision below.

The Government, relying primarily upon *Jensen v. National Marine Fisheries Service* (512 F.2d 1189 (9th Cir. 1975)), argued that the appeals were not justiciable because they questioned the Government's selective approval of the Commission's regulations, which was a political question. Circuit Judge Wright disagreed with this view, finding that a justiciable

<sup>7</sup> *Id.*, 11.

<sup>2</sup> *Ibid.*

<sup>1</sup> 600 F.2d 733, 736.

issue had been presented to the court and that it comprehended the effect of the Commission's emergency order as well as the matter of whether Canada had officially approved the regulations. The court said:

Even if in other respects a traditional political question analysis could apply, we would be reluctant to declare these cases nonjusticiable because such a holding would prevent us from reviewing the propriety of appellants' convictions and prison sentences. We are less inclined to withhold review when individual liberty, rather than economic interest, is implicated.<sup>3</sup>

Appellants contended that an exception for Indians violated the objectives of the Convention, that partial approval by the United States of the Commission's regulations was ineffective, and that the regulations therefore were not approved by the United States and could not support the conviction. The court found, however, that

[e]xemption of treaty Indians from the 1977 IPSFC regulations was not inconsistent with the convention. Article VI merely states that the regulations are "subject to approval of the two Governments." It does not state that each country is limited to approval or disapproval in whole, rather than in part. As long as the objectives of the convention were not impeded, we cannot say the United States violated the treaty here by approving Commission regulations only in part.<sup>4</sup>

Moreover, Canadian practice indicated that Indians were exempted there from the Commission's regulations.

Appellants also invoked the court's statement in *United States v. Washington* (520 F.2d 676, 690) that "Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulations. . . ."<sup>5</sup> Circuit Judge Wright said:

This passage does not sustain the appellants' argument. Under article VI of the convention, regulations for American convention waters are not effective unless they are approved by the United States. An unstated but necessarily implied condition precedent to applying IPSFC regulations to treaty Indians is that they are first properly approved. To hold otherwise would interpret the quoted language as requiring American fishermen to abide by any and all Commission regulations even if the government exercised its lawful article VI right to reject them.<sup>6</sup>

Appellants' argument that special treatment for Indians deprived them of equal protection of the laws was found by the court to be without merit on the ground that "[t]he propriety of preferential treatment for Indians, particularly when based upon treaty obligations, is rooted in the constitution and has found frequent expression in Supreme Court opinions."<sup>7</sup> The court pointed out that appellants' violation of the Department of the Interior's regulations setting aside certain days for Indian fishing was at the same time a violation of the Commission's "emergency

<sup>3</sup> *Id.*, 738.

<sup>4</sup> *Id.*, 739.

<sup>5</sup> *Id.*, 740 (quoted by court).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* (footnotes by court omitted).

order," so that their convictions under 16 U.S.C. §776a were valid. Finally, the court found no merit in the contention that Canada had not officially approved the Commission's regulations for American waters. Observing that the Convention was vague on this point, the court found that in practice the two states only approved regulations pertaining to their own waters.

*Treaty—definition—Base Labor Agreement of 1968 with Republic of the Philippines*

ROSSI v. BROWN. 467 F.Supp. 960.  
U.S. District Court, D.D.C., March 20, 1979.

Plaintiffs, United States nationals residing in the Philippines, were employed as civilian game room managers at the United States Naval Station at Subic Bay. Their services were terminated when these positions were reclassified as positions that could be filled by Philippine nationals, pursuant to the Agreement Relating to the Employment of Philippine Nationals in the United States Military Bases in the Philippines of 1968 (19 UST 5892, TIAS No. 6542, 658 UNTS 347) (BLA). Plaintiffs argued that termination of their positions constituted discrimination on the basis of citizenship in violation of title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. §2000e *et seq.*), as well as section 106 of Public Law 92-129 (5 U.S.C. §7151 note) (1976) (section 106), which barred discrimination on the grounds of U.S. nationality in the employment of civilians at military bases abroad "unless prohibited by treaty." Plaintiffs' complaint was rejected in administrative proceedings at the Subic Bay base on the grounds that the terms of the BLA could not be changed by the Department of the Navy. Subsequently, plaintiffs brought suit against the Secretary of Defense and the Secretary of the Navy challenging their termination. They sought to enjoin the military authorities from firing them and barring them from the base.

Plaintiffs contended that the term "treaty," as employed in section 106, must be interpreted in the light of American constitutional usage, *i.e.*, as an international agreement that had received the approval of the Senate. They argued that the BLA could only supersede various acts of Congress designed to prevent discrimination against American nationals at military bases abroad if it were a treaty within the terms of Article II, section 2 and of Article VI of the Constitution. While defendants recognized that the BLA had not been submitted to the Senate, they argued that it was as binding as a treaty in the constitutional sense, and hence that it was a "treaty" as that term was used in section 106. Defendants showed that the legislative history of section 106 was inconclusive in the matter of definition of "treaty," and they urged the court to exercise caution in interpreting the word in order to avoid any interference with the authority of the executive branch over the conduct of foreign relations. The district court found for defendants.

In a memorandum opinion, District Judge Flannery observed that the

term "treaty," as defined in Article 2(1)(a) of the Vienna Convention on the Law of Treaties (63 AJIL 875 (1969)) meant "a binding agreement between nations which governs some aspect of the relations between them,"<sup>1</sup> whereas the constitutional definition of "treaty" required the approval of the agreement by the Senate before it could become binding. In American practice, an executive agreement would be a "'treaty' within the broad generic sense set forth [in the Vienna Convention] . . . , but not a 'treaty' in the sense set forth in the Constitution."<sup>2</sup> The court pointed out, however, that the BLA should be classified as a "congressional-executive agreement," *i.e.*, an agreement that had been made with the prior approval of Congress, and observed, furthermore, that it was the trend of informed opinion that this type of agreement is the equivalent of a treaty. The issue here was the determination of what Congress intended by the use of "treaty" in section 106.

District Judge Flannery noted that the Agreement Concerning Military Bases with the Philippines of 1947 (61 Stat. 4019, TIAS No. 1775, 11 Bevans 55, 43 UNTS 271), which was authorized by the same statute as the BLA, had been regarded as

a treaty within the meaning of a Supreme Court decision providing that the extradition of a defendant in a criminal case could only be valid if authorized "by treaty or Act of Congress." *Williams v. Rodgers* [*sic*], 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926, 92 S.Ct. 976, 30 L.Ed.2d 799 (1972) [66 AJIL 402 (1972)]; *see Valentine v. United States*, 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5 (1936).<sup>3</sup>

On the evidence, the court noted that "the mere use of the word 'treaty' is not dispositive."<sup>4</sup> An examination of the text of section 106 and its legislative history led the court to conclude that there was no merit in plaintiffs' contention.

Plaintiffs drew attention to the recent Case Act (1 U.S.C. §112b), which required that international agreements other than treaties be submitted to Congress, arguing that this development supported their analysis of section 106. The court, however, rejected this argument, saying:

Section 106, however, insofar as the court can determine from the legislative history, dealt with discrimination against the families of American servicemen, particularly in Europe. If the Congress was attempting to make Section 106 another front in the war against executive agreements, as plaintiffs suggest, there should have been at least *some* indication of that intent in the legislative history. The court therefore rejects the plaintiffs' suggestion that the word "treaty" be interpreted in the constitutional sense just because it was so employed in roughly contemporaneous legislation.<sup>5</sup>

The court continued:

The court notes that at the time Section 106 was passed, twelve international agreements were in effect which contained provisions for hiring preference for local nationals at overseas military bases. None

<sup>1</sup> 467 F.Supp. 960, 963.

<sup>2</sup> *Id.*, 964.

<sup>3</sup> *Id.*, 965.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Id.*, 967 (emphasis by court).

of these agreements had been submitted for the advice and consent of the Senate. . . . Two additional agreements have been added since 1971 with local national preference provisions. It is beyond dispute that these agreements were entered into after negotiations, with the understanding that the hiring of local nationals when possible would be part of the *quid pro quo* for the retention by the United States of military bases in the host country. The interpretation of Section 106 urged by the plaintiffs would invalidate the preferential hiring provisions of these treaties, with uncertain effects in the conduct of foreign affairs. The existence of these agreements, and their scope, counsels the court in two ways. First, it suggests that the court should not lightly infer a Congressional intent to overturn portions of fourteen international agreements in the absence of *any* legislative history suggesting such an intent. Second, it persuades the court to act cautiously in an area fraught with sensitivity and affecting foreign affairs of the United States.<sup>6</sup>

The court did not agree, however, with defendants that this case was non-justiciable. The court said:

This case does not require the court to interpret the terms of a treaty or to meddle in areas of foreign import which have been traditionally regarded as the province of the President. It involves the construction of an Act of Congress, a task which necessitates an evaluation of the wording of the statute, the legislative history, and the applicable case law and canons of construction. The impact on foreign affairs of such construction does not render the case nonjusticiable.<sup>7</sup>

The court concluded that

the term "treaty" in Section 106 should be construed to mean a treaty as the term is defined under international law—an agreement between nations. This being the case, the Base Labor Agreement is a valid exercise of the President's authority to retain bases "by such means as he finds appropriate." 22 U.S.C. §1392 (1976). The specific provision that the Department of Defense may discriminate on the basis of citizenship if provided by treaty therefore controls over the general provisions of Title VII. . . . The court need not address the question whether Title VII applies to citizenship as well as to national origin.<sup>8</sup>

*Treaties—transfer of prisoners—constitutionality—Treaty on the Execution of Penal Sentences with Mexico of 1976*

PFEIFER v. UNITED STATES BUREAU OF PRISONS. 468 F.Supp. 920. U.S. District Court, S.D. Cal., Jan. 29, 1979.

Petitioner, an American national who had been tried and sentenced in Mexico to seven years imprisonment on charges of illegal possession of cocaine and counterfeit American currency, was transferred to the United States to serve out the balance of his sentence, pursuant to the Treaty with Mexico on the Execution of Penal Sentences of 1976 (28 UST 7399, TIAS No. 8718, *reprinted in* 15 ILM 1343 (1976), 71 AJIL 393 (1977)) (Treaty). In a habeas corpus proceeding, petitioner complained that the Treaty and its implementing legislation (18 U.S.C. §§4100-4115 (Supp.

<sup>6</sup> *Id.*, 967-68 (emphasis by court).

<sup>7</sup> *Id.*, 968.

<sup>8</sup> *Ibid.*

1978)) were unconstitutional. He contended that he could not be held in prison in the United States for offenses against Mexican law and that the pretrial and trial proceedings to which he had been subjected in Mexico were unfair according to U.S. standards. The district court denied the petition for habeas corpus.

District Judge Thompson pointed out that petitioner's constitutional argument was little different from that rejected in *Holmes v. Laird* (459 F.2d 1211 (D.C. Cir. 1972), cert. denied 409 U.S. 869 (1972), 67 AJIL 153 (1973)). The court said:

America is not vicariously liable for the acts of another nation. Consequently, as in *Holmes*, the fifth amendment permits the United States to enforce the sentences meted out by foreign courts, even if those sentences were "unconstitutionally" procured. American custody of convicts originally tried and imprisoned in Mexico, as in Pfeifer's case, is simply another form of enforcing a foreign sentence. Therefore, the Treaty does not run afoul of the Constitution, simply because it provides for the incarceration in the United States of American citizens whose foreign trials did not comply with the Bill of Rights.<sup>1</sup>

The court observed that U.S. constitutional standards have been applied to the actions of foreign officials involved with American officials only where the defendant was being tried by an American court for an American crime; in any event, petitioner did not present any evidence to indicate that American agents had taken part in these proceedings.

Petitioner also contended that his transfer to the United States had violated the terms of the Treaty and implementing legislation in that he had not "knowingly and voluntarily" consented to it (Art. IV(2), 18 U.S.C. §4100(b)(Supp. 1978)). He argued that the choice between serving his sentence in the United States or remaining in a Mexican prison constituted duress. The court found no merit in this argument, especially as petitioner had sworn at the transfer hearing before a U.S. magistrate that he was acting freely. Petitioner asserted that his assigned counsel during the transfer proceedings was inadequate and as a representative of the Department of Justice had a conflict of interest in the matter. District Judge Thompson pointed out that counsel used in these transfer proceedings were, by law, members of the federal defenders program, not members of the U.S. Attorney's Office, so that no allegation of conflict of interest could be made. In the opinion of the court, petitioner had received competent advice in the transfer process.

CURRENT DEVELOPMENTS REGARDING JUDICIAL DECISIONS REPORTED IN THE JOURNAL, 1978-1979

*ASG Industries, Inc. v. United States*, No. 77-5-00879 (Cust. Ct. 1979), 73 AJIL 687 (1979); reported at 467 F.Supp. 1200.

*Civil Aeronautics Board v. Deutsche Lufthansa Aktien-Gesellschaft*, No. 78-1851 (D.C. Cir. 1979), 73 AJIL 511 (1979); reported at 591 F.2d 951.

<sup>1</sup> 468 F.Supp. 920, 924.

- Foley v. Connelie*, 98 S.Ct. 1067 (1978), 72 AJIL 923 (1978); reported at 435 U.S. 291.
- Hooker v. Klein*, 573 F.2d 1360 (9th Cir. 1978), 72 AJIL 926 (1978); cert. denied, 99 S.Ct. 323 (1978).
- Mannington Mills, Inc. v. Congoleum Corp.*, No. 78-1845 (3d Cir. 1979), 73 AJIL 691 (1979); reported at 595 F.2d 1287.
- Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196 (5th Cir. 1978), 73 AJIL 141 (1979); cert. denied sub nom. *Occidental of Umm al Qaywayn, Inc. v. Cities Service Oil Co.*, 99 S.Ct. 2851 (1979).
- Terrazas v. Vance*, 577 F.2d 7 (7th Cir. 1978), 73 AJIL 140 (1979); probable jurisdiction noted 99 S.Ct. 1532 (1979).
- United States v. Molt*, 452 F.Supp. 1200 (E.D. Pa. 1978), 73 AJIL 145 (1979); aff'd in part, reversed in part and remanded, 599 F.2d 1217 (3d Cir. 1979), 74 AJIL 191 (1980).
- United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978), 73 AJIL 299 (1979); cert. denied 99 S.Ct. 1422 (1979).
- United States v. Richardson*, 580 F.2d 946 (9th Cir. 1978), 73 AJIL 304 (1979); cert. denied 99 S.Ct. 835 (1979).
- Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), 73 AJIL 298 (1979); cert. denied sub nom. *Vergara v. Chairman, Merit Systems Protection Board*, 99 S.Ct. 1993 (1979).
- Zenith Radio Corp. v. United States*, 98 S.Ct. 2441 (1978), 73 AJIL 145 (1979); reported at 437 U.S. 443 (1978).



## CURRENT DEVELOPMENTS

### THE CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL

Governmental representatives meeting at Vienna from October 17 to 26, 1979, completed negotiation of a Convention on the Physical Protection of Nuclear Material (the Convention). At this fourth session, the conference adopted a text that is to be opened for signature from March 3, 1980, both at the International Atomic Energy Agency headquarters in Vienna and at United Nations headquarters in New York.<sup>1</sup> Representatives of 58 states, the European Atomic Energy Organization, and, as observers, four additional states and the OECD's Nuclear Energy Agency, participated in the conference.

The Convention was a United States initiative and has been under negotiation in multilateral meetings since late 1977. The U.S. delegation to these meetings was led by the Department of State, and included representatives from the Arms Control and Disarmament Agency, the Departments of Energy and Defense, and the Nuclear Regulatory Commission. Sections 203 and 403(c) of the Nuclear Nonproliferation Act of 1978<sup>2</sup> call for the United States to seek to negotiate a convention containing some of the provisions that were included in the Convention that has been adopted.

The Convention requires states parties not to export or import or authorize the export or import of nuclear material used for peaceful purposes unless assurances have been received that such material will be protected during international nuclear transport at levels prescribed in the annexes to the Convention. Each state party undertakes to take appropriate steps to insure that nuclear material in international transport is protected when such material is within its territory, or is on board a ship or aircraft under its jurisdiction and engaged in transport to or from that state.

The Convention also provides a framework for international cooperation in the recovery and protection of stolen nuclear material. In the case of theft, robbery, or other unlawful taking of nuclear material or of credible threat thereof, states parties undertake to provide cooperation and assistance to the maximum extent feasible to any state that so requests.

Finally, the Convention defines certain serious offenses involving nuclear material that states parties are to make punishable and for which offenders would be subject to a system of prosecution or extradition.

The Convention will come into force when 21 states have become parties.

<sup>1</sup> Text adopted October 26, 1979; Final Act signed on the same date. The Convention is *reprinted in* 18 ILM 1419 (1979).

<sup>2</sup> Pub. L. No. 95-242, 92 Stat. 120 (1978) (to be codified at 22 U.S.C. §§3201-3282 and 42 U.S.C. §§2011-2160a). Further, section 203 of the Nonproliferation Act is at 92 Stat. 124 and will be codified at 22 U.S.C. §3243. Further, section 403(c) is at 92 Stat. 146 and will be codified at 42 U.S.C. §2153b.

Provision is made for accession by EURATOM. A dispute settlement article allows parties to accept binding arbitration or reference to the ICJ, or both.

RONALD J. BETTAUER

*Office of the Legal Adviser, Department of State  
Chairman of the U.S. Delegation*

#### VIOLATIONS OF ILO CONVENTIONS BY THE USSR AND CZECHOSLOVAKIA

##### *The Soviet Union and ILO Convention No. 87*

On several occasions the ILO Committee of Experts on the Application of Conventions and Recommendations has considered the question of compatibility of Soviet legislation with the Convention concerning Freedom of Association and Protection of the Right to Organize,<sup>1</sup> No. 87, and particularly with Article 2, which provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. In 1977, the committee dealt with the right of workers to establish unions of their choice.<sup>2</sup> It observed that Soviet laws and regulations recognized for every category of workers only one trade union committee in every undertaking. By bestowing trade union functions solely upon the trade union committee of the undertaking concerned, the possibility that another organization might be set up to represent workers of the same category seemed to be precluded. The committee was of the view that such a situation would be incompatible with Article 2 of the convention.<sup>3</sup>

The Government of the USSR had stated that Soviet laws and regulations did not exclude the possibility of establishing organizations other than those that already existed. The committee, however, took the position that such organizations would not be able to carry out their functions since the legislation bestowed these functions on the trade union committee exclusively. The Government should therefore amend the legislation in force so that any workers who wished to establish other organizations to further and defend their interests might do so lawfully and in accordance with established rules.

The Soviet Government further claimed that the practice established in the USSR and a number of other countries of setting up trade unions on the basis of the production principle, whereby all the workers in one

<sup>1</sup> See INTERNATIONAL LABOR ORGANIZATION [hereinafter ILO], CONVENTIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE, 1919-1966, at 663 (1966).

<sup>2</sup> See INTERNATIONAL LABOR CONFERENCE [hereinafter ILC], REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 165 (Report III, Part 4A, 63d Sess., 1977). Regarding trade union rights of collective farm members in the USSR, see *id.* Difficulties with regard to trade union rights of collective farm members also have arisen in other Eastern European countries.

<sup>3</sup> *Id.* at 166.

undertaking belong to one trade union, was more favorable to the workers than other systems. "In accordance with paragraph 8 of Article 19 of the ILO Constitution, the Government sees no necessity for changing the legislation in force."<sup>4</sup> The committee rejected this Soviet argument, stressing that Article 19, paragraph 8 of the Constitution is applicable to national provisions "which go beyond the requirements of a Convention without contradicting them."<sup>5</sup>

The committee also considered the paramount role of the Communist Party in trade unions, in light of Article 126 of the Soviet Constitution, which provides that the Communist Party "is the leading core of all the organizations of the working people."<sup>6</sup> The committee pointed out that if that provision should result in subjecting the operation of these organizations to the general direction of the Communist Party, it would be impossible legally to establish organizations independent of the party. Moreover, such organizations would be unable to exercise fully the right to organize their activities and formulate their programs in conformity with the provisions of the convention. The situation therefore amounted to the restriction of trade union rights by the national Constitution.<sup>7</sup>

In 1979, the Committee of Experts reiterated its views that provisions of Soviet law were incompatible with Article 2 of the convention,<sup>8</sup> and, as regards the role of the Communist Party, with Article 3.<sup>9</sup> The committee's report was adopted by the 65th International Labor Conference despite objections made by the representative of the Soviet Government in the (tripartite) Conference Committee on the Application of Conventions and Recommendations.<sup>10</sup>

<sup>4</sup> *Ibid.* Article 19(8) of the ILO Constitution provides that the adoption of any convention or recommendation by the conference, or the ratification of any convention by any member shall not be deemed to affect any law, award, custom, or agreement that ensures more favorable conditions to the workers concerned than those provided for in the convention or recommendation. For the text of the ILO Constitution, see 62 Stat. 3485, TIAS No. 1868, 4 Bevans 188, 15 UNTS 35. For amendments of June 25, 1953, see 7 UST 245, TIAS No. 3500, 191 UNTS 143. For amendments of June 22, 1962, see 14 UST 1039, TIAS No. 5401, 466 UNTS 323.

<sup>5</sup> ILC, 1977 REPORT OF THE COMMITTEE OF EXPERTS, *supra* note 2, at 167. See also 55 ILO OFF. BULL. 147 (1972).

<sup>6</sup> See HAZARD, *Union of Soviet Socialist Republics* (1972), in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (eds. Baustein & Flanz, 1971- ).

<sup>7</sup> ILC, 1977 REPORT OF THE COMMITTEE OF EXPERTS, *supra* note 2, at 167.

<sup>8</sup> ILC, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 145 (Report III, part 4A, 65th Sess., 1979). For the comments of the committee on the situation prevailing in Czechoslovakia, see *id.* at 119.

<sup>9</sup> Article 3 of Convention No. 87 concerns the autonomy of workers' and employers' organizations. It states that the public authorities "shall refrain from any interference which would restrict this right or impede the lawful exercise thereof." ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 1, at 664.

<sup>10</sup> ILC, Prov. Rec., 33d sitting, at 43/9 (65th Sess., June 26, 1979). The representative of the Soviet Government argued, *inter alia*, that the convention did not require that there should be a multiplicity of trade unions and that the request of the Committee of Experts to the effect that Soviet legislation be amended went beyond the framework of the convention. As regards the role of the Communist Party, he claimed that the committee engaged in a value judgment of a particular social system.

In 1978, the World Confederation of Labor and the International Confederation of Free Trade Unions complained to the ILO that the Soviet Union was violating ILO Conventions Nos. 87 and 98.<sup>11</sup> The complaints alleged that Soviet authorities dismissed from work, arrested, or confined to psychiatric hospitals workers who criticized the heads of the enterprises where they worked and who had decided to set up a trade union ("Workers' Free Trade Union Association"). The complaints were considered by the Committee on the Freedom of Association.<sup>12</sup>

According to the complainants, the desire to express one's views as a worker could lead to confinement in a prison or in a psychiatric asylum. It was impossible to create a trade union organization independent of the state and of the Communist Party. A number of workers have been imprisoned for having wanted to establish such a trade union. The complainants concluded that the conventions on freedom of association had been violated and requested the dispatch of a mission of "direct contacts" with the Soviet authorities.<sup>13</sup> The information referred to in the complaints consisted of material compiled by Amnesty International on the basis of documents issued by a group of unemployed Soviet workers, who had joined to protest against violations of their freedom of expression and workmen's rights. The complaint mentioned names of workers whose rights were allegedly infringed and the dates of their arrests and confinements.

The Soviet Government issued a general denial, arguing that the allegations made in the complaints were completely unfounded. The right of workers to organize collectively and the freedom of action of trade unions in the USSR were guaranteed by the country's Constitution and were exercised in practice. The letters from the World Confederation of Labor and the ICFTU contained no facts attesting to any form of infringement of freedom of association in the Soviet Union. The persons mentioned in the letters had no connection with trade unions or with the defense of the occupational interests of workers. The examination by the ILO of the letters of complaint was accordingly "illegal and inadmissible."<sup>14</sup>

The interim report of the Committee on the Freedom of Association emphasized that the complainants had supplied detailed information about the identity of the persons affected and the dates of their arrest or con-

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The Soviet legislation merely confirmed conditions created by a historical process. The trade unions had freely accepted the leading role of the Communist Party. Members of the Communist Party "were a minority of trade union members, and, if the majority who were not party members agreed, their decision prevailed" [*sic*!]. This was in accordance with Article 3 of Convention No. 87. *Id.*, Report of the Committee on the Application of Conventions and Recommendations at 36/39.

<sup>11</sup> Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, CONVENTIONS AND RECOMMENDATIONS, *supra* note 1, at 777.

<sup>12</sup> ILO Governing Body [hereinafter GB] Doc. 209/6/3, Case No. 905, at 74-79 (1979).

<sup>13</sup> *Id.* at 75. For a thorough discussion of the "direct contacts" procedure, see ILC, 1979 REPORT OF THE COMMITTEE OF EXPERTS, *supra* note 8, at 13-27.

<sup>14</sup> GB Doc. 209/6/6, *supra* note 12, at 77-78.

finement to hospitals, and in some cases, about the places where they were detained or confined in psychiatric hospitals. The report observed that

[t]he Government's comments do not contain precise information of such nature as to refute the specific allegations made. . . .

In general, when a complaint contains precise allegations the Committee is of the opinion that the reply of the Government concerned should not be limited to observations of a general nature. The purpose of the whole procedure is to promote respect for trade union rights in law and in fact. . . .<sup>15</sup>

The committee recommended to the Governing Body that it (1) note that the Soviet Government denied the allegations but had supplied no precise details concerning them, and (2) request the Government to provide observations or detailed information concerning the allegations.<sup>16</sup> Despite the strong objections of the Soviet delegates, these recommendations were approved by the ILO Governing Body on February 28, 1979.<sup>17</sup>

### *Czechoslovakia and ILO Convention No. 111*

In 1977, the ICFTU made a "representation" to the ILO, in accordance with Article 24 of the ILO Constitution, alleging a failure by the Government of Czechoslovakia to observe the Convention concerning Discrimination in Employment and Occupation,<sup>18</sup> No. 111. The ground for the representation was that repressive measures had been taken affecting the employment of authors or signers of documents who had publicly criticized the Government's policy in the field of human rights. According to material attached to the complaint, workers had been dismissed with or without notice and had incurred other measures affecting their employment for having signed or supported Manifesto 77, and the courts had held that these dismissals were valid under the Labor Code of Czechoslovakia.<sup>19</sup>

<sup>15</sup> *Id.* at 78-79.

<sup>16</sup> *Id.* at 79.

<sup>17</sup> GB Doc. 209/205 at 4; GB Doc. 209/PV, III/9-IV/4 (1979).

<sup>18</sup> CONVENTIONS AND RECOMMENDATIONS, *supra* note 1, at 969.

<sup>19</sup> See 61 ILO OFF. BULL., ser. A., No. 3, Supp. at 3, 10, 11 *et seq.* (1978). Article 24 of the ILO Constitution provides that if any representation is made to the International Labor Office by an industrial association of employers or of workers that any of the members has failed to secure the effective observance within its jurisdiction of any convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit. It may be observed that Article 24 is of special significance because it allows complaints against governments to be submitted by organizations of employers or employees, rather than by governments (which are often anxious to avoid offending other governments). Article 25 states that if no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it. The procedure for the examination of representations is governed by Standing Orders adopted by the Governing Body on April 8, 1932, and amended on February 5, 1938. See text in *id.* at 7-9. For the text of Manifesto 77, see *id.* at 54-56. For recent reports regarding the trials of members of the Charter 77 human rights group, see N.Y. Times, July 15, 1979, §A, at 3, col. 3; N.Y. Times, October 24, 1979, §A, at 1, col. 3.

Among those dismissed was an employee of the National Insurance Company, which explained that his post required not only substantial professional knowledge but also a high level of political consciousness in conformity with the established socialist order, and that he had not satisfied these requirements.<sup>20</sup>

In another case, the work contract of an employee of the National Museum was terminated on the ground that in signing the "libellous and subversive document known as Charter 77" he had seriously failed in his duty to work in the interest of the socialist society.<sup>21</sup> He contested the dismissal in the district court of Prague, claiming that the grounds for dismissal were insufficient: signing Charter 77 could not be considered a serious infringement of work discipline, his behavior had not endangered the safety of the state, and his retention in the establishment would not jeopardize the due performance of its tasks.<sup>22</sup> The court rejected the complaint contesting the dismissal.<sup>23</sup>

In accordance with Article 2 of the Standing Orders, the Director-General of the ILO communicated the representation of the ICFTU to members of the Governing Body, which appointed a tripartite committee composed of a government member, an employer member, and a worker member. The committee pointed out that under Article 1 of Convention No. 111 the term "discrimination" includes, in particular, "any distinction, exclusion or preference made on the basis of . . . political opinion . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation," but that "[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination." Under Article 4, "[a]ny measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice."<sup>24</sup>

The committee noted that according to the representation, the actions

<sup>20</sup> See OFF. BULL. Supp., *supra* note 19, at 34.

<sup>21</sup> See *id.* at 17-18.

<sup>22</sup> *Id.* at 45.

<sup>23</sup> The court stated that

under section 53, subparagraph 1(c) of the Labour Code, an employer may exceptionally dismiss an employee . . . [who] has endangered the safety of the State, and secondly, if retention of the employee until expiry of the period of notice could endanger the due performance of the organization's tasks. By the safety of the State was meant the integrity of the national territory, the integrity of the State's capacity to organize its defence, the State's international relations, and the integrity of state organs and the state secrets. These are fundamental principles of our state structure; they are fixed by the Constitution and protected by the Penal Code. . . .

The Court, in consideration of the statement by the Public Prosecutor . . . came to the conclusion that grounds for immediate dismissal were fully present, for the high degree of danger to the safety of the State, and therefore also to the work of the employing establishment, had been proved.

*Id.* at 47.

<sup>24</sup> *Id.* at 4.

impugned were motivated by the workers' having signed or adhered to a document such as Manifesto 77. The committee did not consider the general statements of the Government as constituting an adequate response to the specific allegations concerning dismissals and other measures referred to in the representation. It did not

emerge from the information available that the signing or adhering to such a document could in itself be considered, in relation to the principal protection envisaged by the Convention on matters of political opinion . . . as an activity against the security of the State or incompatible with the requirements of their forms of employment.<sup>25</sup>

In conclusion, the committee did not view the reply of the Government to be satisfactory in terms of Articles 24 and 25 of the Constitution and recommended to the Governing Body, on the basis of Articles 8 and 9 of the Standing Orders, that discussion be opened on the application of Article 25 of the Constitution.<sup>26</sup> At its 208th session (November 14-17, 1978) the Governing Body "considered" (by 38 votes in favor, 4 against, with 9 abstentions) that under Article 25 of the Constitution the reply received from the Government of Czechoslovakia was not satisfactory. Accordingly, it decided that the representation and the reply should be published, together with the report of the tripartite committee.<sup>27</sup>

The Czechoslovak question continues to receive the attention of ILO bodies. In light of the examination of the complaint described above, the Committee of Experts on the Application of Conventions and Recommendations asked the Government to indicate the measures taken or contemplated to ensure that all sanctions previously imposed for reasons incompatible with Convention No. 111 be reconsidered.<sup>28</sup>

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<sup>25</sup> *Id.* at 5. The committee (*id.* at 4) cited an observation of the Committee of Experts on the Application of Conventions (from its 1972 report at the 57th session, at pp. 203-04) with regard to Convention No. 111:

In protecting workers against discrimination on the basis of political opinion, the Convention implies that this protection shall be afforded to them in respect of activities expressing or demonstrating opposition to the established political principles . . . since the protection of opinions which are neither expressed nor demonstrated would be pointless, and that the protection afforded by the Convention is not limited to simple differences of opinion within the framework of the established principles.

The tripartite committee believed that the Committee of Experts had "made it clear that the definition of activities prejudicial to the security of the State or special requirements for certain specified forms of employment should not be such as to authorise measures inconsistent with the basic protection provided for by the Convention." OFF. BULL. Supp., *supra* note 19, at 4.

<sup>26</sup> OFF. BULL. Supp., *supra* note 19, at 5-6.

<sup>27</sup> *Id.* at 1. See also *The Implementation of ILO Conventions: The Czechoslovak Case*, INTERNATIONAL COMMISSION OF JURISTS, THE REVIEW 26 (No. 22, June 1979).

<sup>28</sup> ILC, 1979 REPORT OF THE COMMITTEE OF EXPERTS, *supra* note 8, at 182-83; ILC 1979 Prov. Rec., *supra* note 10, Information and Reports on the Application of Conventions and Recommendations, at 36/45-36/49.

## THE CONFERENCE ON EXCESSIVELY INJURIOUS OR INDISCRIMINATE WEAPONS

The possibility of formulating rules restricting or banning certain weapons was considered at two Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts convened by the International Committee of the Red Cross (ICRC) (1971 and 1972),<sup>1</sup> and at the four sessions of the Swiss-convened Diplomatic Conference on the same subject (1974-1977).<sup>2</sup> In between these were two more ICRC Conferences of Government Experts on the Use of Certain Conventional Weapons that may Cause Unnecessary Suffering or Have Indiscriminate Effects (1974, 1976).<sup>3</sup> In spite of all these efforts, the Diplomatic Conference was unable to reach agreement on these weapons; instead it adopted a resolution<sup>4</sup> calling on the United Nations to convene a conference on the subject by 1979.<sup>5</sup>

In response, the General Assembly<sup>6</sup> convened two sessions of a Preparatory Conference<sup>7</sup> that met in Geneva in 1978 and 1979, and were followed by the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, from September 10 to 28, 1979. Though it was able to start its work largely from detailed "basic proposals" (*i.e.*, drafts) submitted by the Preparatory Conference, the UN Conference—which adopted rules of procedure that did not provide for the taking of decisions by vote<sup>8</sup>—also was unable to complete work on any treaties; however, in light of the progress made it recommended to the General Assembly that another session be convened for a period of up to 4 weeks starting on September 15, 1980.<sup>9</sup> The progress made in negotiating the various instruments considered at the conference will be sketched in the following pages.

### 1. *Fragments Nondetectable by X-rays*

The Preparatory Conference had achieved full agreement that weapons that injured primarily by means of fragments not detectable by X-rays

<sup>1</sup> ICRC, *WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS: REPORT ON THE WORK OF EXPERTS* (Geneva, 1973). See also UN Docs. A/8370 and Add.1 (1971) and A/8781 (1972).

<sup>2</sup> See UN Docs. A/9726 (1974), A/10227 (1975), A/31/146 (1976), and A/32/124 (1977).

<sup>3</sup> ICRC, *CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS*, Lucerne, September 24 to October 18, 1974 (Geneva, 1975); and *id.* 2d Sess., Lugano, January 28 to February 26, 1976 (Geneva, 1976).

<sup>4</sup> Resolution 22(IV) of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1977).

<sup>5</sup> The above background material is summarized from Chapter 9 and Appendix 9A of the Stockholm International Peace Research Institute's excellent study on *Anti-personnel Weapons* (Taylor and Francis Ltd., London 1978).

<sup>6</sup> GA Res. 32/152 (December 19, 1977) and 33/70 (December 14, 1978).

<sup>7</sup> The reports of which appear respectively in UN Docs. A/33/44 (1978) and A/CONF.95/3 (1979).

<sup>8</sup> UN Doc. A/CONF.95/2 (1979); see also UN Doc. A/CONF.95/3 (1979), para. 39.

<sup>9</sup> UN Doc. A/CONF.95/8 (1979), para. 22. The General Assembly accepted this recommendation in its Resolution 34/82 of December 11, 1979.



(e.g., plastic-covered grenades) should be banned unconditionally.<sup>10</sup> This simple prohibition was therefore referred directly to the Drafting Committee, which, however, was unable to complete an instrument because it had not yet been decided whether a general treaty or individual instruments would be concluded (*see* 5 below).

## 2. Mines and Booby Traps

The Committee of the Whole of the conference, on the basis of the work of its Working Group on Landmines and Booby Traps,<sup>11</sup> approved a Draft Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, subject to disagreement on one clause and a reservation as to one paragraph.<sup>12</sup> That instrument would generally prohibit the indiscriminate use of such weapons or their use against civilians; require that records be kept of all preplanned mine fields and booby traps and that endeavors be made to keep records of those laid on an ad hoc basis; require, with some restrictions, the publication of such records after the cessation of active hostilities; require that UN peacekeeping, observation, or fact-finding missions be protected from and/or informed of the location of mines and booby traps in their areas of operations; promote the reaching of agreements for the removal of mines and booby traps; restrict the use of remotely delivered mines to military objectives and require that either their location be accurately recorded or each mine be equipped with a self-activating or remotely controlled neutralizing mechanism; restrict the use of mines and booby traps in populated areas; and prohibit the use of particularly treacherous booby traps (e.g., those specially appealing to children or attached to persons or to corpses).

The remaining disagreement concerns the obligation to publish the location of mines and booby traps at the end of hostilities, in respect of national territory still occupied by hostile forces.<sup>13</sup> The reservation refers to the provision on remotely delivered mines, whose indiscriminate emplacement Yugoslavia would prefer to prohibit outright.<sup>14</sup>

## 3. Incendiary Weapons

The Committee of the Whole submitted to the conference a Draft Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons,<sup>15</sup> which, however, still reflects large areas of disagreement; in addition, two groups of states submitted alternative draft protocols.<sup>16</sup> These several texts indicate that no complete agreement was reached on the definition of "incendiary weapon" and, in particular, of "flame weapon" (a category that is to in-

<sup>10</sup> UN Doc. A/CONF.95/3 (1979), Ann. II, App. A.

<sup>11</sup> UN Doc. A/CONF.95/8 (1979), Ann. I, App. B.

<sup>12</sup> *Id.*, Ann. I, App. A.

<sup>13</sup> *See id.*, Ann. I, App. B, paras. 10-12 and Attachment I, para. 1, as well as App. A, Art. 3(3)(a).

<sup>14</sup> *See id.*, Ann. I, App. A, n. to Art. 4, and App. B, para. 15.

<sup>15</sup> *Id.*, Ann. I, App. C, Attachment I. <sup>16</sup> *Id.*, Ann. I, App. D.

clude napalm). There is even wider lack of agreement about the uses that are to be prohibited. One proposal would proscribe any use of such weapons; more limited proposals would assure absolute protection only to civilians and civilian objects as such, more limited protection to military objectives within a concentration of civilians, and still less or none to combatants, especially those within fortified objectives.

#### 4. *Small-Caliber Weapon Systems and Other Weapon Categories*

The conference adopted a resolution on small-caliber weapon systems (*i.e.*, arms and projectiles) that recalls the 1899 declaration banning dum-dum bullets,<sup>17</sup> encourages the carrying out of further research on the wounding effects of such systems, and appeals to all governments to exercise self-restraint in the development of such systems in order to avoid an unnecessary escalation of their injurious effects.<sup>18</sup>

The Committee of the Whole also discussed briefly, without reaching any conclusion, several other types of weapon categories, such as antipersonnel fragmentation weapons, flechettes, and fuel air explosives.<sup>19</sup>

#### 5. *Legal Framework of Agreements*

The conference gave extensive consideration to the form in which any specific prohibition that might be agreed on should be expressed. One possibility is to conclude a separate treaty instrument for each such prohibition. Another is to conclude a general treaty, of which each of the specific prohibitions would form an integral or separable annex; or, if it is expected that other prohibitions might be agreed on later within the framework of the same general treaty, each of the specific prohibitions agreed to originally or later might form a separate protocol to the treaty.

A conference working group prepared the Outline of a Draft Convention,<sup>20</sup> which suggests that the general treaty might include, in its substantive or final clauses, provisions that define the types of situations to which the treaty and any annexes/protocols to it would apply; that specify the relations with other international agreements; that possibly permit "authorities" (such as national liberation movements) engaged in an armed conflict with a state party to cause the treaty to apply to such conflict; that possibly provide for the facultative provisional application of the treaty to conflicts that arise before it enters into force; and that permit denunciations, but not with effect on any current conflicts.

Differences arose regarding the review and amendment of such a treaty and of the annexes/protocols to it.<sup>21</sup> On the one hand, it was generally recognized that the adoption of amendments to any specific prohibitions

<sup>17</sup> Hague Declaration (IV.3) of July 29, 1899, 26 Martens Nouveau Recueil 1002 (2d ser.) reproduced in UN Doc. A/9215, vol. I, ch. I, pt. II, sec. 3 (1973).

<sup>18</sup> *Id.*, Ann. III.

<sup>19</sup> *Id.*, Ann. I, para. 14; UN Doc. A/CONF.95/CW/SR.5 (1979).

<sup>20</sup> UN Doc. A/CONF.95/8, Ann. II, App. A (1979).

<sup>21</sup> *Id.*, Ann. II, paras. 7-12 and 14, and Apps. B and C.

should primarily be the right and responsibility of the parties to the instrument incorporating that prohibition; on the other hand, it was also recognized that the further development of humanitarian law relating to weapons should not be monopolized entirely by the parties to a particular treaty in this field, even though they might logically be given preeminence in initiating the review process.

It is hoped that a second session of the UN Conference will finally be able to reach complete agreement on at least several of the particular prohibitions that have already received such intensive scrutiny in a succession of international fora.

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\* Any views expressed herein do not necessarily constitute those of the United Nations.

## BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

*Thomas Jefferson and the Law.* By Edward Dumbauld. Oklahoma: The University of Oklahoma Press, 1978. Pp. 293. Index. \$25.

In addition to his professional career as a lawyer and Federal District Judge, the author is well known for his scholarly interest in Thomas Jefferson. As early as 1946 he had published an engagingly written volume on *Thomas Jefferson, American Tourist*, that repeatedly elicited appreciative citations in Professor Dumas Malone's monumental five-volume treatise, *Jefferson and His Time*.<sup>1</sup> The author has also published several articles on various aspects of Jefferson's career that are listed in the comprehensive (31-page) bibliography appended to the present volume.

The key to the present volume is contained in the opening sentence of the author's introduction. "That Thomas Jefferson was a lawyer by profession," he tells us, "is often overlooked." The thought is that Jefferson's dramatic public career and the amazing range of his intellectual interests have tended to overshadow his achievements "in the prosaic realm of law" (p. vi). The author is concerned to redress the balance. He is aware, of course, that other scholars have noted that Jefferson's chosen profession was "law," but he considers that they have not treated this phase of his career in depth. His approach is therefore more sharply focused on legal issues and their analysis than on those broader aspects of Jefferson's career that have engaged the interest and fired the imagination of historians and political theorists.

The book is divided into eight brief chapters totaling 156 pages, supplemented by 1380 notes occupying no less than 95 pages. They attest to the extensive scope of the research effort and the meticulous care devoted to it.

Because the author's principal focus is directed elsewhere, specific references to international law are quite brief. They are limited to a few pages in chapter 2 (pp. 33-34) in which he calls attention to Jefferson's reliance on Grotius, Pufendorf, Wolff, and Vattel in discussing the survival of treaties despite changes in the French Government. The author also alludes to Jefferson's well-known views on neutral rights and duties, usually considered his main contribution to international law. And he in-

<sup>1</sup> The reference is to Professor Dumas Malone's projected 6-volume treatise, 5 of which have been published. Appreciative acknowledgments of Dumbauld's earlier work appear in Vol. I (1948), at p. 466; Vol. II (1951), at p. 502; and Vol. III (1952), at p. 524. More significant is the following comment on p. 122 of Vol. I: "His [Jefferson's] legal business is now being analyzed by Edward Dumbauld who has given me the benefit of many informal comments." This reference indicates that Dumbauld has been engaged with the present book, off and on, for a period of some 30 years, a fact confirmed by the author in his preface.

cludes brief references to Jefferson's views on navigation, expatriation, and peaceful coercion.<sup>2</sup> It is worth noting that the same chapter contains an interesting historical account, with contemporary overtones, of the scope and effect of treaties in our constitutional system: Jefferson is revealed as advocating, with characteristic prescience, the use of the federal judiciary as a better means of assuring that treaty obligations rode over conflicting state legislation than was the more sweeping proposal of Madison, which would have entailed a potential federal veto on all state legislation. It was this controversy that called forth Jefferson's much-quoted remark that Madison's proposal was defective in that "the hole and the patch should be commensurate." But the book's chief emphasis, to repeat, is directed less to Jefferson's notions about law than to his qualities as a lawyer.

It is not sufficiently appreciated that these qualities were manifested at the very threshold of his career when from 1767 to 1774 he was an active practitioner at the Virginia bar. His practice was varied, extensive, and comparatively lucrative. In describing it the author draws on original sources contained in Jefferson's *Case Book*, *Fee Book*, and other writings, but throughout, he supplements them with his own learning and independent research. We discover that Jefferson was involved in over 939 cases before the General Court covering such matters as land ownership, slander, the liberty of persons claimed as slaves, trespass, and assault and battery. In order, however, to better demonstrate the erudite learning and resourceful professional skill Jefferson brought to bear in handling his cases, the author has selected for extended analysis a highly complicated "Will Case" (*Bolling v. Bolling*) involving the ownership of emblements. In this case Jefferson was pitted against his former preceptor and lifelong friend, George Wythe, one of the most learned lawyers of his time, who later was to become the holder of the first chair of law (at William and Mary) in America. The author devotes 26 pages to an analysis of the contrasting legal arguments advanced by the parties in this case. In later chapters he covers Jefferson's activities as a legislator, law reformer, unofficial reporter, and archivist.

With one notable exception the author's analysis of Jefferson's legal talents is pretty much centered on this early period. The exception has to do with a celebrated case begun in 1810 in which Jefferson was sued for \$100,000 by Edward Livingston. Widely known as the *Batture* case, it involved many subtle procedural legal points to which the author devotes an entire chapter. It may be confidently predicted that the author's analysis of this case, based on Jefferson's last published work, will command the attention of all future Jefferson scholars.<sup>3</sup>

<sup>2</sup> The author's seeming neglect of international law is not attributable to an oversight but to a self-imposed limit on the scope of his book. His bibliography lists a number of articles dealing with this aspect of Jefferson's career including Waltze, *Thomas Jefferson and the Law of Nations*, 29 AJIL 66-81 (1935), and Sears, *Jefferson and the Law of Nations*, 13 AMER. POL. SCI. REV. 379-99 (1919). See also Dumbauld, *Independence under International Law*, 70 AJIL 425-31 (1976).

<sup>3</sup> The case involved a dispute over the deposit of alluvial lands in the "batture"

From what has been said above, it may be inferred that the present book is more likely to appeal to students of American history and especially devotees of Jefferson than to readers primarily interested in international law and relations. The author's self-imposed limits on the scope of his book do not, however, detract from the realization that it constitutes not only a useful but, in many ways, a unique contribution to the enormous literature devoted to the life and career of one of the most remarkable and fascinating figures in United States history.

HARDY CROSS DILLARD  
Board of Editors

*La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle.* By Pierre-Marie Dupuy. Paris: Editions A. Pedone, 1977. Pp. 309.

The International Law Commission in its current work on state responsibility has limited itself, for the time being, to responsibility for wrongful acts. But one would think that a more important current problem is the one Pierre-Marie Dupuy treats in his book: responsibility for damages of technological and industrial origin, which includes damages caused by ultrahazardous activities as well as by pollution. Many authors, most prominently Wilfred Jenks and L. F. E. Goldie of the Anglo-American school, see the solution for such damages in responsibility without fault (and without unlawful act): that is, objective liability, or strict responsibility, as it has been developed in the United States since *Rylands v. Fletcher*. In international law the point of departure for this evolution, whose acceleration has often been advocated, can be found in the celebrated *Trail Smelter* arbitration of 1941. The primary merit of Dupuy's work is that he has had the courage to question these ideas, which many writers have accepted without examining them closely.

In the first part of the book, Dupuy shows that international law on the subject has evolved quite differently from the generally accepted notion. Admittedly, the idea of objective liability has been established in a number of international conventions: on space objects, nuclear activities and transport, and pollution (notably, the transport of hydrocarbons). But this responsibility applies only to those engaged in the activities (the operators). Thus, international state responsibility arises only if the state is the operator, a situation that is limited to certain nuclear-powered vessels (under special agreements) and outer space objects. In the other cases covered by these conventions, state responsibility is indirect and secondary, and cannot be invoked unless the state has failed to meet an obligation.

Thus, conventional law has made a very limited contribution to the development of a general rule of objective liability, while customary law,

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(beach) of New Orleans. During his term as President, Jefferson ordered the forcible ejection of Livingston from the land. Dumbauld devotes 38 pages to an analysis of the background of this case and the specific legal issues it generated. The case was dismissed on procedural grounds on December 5, 1813.

even today, acknowledges responsibility only for unlawful acts or omissions. Moreover, Dupuy has no difficulty showing that those who believe they have discovered applications of objective liability in the *Trail Smelter* and *Corfu Channel* cases, or in *Lac Lanoux*, are in error. Until now, a regime of objective responsibility would have derogated from the pertinent general rules of international law and has only been established by conventions.

According to Dupuy, state practice has not conformed to the dazzling doctrine of objective responsibility because of the special difficulties encountered in bringing it into play. These difficulties, in turn, explain why solutions have been sought elsewhere. Dupuy illustrates these two points in the second part of his book.

While his explanations for the difficulties of applying objective responsibility on the international level are convincing, they are not all equally so. Those based on the fact that the principle displaces the center of gravity of the system of responsibility from the actor (generating factor) to the victim (injury) are real enough, but this situation can also be found in domestic law, where the results have been different. The same can be said for the difficulty of establishing a clear boundary between legal activity and unlawful action. On the other hand, Dupuy correctly points out that the idea of objective liability can be accepted only if an intense solidarity is perceived or established between the author of the injury and its victim, and that such solidarity is not easily found in international society. It is also true that imputing nonstate activities to the state presents a problem that cannot be easily solved.

This situation certainly justifies the preference for other solutions when damages result from ultrahazardous activities or pollutants: the formulation of regulations that better define and increase preventive obligations, the establishment of quantitative standards, and the placing of responsibility for the financial burden of *preventive* measures on the authors of harmful activities. Objective responsibility, however, can only be effected on a conventional basis.

Whether new ideas and special interests will bring about a new rule of general international law (or of conventional international law) is an open question. The author seems to think that they will do so in the form of a generalization of neighborly obligations, as defined in the *Trail Smelter* case (p. 35). On the other hand, one may well ask whether an evolution of the concept of responsibility for unlawful acts must necessarily lead to the complete elimination of the idea of fault, which Dupuy calls "déculpabilisation" (p. 358). A trend in this direction may be discerned in connection with pollution: pollution activities as such are not condemned, but their elimination is demanded through preventive action. However, a complete "déculpabilisation" of unlawful acts such as pollution may well result in the disappearance of the deterrent function of culpability.

Dupuy helps us to appreciate the wisdom of the ILC in limiting its first attempt in the field to the study of responsibility for unlawful acts. We also become more aware of the need for a conventional solution to the

problems raised by ultrahazardous activities, but not one that necessarily moves in the direction of objective responsibility of states. It would seem that even now, without conventional law, an international tribunal could resolve the concrete problem of responsibility for such activities on the basis of general international law and principles of responsibility for unlawful acts. Perhaps because of misinterpretation, which Pierre-Marie Dupuy helps clear up, the potential of the *Trail Smelter* case seems far from having been fully realized.

This is a stimulating book and should be read by everyone interested in modern aspects of state responsibility.

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*Points of Choice.* By Roger Fisher. Oxford, London, Glasgow: Oxford University Press, 1978. Pp. vii, 89. Index: \$5.95.

This is the fifth, and final, volume in a series which has as its purpose to explain the impact of international law on international crises. In this volume Professor Fisher develops the general thesis that "the best way to cope with an international crisis . . . is to have a functioning international system that handles a dispute before it becomes a crisis" (p. 54). In chapter 1 he examines the goals that a statesman will pursue, his means of promoting that pursuit, and the constraints under which he operates. In chapter 2 he examines in more detail the problems of formulating the primary goal of "peace," and of pursuing it, and has some challenging things to say. For example, he is opposed to developing the notion of individual, criminal responsibility under international law, or even of sanctions against governments, believing that the use of techniques more akin to the domestic injunction or action for a declaration will be the more effective. He argues, quite persuasively, for an approach which, in any individual case, will characterize the matter as a dispute rather than a violation of international law, which will use domestic institutions whenever possible, use international institutions to review national determinations, and above all produce a determination with which the offending state can easily comply (p. 31).

In chapter 3 he explores the different forms of "power," exposing the crudity of military power and exploring the values of power deriving from authority or from reputation. The use of law in the formulation of goals, and the advantages of framing goals and expressions of policy in legal terms, is the theme of chapter 4; and in chapter 5 Fisher demonstrates how to choose a successful strategy by reference to a legal approach.

With most of this any reader will readily agree: indeed, so much of it seems plain common sense. Yet Fisher frames a major indictment against the world's statesmen for failing to perceive what is so sensible. "One reason why the international system is so deficient in process is that few statesmen understand the kind of machinery that would best serve their



interests—the kind that can cope with differences and handle them at a non-crisis level” (p. 23).

This basic assumption of the foolishness, or unwisdom, of the statesmen of the world is what troubles this reviewer most. For it is an assumption not really proven by the evidence. True, there is a masterly illustration of how Nasser might have better phrased his proclamation closing the Straits of Tiran in legal terms, which would have made it far more difficult for Israel to treat the proclamation as a *causus belli* (pp. 74–75). Yet many of the other illustrations are unconvincing. For example, to treat Britain’s relinquishment of sovereignty over Cyprus as over-delayed because of a reluctance to abandon legal rights is to ignore the complexities of that situation (p. 65). To regard the 1956 Middle East crisis as stemming from a failure by Great Britain to make appropriate legal arrangements for what would happen after the termination of the Suez Canal Company’s concession in 1968 seems almost naive (p. 63).

Perhaps the core of the difficulty is not that statesmen are foolish or lacking in perception of what the law offers, but rather that they do not share the author’s belief in the value of abiding by law. It is not without significance that the example Fisher gives of the advantages of a state’s abiding by law is the Watergate affair (p. 84). One can think of illustrations, more truly international, pointing the other way: India’s invasion of Goa, China’s invasion of Tibet, the Soviet invasion of Hungary, the Icelandic defiance of the International Court, and so on.

This is not to quarrel with Fisher’s aims, which this reviewer would wholly share, but rather to express some caution about assuming that once our statesmen understand the system, and the advantages of using law, we can avert many of the crises which now beset us.

D. W. BOWETT  
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*Ugo Grozio e la tradizione storica del diritto internazionale.* By Massimo Panebianco. Naples: Editoriale Scientifica, 1974. Pp. xi, 243. Index.

More than 330 years after the death of Hugo Grotius, no study of international jurisprudence can ignore the monumental work of the Dutch genius. At the age of 38, with scores of translations, poems, briefs, and essays already published, the prodigy of Delft escaped from life imprisonment in Holland and finished his master work, *On the Law of War and Peace: Three Books in which the Principles of the Law of Nature as well as Nations, likewise Public Law, are Explained*, in Paris in 1625.

Panebianco has undertaken a remarkable study of Grotius’s work, not only to clarify the history of the rebirth or rediscovery of the Roman *jus gentium* in 17th-century Europe, but also to examine the effect of that historical tradition upon the divergent schools of naturalism and positivism that followed Grotius. In addition to presenting an overview of *De iure belli ac pacis*, Panebianco examines the thesis of the historical continuity between ancient and modern international law by referring to the works of positivists such as Zouche, Bynkershoek, and Ward, as well as the ap-

proaches of Vico, Leibnitz, Rachel, and Textor. The author also weighs the idea of historical discontinuity by describing the work of the naturalist and first professor of international law, Pufendorf, as well as the "logical-deductive" school of Wolff and his more famous pupil, Vattel.

In the final part of the book, Panebianco reaches the 19th- and 20th-century reinterpretation of the historical tradition of international law. Essentially, he illuminates the cleavage in legal theory between monism and pluralism, between universal norms implemented through the agency of constituent states and norms generated by the voluntary, collective acts of sovereigns as the basis of a world community. This central philosophical dispute, not unknown in antiquity, greatly affects the foreign policy and diplomacy of modern states, and Panebianco notes the current challenges to the idea of a world community by the admission of new Asian and African states to sovereign status, by the ideological confrontation between state and private capitalism, and by the rise of the multinational corporation, all of which militate against the constitution of the *magna civitas gentium*. The book is rich in analysis, concluding with the premise of *jus gentium* as the historical basis for the developing European community.

Panebianco has opened some splendid vistas for students of international jurisprudence in a relatively short, thoroughly researched work. An appendix that includes the Prolegomena to *De iure belli ac pacis*; extracts from the *Digest of Justinian* on justice and law, treaties, captures and rights of recovery, and legations; and relevant excerpts from Livy's *History of Rome* as well as Polybius's *Histories* is a very useful reference.

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*Methods of Interpretation and Community Law.* By Anna Bredimas. Amsterdam, New York, Oxford: North-Holland Publishing Co., 1978. Pp. xviii, 219. Index. \$32.75; Dfl.75.

The first three parts of this book (which is based on the author's thesis at University College, London) address general problems of judicial interpretation of constitutive and statutory documents, the methods of interpretation employed by the Court of Justice of the European Communities, and the Court's interpretative process as viewed from an outcome-oriented perspective. The logic of the division between parts II and III, incidentally, is not entirely clear: the subchapters of part II deal, in turn, with the textual, "subjective," and functional methods of interpretation, while those of part III address extensive versus restrictive interpretation and interpretation drawing on general principles of national and international law. All are part of the interpretative *process* in the sense, for instance, that functionalism in interpretation may lead to an extensive interpretation or draw on such sources as general principles of law. The categorization thus appears artificial, perhaps misleading.

Part IV relates the interpretative process with respect to Community

law to the specific example of the integration of English law into the Community legal order. Quite appropriately, the vehicle for the inquiry is the preliminary reference procedure of Article 177 of the EEC Treaty.

Although much has been written previously concerning the methodology for interpreting Community law, the subject is of renewed interest because of the accession of two common law countries, Ireland and the United Kingdom, to the Communities. Part IV of the study is therefore highly relevant. Unfortunately, it fails to accomplish its purpose. Three pages, constituting one whole chapter, deal with "Problems of Interpretation of Art. 177 EEC." Ten pages describe "English Methods of Interpretation" and another mere 10 pages attempt to relate the English methodology to that of the Community and to examine the English case law with respect to references under Article 177 to the Court of Justice. *Bullmer v. Bollinger* ([1974] 2 All E.R. 1226) receives attention for Lord Denning's dictum on interpretation, but his views with respect to the central problem of judicial integration—when is it necessary or appropriate for national courts to effect a reference?—are mentioned only in passing: "This part of the judgment setting forth very restrictive guidelines . . . is to be regretted and should not be treated as authoritative by lower courts" (p. 171). Of the extensive literature engendered by the case, only two articles are cited and no reason is given why Lord Denning's "guidelines" should not be treated as authoritative in a legal system adhering to *stare decisis*.

The more general discussion of the process of interpretation (parts I–III) is equally disappointing. The crucially important problem of integration—the primacy of Community law over national law—is treated quite inadequately. One aspect, the reference procedure under Article 177 of the EEC Treaty, was mentioned above. Discussion of the parallel procedure under the Community's recognition-of-judgments convention is lacking. It is also not enough to quote from the Court of Justice's decision in *Internationale Handelsgesellschaft* ([1970] ECR 1125) without also addressing the tension that arises when a national court is unwilling to accept the Community law's asserted supremacy without question. Thus, in the same case, the German Constitutional Court subsequently asserted its power to review Community law for its compatibility with constitutionally guaranteed basic rights (27 NJW 1697 (1974)). Similarly, for a balanced view of the celebrated decision in *Costa v. ENEL*, where "from a single story of non-payment of an electricity bill to the nationalized electricity industry, primacy of Community law was declared" (p. 88), it is important to know that the "declaration" was the Community Court's, but that the Italian Court of Cassation subsequently found a way to avoid the result ([1970] Foro It. I, 765–71). How these differences can be bridged—for instance, whether Community law should be interpreted as including the standards of the European Human Rights Convention and the European Social Charter, thus assuring the protection of basic rights on the Community level—is a most important and urgent problem. It is not addressed.

Throughout, the treatment is too brief and cursory to deal adequately with the many important questions raised. Generalities and ambiguities

abound: "Whilst the Member States cooperate rather than obey and the Community organs are common but not federal, the Community rules must be obeyed. Supremacy, therefore, reflects the need for a federal structure which has not yet been achieved" (p. 89).

The author undertook an important and ambitious project. Her book presents many, but not all, of the problems. Its brevity does not allow for analysis in depth; it is in the nature of a preliminary inquiry, an outline. This is particularly unfortunate since the extensive bibliography as well as the documentation display great familiarity with the sources.

PETER HAY

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*Legal Aspects of International Terrorism.* Edited by Alona E. Evans and John F. Murphy. Published under the auspices of the American Society of International Law. Lexington, Mass. and Toronto, Canada: Lexington Books, D.C. Heath and Co., 1978. Pp. xxxvii, 690. Index. \$34.95.

After the success of the Israeli and German endeavors at Entebbe and Mogadishu respectively, there was a general feeling that terrorism might slacken off, and for a period it appeared as if this optimism were justified. However, recent events affecting the activities of the Irish Republican Army and threats by Yasin Arafat and various Arab groups consequent upon the signing of the Israel-Egypt Peace Treaty indicate that this euphoria was probably misplaced. Among those not so affected was the American Society of International Law, which went ahead with the compilation of a group of essays concerned with *Legal Aspects of International Terrorism*.

While the media have often glamorized terrorist acts, particularly when aircraft hijackings are involved, it will probably come as a shock to most people to note that a list of domestic and foreign aircraft hijackings between January 1, 1960, and July 31, 1977, extends over 80 pages (pp. 68-147), covering 493 incidents of a variety of airlines and nationalities. This table is valuable not only as a list, but also because it gives details of the fate of the aircraft and of the hijackers. It is interesting to note the number of occasions when successful assaults against the terrorists were made and how often asylum was denied and by whom. Professor Evans is to be thanked for making this material available, as well as similar tables on rendition and trial.

One of the values of this compilation is that it covers a number of matters which are frequently ignored because of their technical character or, in some cases, their specifically local nature. Despite the title, there is perhaps an overemphasis on U.S. interests and reactions. A British royal commission has recently drawn attention to the risk that terrorists might secure nuclear materials; Herbert H. Brown is equally concerned by the problem of threats to nuclear facilities; and J. D. Nyhart and J. Christian Kessler turn their attention to ocean vessels and offshore structures. Closely related to this material is the paper by Brian Jenkins and Alfred P. Rubin

on new vulnerabilities and the acquisition of new weapons. They point out, for example, how vulnerable a public water supply is (p. 241), and they call for greater technological research in controlling these and other threats (p. 253). It must not be forgotten, however, that any such system still depends on the integrity and skill of the humans who apply it.

Among the few international successes in relation to the control of terrorism has been the adoption of the Convention concerning Terrorist Acts Against Diplomats and Other Protected Persons, although the exception in the name of national liberation is to be deplored. This aspect of the problem is discussed by John E. Murphy, while Jordan J. Paust looks at the related problem of "non-protected" persons and things, and mentions the difficulty of definition, suggesting that any "generally accepted definition of terrorism requires an element of 'terror' and a coercive purpose" (p. 346). Among the earliest kidnappings were those of business executives, and this is still frequently a problem in Europe. Clarence Mann, counsel of Sears, Roebuck, deals with this issue, and his paper should be read in conjunction with a second contribution by Paust on private measures of sanction. The issue of noninternational sanctions is also examined by Murphy, although on a state level and in the light of international law, for he analyzes the problem of state self-help, particularly as it affects international public policy. Although prepared to concede Israel's basis for Entebbe as a need to defend nationals, he rejects the idea of humanitarian intervention; he also strongly opposes direct unilateral action against states that allow themselves to become centers of subversive terrorist activity, not so much because he questions the legality of such actions, as because he fears that "the danger to the maintenance of international peace and security of the use of force against subversive centers might be greater than that of international terrorism itself" (pp. 558, 565). One may be inclined to question whether this argument cannot be used to justify any act of appeasement, however abject.

In her paper on aircraft and aviation facilities, after making suggestions as to action that the United States might take internally, Evans calls for international action on both a regional and a global basis to establish minimum standards of security, and for the enforcement of the Tokyo, Hague, and Montreal Conventions. She also favors the convocation of a conference outside the United Nations to draw up a comprehensive agreement directed against terrorism that would define the offense, provide for the trial of offenders without exception by the regular courts (although this may raise many difficulties insofar as the political offense defense is concerned), and create state responsibility in regard to any state that fails to enact implementing legislation, or to extradite or try offenders, or that otherwise supports terrorism (pp. 38-40). While this step might avoid some of the political and ideological grounds that have prevented United Nations action, it is almost certain that countries that support terrorist movements either would not attend the drafting conference or would fail to ratify any agreement that might be produced. Some of the problems in this field become clear from a trio of papers concerning international control and punishment

of terrorism contributed by M. Chérif Bassiouni, Alona E. Evans, and Wayne Kerstetter.

For anyone interested in this manifestation of underground warfare today, this collection of essays is absolutely vital material, from the point of view of the history, prognosis, and analysis of problems.

L. C. GREEN

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*Enhancing Global Human Rights.* By Jorge I. Domínguez, Nigel S. Rodley, Bryce Wood, and Richard Falk. New York: McGraw-Hill Book Co., 1979. Pp. xv, 270.

This book is part of the Council on Foreign Relations's ambitious 1980's Project. The project aims at identifying future conditions of international relations and the kinds of adaptations of assumptions, institutions, and policies that may be required. *Enhancing Global Human Rights* examines human rights from such a perspective.

The book has five sections. The first, "Introduction: Human Rights—Toward International Action," is an elegantly written overview by Richard Ullman. He emphasizes three basic matters which run through the other contributions: the problem of defining human rights, the problem of monitoring the activity of governments, and the problem of acting on the information thus obtained. The second section by Jorge Domínguez is entitled "Assessing Human Rights Conditions." It is a bold attempt to formulate an operational framework for the assessment of actual human rights conditions. Domínguez has devised a 32-cell matrix that evaluates the Lasswell-Kaplan-McDougal basic values of power, respect, rectitude, wealth, well-being, enlightenment, skill, and affection in the light of four "modes of enjoyment," security, growth, equality, and liberty. He outlines how this framework might function with two "country case-study comparisons" (pre- and postrevolution Cuba and Mexico) and four "issue-area" studies (infant mortality, slavery, torture, and political prisoners). The analysis is readable but parts show signs either of not having been fully thought through, or of having been butchered in the editorial process. (See, for example, the pseudo-empirical tables at pp. 65-66 and pp. 81-82 which are explained far too cryptically for the reader to grasp where the numbers come from.) The third section, "Monitoring Human Rights Violations in the 1980s," is by Nigel Rodley. He examines current governmental and nongovernmental (NGO) monitoring activities and concludes that the brunt of monitoring will continue to be borne by NGO's. He offers some suggestions for an ideal worldwide monitoring institution. As might be expected of the legal adviser for Amnesty International, Rodley has a nice feel for the way NGO's operate, but his pithy remarks about some of them (the International Association of Democratic Lawyers and the International League for Human Rights, for example) are a little unbalanced. The fourth section, Bryce Wood's, on "Human Rights Issues in Latin America," is a useful perspective that includes some thoughtful remarks on the "en-

forcement" roles of the OAS Commission on Human Rights and the U.S. human rights policy. The final section, "Responding to Severe Violations," is the typical provocative material one expects of Richard Falk. By "severe violations" he means genocide, official racism, large-scale official terrorism, totalitarian governance, deliberate refusal to satisfy basic human needs, ecocide, and war crimes. Generally, as Falk sees it, such misdeeds will continue and even intensify. Not much will be done about them because of the weakness of the prevailing system of world order, characterized by undue emphasis on the sovereign state. This weakness will not be overcome without the introduction of a new system of world order.

There is little that is new in this book, but the presentation is attractive. It will be widely read by policy planners, students, and the NGO community.

ROGER S. CLARK

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*The OAS and the Promotion and Protection of Human Rights.* By Lawrence J. LeBlanc. The Hague: Martinus Nijhoff, 1977. Pp. vii, 179. Index.

This handy and informative book may well be recommended to a reader interested in the structures elaborated by the Latin American nations for the protection of human rights within their region. The author begins his analysis of the development of this protection with the adoption of the OAS Charter in 1948, including the familiar problems posed by the nonintervention provisions of Article 15, and proceeds to the subsequent creation in 1959 of the Inter-American Commission on Human Rights, which was elevated to the status of an OAS organ in 1970 by amendment of the Charter. He traces the drafting and adoption of the Inter-American Convention on Human Rights and discusses at length why the prospects for its entrance into force in the foreseeable future are slim.

The book is especially informative in its discussion of the workings of the Inter-American Commission. It will come as a surprise to many that the United States at the outset was vigorous in its opposition to authorizing the Commission to examine and take action on petitions alleging violations of human rights, something it later championed in the United Nations. Indeed, the United States did not want the Commission to protect human rights, but only to promote them. This restrictive view was opposed by a large bloc of states, especially Costa Rica, Venezuela, and Ecuador, when the issue was debated in the OAS Council in 1960. While, unfortunately, the view of the United States prevailed by a narrow vote, the Commission itself at its first session adopted a broad view of its competence, which was confirmed by amendments to its statute in 1965. Since that date, petitions have been regularly received from individuals, groups, and associations.

Because the Commission is an organ of the OAS, its autonomy has been protected by election of the commissioners in their personal capacity, rather than as governmental representatives. Whether each commissioner is free of pressures from his home country is not easy to ascertain, since the minutes

of the Commission's deliberations on petitions received are kept secret in order to protect the petitioner. The Commission's annual report to the OAS General Assembly does indicate a high degree of objectivity since many nations have been singled out for violations.

The most interesting phase of the Commission's work in protecting human rights involves its handling of petitions which may be received unsigned. They are first screened by the Secretariat, both as to the nature of the acts alleged and as to exhaustion of domestic legal remedies. No statistics are available for the number of petitions received or rejected by the Secretariat, but a standing subcommittee of the Commission reviews all petitions and the actions of the Secretariat. Admissible petitions may then be forwarded to the governments for information, which is to be received within 180 days. If no information is received or the Commission feels it has a sufficient basis to go forward, a member of the Commission not from the country in question will be named to gather the facts, and the Commission will then as a whole deal with the petition by an appropriate resolution. The Commission may make general recommendations to the particular country or to the whole of the OAS, and may publish its evidence and report. A summary of the actions is contained in its annual report.

In handling complaints of torture in Brazil, the Commission promulgated far-reaching resolutions denouncing the actions of this country in cases involving death by torture. After investigation of the facts, the Commission called for punishment of the persons responsible for the deaths and reparation to the families involved.

In examining any situation, the Commission may deem it wise to make an on-the-spot investigation; this process requires the consent of the member state in question. Such a visit occurred in Chile in 1974 and strong resolutions were then adopted.

Obviously, the Commission is limited as to what it can do to protect human rights since it has no coercive powers, even as noted above, to gather information from any member state or to conduct an on-the-spot investigation without governmental consent. But various member states have complied voluntarily. The OAS as an organization remains singularly concerned about intervention in the internal affairs of a member state. Thus, it refused to act on the Commission's recommendation concerning Chile. While overall results thus far are mixed, at least there exist good machinery and individuals committed to the cause, which offers hope for the victims of human rights violations throughout the Americas.

RITA E. HAUSER  
*Of the New York Bar*

*Reaching Judgment at Nuremberg.* By Bradley F. Smith. Meridian, New York: New American Library, 1977. Pp. xviii, 349. \$5.95.

"Was Nuremberg actually a trial or merely a vigilante revenge dressed up in *ex post facto* law?" That is the leading question posed by the author, described as "an historian," who purports to find the answer by probing the



tribunal's secret deliberations. There is more to this book than the comparison of trial memoranda exchanged by judges and aides. Bradley Smith sketches the paths leading to the charter of the International Military Tribunal, the process of selecting the accused, the framing of the indictment, the long trial, the judgment, and the punishment of the 22 defendants. He concludes that the war crimes policy of the Allies was confused, improvised, and dangerous, with "mistakes piled on folly" (p. 301). He scorns sentences produced by judicial compromise but praises the judges for having emasculated the allied attempt to impose collective guilt on Nazi organizations. He credits the court for having restricted the prosecutor's notions of conspiracy, aggressive war, and crimes against humanity. It is a book to warm the heart of all war criminals.

In seeking the origins of war crimes policy, the author scans the correspondence of governmental departments during the last months of the war. It would seem from his description that the State and War Departments were primarily motivated by a desire to defeat Treasury Secretary Morgenthau's plan for Germany, which included a proposal that Nazi leaders be executed without trial. Prime Minister Churchill and Foreign Secretary Eden favored "political disposition" of Hitler and his henchmen, but President Truman opted for the judicial process. Smith correctly states that the United States gave the final impetus to the Nuremberg trial, but his view of the road is myopic. He fails to see the long evolutionary trail over which the Nuremberg principles traveled. No mention is made of the arguments for an international criminal court which trace back to the Hague Conferences of 1899 and 1907, the Versailles Treaty, the League of Nations, studies by learned societies such as the International Law Association and the Association of Penal Law, or the pioneer work of such scholars as V. V. Pella, Saldaña of Madrid, Politis of Greece, Lauterpacht of Cambridge, Glueck of Harvard, and many others. No reference is made to the debates in the United Nations War Crimes Commission of London, which dealt with the legal doctrines later adopted by the prosecutors.

According to Smith, "the Allies were drawn together as much by a desire for revenge and a hatred for things Nazi and German as by a determination to punish criminal acts" (p. 72). He does mention in the next breath that "there was also a sense of high moral purpose . . . to ensure peace by prosecuting crimes under international law," but it almost escaped his notice. He ignores the opening admonition by the American prosecutor, Justice Robert Jackson: "The record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well." He ignores the dozen subsequent trials, under Telford Taylor, which expanded the Nuremberg principles and added to the evolving reality of international penal law. He ignores the later actions, however limited, by other countries and the United Nations in support of the Nuremberg doctrines.

Surely there is room for hindsight wisdom about the Nuremberg proceedings, but one must never forget that international law does not grow in a straight and clearly visible line, and one should not overlook the evidentiary

and procedural difficulties that had to be overcome in a short time. The accused were, in Jackson's words, "given the kind of a trial which they, in the days of their pomp and power, never gave to any man." True it is that the Nuremberg precedents have not always been honored, and the world is still far away from accepting a code and an international court to penalize those who commit crimes against peace and crimes against humanity. But what is needed is to build on the Nuremberg foundation and not to tear it down. This book is interestingly written—colorful and colored—and, in the opinion of this reviewer, serves no constructive purpose.

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Of the New York Bar

*Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. Dezember 1972.* By Georg Ress. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht. Heidelberg, New York: Springer-Verlag, 1978. Pp. 436. Index.

This excellent and comprehensive study deals with the problem of a divided Germany, emphasizing particularly the legal status of Germany after the conclusion of the 1972 Treaty on the Basis of Relations between the two German States (the Treaty). Although the author is aware of discrepancies between the political and social reality and the legal theory in Germany, he limits his research to the legal aspects. He states that one of the major objectives of the study is "to analyze the status of the two German states and the legal problems of their bilateral relations in the light of the Treaty on the Basis of Relations and the judgment of the Federal Constitutional Court." As the experience of the last few years has shown, the Treaty is a relatively complicated document of international law reflecting the exceptional character of the legal situation of Germany in nearly every provision. Considerable difficulties exist in interpreting its verbal compromises, its "agreements not to agree," various other provisions, and its gaps.

The author also carefully analyzes the impact of the other *Ostverträge*, i.e., the Moscow Treaty, the Warsaw Treaty, and the Prague Treaty, upon the legal status of Germany. Ress asserts that these treaties do not form a coherent legal system. He then raises the question whether the Federal Republic of Germany (West Germany or "Federal Republic") and the German Democratic Republic (East Germany or "GDR") had the necessary authority under international law to sign the Treaty.

Pursuant to the *Deutschlandvertrag* of 1954, the three major Western powers reserved some occupational authority (rights and responsibilities) relating to Berlin and to Germany as a whole, including the reunification of Germany and the peace settlement. The author concludes that the Treaty is not a substitute for a peace treaty and that the status of the two German states in relation to the German Empire remains unresolved. In this discussion, the author also refers to Germany's international situation, including the controversy concerning the continuance or dismemberment of the German Empire and continuation of a uniform citizenship.

Ress indicates that, although the "German nation" continues to exist, neither German state is allowed to prevent the other from maintaining its right of self-determination or from pursuing an active policy of reunification. With regard to the legal consequences of contractual cooperation between the Federal Republic and the GDR, he examines the following communiqué from the Federal Government: "Even if there exist two states in Germany, they are not foreign countries to one another; their relations can only be of a special kind." But his analysis of this mixture of internal and international laws indicates that such an intermediate status, *i.e.*, a status having some of the characteristics of complete national emancipation or independence and of total subordination or integration, is in no way extraordinary.

Although the Treaty on the Basis of Relations covers important elements of interstate relations and forms the basis for other treaties, the bilateral obligations resulting from it remain unclear.

This well-documented and perceptive book is a valuable contribution to the study of developments on the legal status of Germany and to the clarification of the German problem.

JULIUS BUDDE  
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*International Straits of the World. Northeast Arctic Passage.* By William E. Butler. Alphen aan den Rijn: Sijthoff & Noordhoff, 1978. Pp. xii, 199. Index. Dfl.70; \$33.50.

*International Straits of the World. Malacca, Singapore and Indonesia.* By Michael Leifer. Alphen aan den Rijn: Sijthoff & Noordhoff, 1978. Pp. xi, 217. Index.

These two monographs on the Northeast Arctic Passage and the Malacca, Singapore, and Indonesia Straits are the first two in a series of seven straits studies to be published under the auspices of the University of Delaware Center for the Study of Marine Policy. Other studies in preparation in this series include: *The Persian Gulf*, by R. K. Ramazani; *The Strait of Gibraltar*, by Scott Truver; *The Red Sea*, by Ruth Lapidoth; *The Baltic Straits*, by Gunnar Alevandersson; and *The Northwest Arctic Passage*, by Gerald L. Morris.

If the caliber of all these studies is as high as that of the first two (and judging by the authors it should be), the series will have made an important contribution to the literature on oceans law and policy. Despite the great interest in ocean resources, the most important economic use of the oceans continues to be ocean transportation. And nothing is more important for that use than a clear and unambiguous right of transit through straits used for international navigation. Consider, for example, the worldwide consequences should blockage of the Strait of Hormuz interrupt the supply of Persian Gulf oil.

Against this background of increased importance of straits, coupled with the ferment in oceans law and politics accompanying the Third United Na-

tions Conference on the Law of the Sea (UNCLOS III), it is particularly important that detailed studies of individual straits be available. This series should admirably fill the bill. The first two studies on the *Northeast Arctic Passage* and the *Malacca, Singapore and Indonesian Straits* are easily the most useful and detailed studies to date of these straits. In every way they are first-rate and belong in the oceans, international relations, and international law libraries of the world.

Despite the excellent quality of the Leifer monograph, it somewhat understates the common interest of the majority of nations of the world in transit passage of straits, though unlike some recent writings it correctly emphasizes that the UNCLOS "Negotiating Text" guarantees such passage. It is this shared interest in transit passage that ultimately was responsible for the text at UNCLOS III and the broad consensus underlying that text.

The Butler monograph on *The Northeast Passage* is particularly important in focusing attention on Arctic Ocean issues. For too long we have neglected these issues while Soviet and Canadian jurists have espoused broad theories, such as the "sector principle," for expanding coastal state jurisdiction at the expense of shared community uses of the Arctic Ocean and U.S. Arctic interests. The sector principle, for example, if applied to ocean or ice areas, would give the Soviet Union control of almost two-thirds of the Arctic Ocean. Professor Butler persuasively rejects these special interest claims. In one respect, however, his monograph could benefit from more extended discussion. At the law of the sea negotiations it was clear that with but one exception the new oceans law will apply to the Arctic Ocean exactly as it will to any other oceans area. That exception is Article 234 on "Ice-covered areas." Article 234 reflects an important Arctic Ocean accommodation among the United States, Canada, and the Soviet Union. That is, in ice-covered areas within the economic zone (out to 200 nautical miles), including straits, the coastal state may "establish and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels" under certain conditions set out in the text. As a key part of the accommodation, however, it was understood that coastal state rights would not extend to vessels entitled to sovereign immunity, including warships, and that any such coastal state regulations must be "non-discriminatory," have "due regard to navigation," be "based on the best available scientific evidence," and be subject to the third-party compulsory dispute settlement provisions of the "Negotiating Text." This is a fundamentally new basis for accommodation of navigation rights within the Arctic Ocean and should clearly establish that the only special right of coastal states in the Arctic is pollution regulation of commercial vessels in ice-covered areas within the economic zone (including overlapped straits). Except in the narrow circumstance of this article (in straits), provisions in the text on innocent passage (in the territorial sea outside of straits) and freedom of navigation (within and beyond the economic zone) apply as fully to the Arctic Ocean as to any other ocean area. Although Butler mentions Article 234, he does not discuss the full accommodation or indicate its enormous importance for the future legal

regime of the Arctic Ocean. For the future this framework will, in my judgment, be the starting point for legal analysis of Arctic Ocean issues.

JOHN NORTON MOORE  
Board of Editors

*Recognizing Foreign Governments: The Practice of the United States.*  
By L. Thomas Galloway. Washington: American Enterprise Institute  
for Public-Policy Research, 1978. Pp. xiv, 191. \$4.75, paper.

In this volume a public-interest lawyer at the Center for Law and Social Policy, in Washington, D.C., analyzes the practice of the United States, especially since 1960, concerning recognition of governments. (He does not treat the recognition of new states.) Pointing out that the problems are confined chiefly to recognition, or nonrecognition, of "governments that come to power through extraconstitutional means" (p. xiii), the author covers briefly the American historical background of recognition and nonrecognition of new governments through 1960, and deals in more detail with the period from 1961 through 1976. He also studies the recognition policies of foreign governments and concludes with a chapter on U.S. recognition policy for the future.

The author finds that the U.S. attitude has grown recently into one of accepting new regimes without protest, resuming relations, and deemphasizing the whole recognition process (p. 124). In only a few instances does the United States use "recognition to pursue policy goals" (p. 125). Looking at recent American practice, Galloway concludes, "the recognition of foreign governments that come into power through extraconstitutional means no longer plays a meaningful role in American foreign policy" (p. 139); and he adds, "[r]ecognition is not now, nor is it likely to become, an effective instrument by which to advance American foreign policy interests" (p. 140). He cautions that "[t]he United States has never officially announced that it has decided to eliminate the concept of recognition of governments that come to power through extraconstitutional means. . . . Instead, it has chosen to proceed gradually, and largely without public announcement" (pp. 145-46). The author urges that the United States announce the gradual elimination of recognition of governments and respond to foreign coups d'état by simply continuing diplomatic relations with the new government (p. 152).

Galloway's treatment of recognition policies of foreign states draws upon responses to a 1969 circular telegram from the Department of State to all American Embassies, and to 1975 letters from the author to embassies in Washington; these are presented in tabular form with footnotes in a useful appendix. He finds a strong movement toward deemphasis of recognition, and says that some 30 out of 100 states surveyed now follow the Estrada doctrine,<sup>1</sup> which he favors, although the United States has not avowed its approval of the doctrine.

<sup>1</sup> On the Estrada doctrine, see 2 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 85 (1963); Jessup, *The Estrada Doctrine*, 25 *AJIL* 719 (1931).

Although treatises and casebooks still devote considerable attention to the problems surrounding recognition of governments, the author makes a persuasive case that such recognition is now playing a smaller part in international relations and international law than formerly. The formal practice and doctrine of recognition may indeed disappear; but the necessity will remain for each "outside" state to decide with whom it will deal as the government of a state that has undergone revolution or a coup d'état. The author acknowledges this problem but he believes that cases of multiple claims to authority will be rare, with no real question in most instances.

WM. W. BISHOP, JR.  
*Board of Editors*

*Humanitarian Politics. The International Committee of the Red Cross.*  
By David P. Forsythe. Baltimore and London: The Johns Hopkins University Press, 1977. Pp. xiii, 298. Index. \$17.95.

To the knowledge of this reviewer, this work represents the first comprehensive treatment of the International Committee of the Red Cross (ICRC). The author has incorporated a thorough description and analysis of the functions of the institution, its structure and organization, and its role in the development of international humanitarian law.

The study first describes how the ICRC relates to the other components of the Red Cross movement, i.e., the National Red Cross Societies, the League of Red Cross Societies, and the International Red Cross Conference. Useful light is shed on how the different actors in the movement came into being, how their functions differ, and how they complement or mutually exclude one another.

The ICRC stands among the other nongovernmental organizations as a unique institution, dedicated to protection and assistance in conflict situations, a discreet actor in the world arena whose predominant tactical approach is that of friendly persuasion based on moral grounds. Ad hoc diplomacy is the central means of its protection and the Committee's pragmatic approach is well illustrated and documented in chapters dealing with political prisoners, hijackings, and kidnappings.

Traditionally, the ICRC's ad hoc diplomacy has been the background and foundation of legal development. A whole chapter reviews the Committee's legislative efforts. While successful in the past, the ICRC's efforts in the 1960's and 1970's are shown as having been controversial. Forsythe contends that too often the ICRC acted merely as a drafting secretariat and underestimated its potential for exercising influence in support of the law for armed conflict.

The ICRC is best known for its protection of one type of conflict victim, the prisoner of war, and to a lesser extent for its concern for the fate of civilians. Selected case studies point to the strengths and limitations of humanitarian protection as practiced by the ICRC and the difficulty of matching existing legal instruments to certain factual situations.

The chapter on the ICRC administrative process reviews some of the

recent structural changes undergone by the institution. The author welcomes the changes which were the result of much-needed self-evaluation. One still cannot say whether they will be able to meet new expectations and demands put upon the institution. The ICRC built its reputation on war, cooperation with nation-states and Christian, Western values. While the author believes this threefold description characterized the past milieu of the ICRC, he strongly believes that it no longer describes its modern milieu, and that in this change lie formidable challenges to the ICRC.

The efficiency of this unique institution is without doubt recognized by the author. However, definite criticisms also pervade the book, which stem from the author's personal belief that some departure from discreet incrementalism would lead to a greater humanitarian good. Although it is not immediately apparent, the author is generally critical of the ICRC's legalistic approach to action, its acceptance of the limitations imposed by the nation-state system, its secrecy, and its all-Swiss composition. He calls for boldness, more openness, and radical thought.

The book is occasionally repetitive. However, it expresses and echoes recent criticisms relating to the future effectiveness of the institution. While one may not be convinced that recent revolutionary humanitarianism is the best answer to the challenges to the ICRC brought about by a changing environment, the book is a welcome study of the ICRC and fills a gap in the literature on humanitarian law.

CHRISTIANE S. DELESSERT

*The Vienna Convention on the Law of Treaties.* Travaux Préparatoires. Compiled by Dr. Ralf Günther Wetzel. Edited and prefaced by Professor Dr. Dietrich Rauschning. Frankfurt am Main: Alfred Metzner Verlag GmbH, 1978. Pp. 543. DM 88. In English and German.

This volume contains the references to the legislative history of the 1969 Vienna Convention (the Convention) provided in Rosenne's book<sup>1</sup> and in addition includes the text, under each article, of Waldock's Reports and of the ILC Reports and Commentaries. These texts represent a small but significant part of the history and will be particularly useful to those students of international law who have no or no easy access to the full array of source material. German students will find that apart from the preface, a short direction on how to use the book, and the text of the articles of the Convention, the book is entirely in English.

In the introduction Dr. Rauschning provides a useful summary of the evolution of the Convention from 1949 to 1969. He discusses the prospects for its entry into force<sup>2</sup> with some mixed feelings. The Convention itself in the last paragraph of the preamble concedes that it may not be complete

<sup>1</sup> S. ROSENNE, *THE LAW OF TREATIES. A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* (1970). See review article by Herbert W. Briggs, 65 AJIL 705-12 (1971).

<sup>2</sup> As of December 31, 1977, 31 states had accepted the Convention as binding by ratification or accession. See ROSENNE, note 1 *supra*, at p. 5. Briggs notes that the number has risen to 33. See *United States Ratification of the Vienna Convention*, 73 AJIL 470-73 (1979).

and that questions not regulated by the Convention will continue to be governed by customary law. Then there is the question which rules or sub-rules are in the nature of codification and which represent progressive development of the law. And Article 34 limits the scope of the Convention *rationa personae* to parties. Rauschnig anticipates difficulties regarding which rules will apply between parties and nonparties and wonders whether the early object of the ILC's work, namely a code rather than a convention, as proposed by Fitzmaurice when he was the special rapporteur (1956-1960), was not a better one. In fact, he thinks it "entirely possible that the result of his [Waldock's] work in the form of the Vienna Convention will render its principal service in its function as a code, rather than as a formal, legally binding treaty" (p. 12). Preparatory work is bound to play a greater role if the Convention is used as a code rather than as an instrument binding on a limited number of states. The facts that the Convention, though not in force, has been invoked by and in proceedings before the ICJ, the European Court of Human Rights, and the German Constitutional Court, and that it has influenced recent textbooks, both indicate its wider role as a code (pp. 16-17).<sup>3</sup>

Moreover, the meticulous scholarship of the several special rapporteurs (Brierly, Lauterpacht, Fitzmaurice, and Waldock), the expertise of the members of the ILC and the Sixth Committee of the General Assembly, the comments by governments on the draft articles, and finally the debates at the two sessions in Vienna and the large majorities of states for each article and the Convention as a whole seem to Rauschnig to support the function of the Convention as a code even after its entry into force for a limited number of states.

LEO GROSS  
Board of Editors

*Soviet Yearbook of International Law*, 1976. Moscow: Publishing House "Nauka," 1978. Pp. 349. 3 rubles, 90 kopecks.

Can Eastern European scholars, who see resolutions of international organizations and conferences increasingly favorable to their positions, devise a theory to justify acceptance of these resolutions as law without opening the gates to dictation by a quasi-superstate? At their 1976 meeting these scholars struggled with the dilemma, noting particularly that the Final Act of Helsinki poses it in acute form. Presumably the task is how to assure the sanctity of the boundary decisions without opening Eastern Europe to verification of "Basket III."

The prominent G. I. Tunkin in his first lead article since 1971 concludes that a new "international juridical system" has come into being that includes more than international law (p. 13). Recommendations such as those in the Helsinki Act form a part of the system. While Tunkin admits that recommendations are not "law," he argues that they are "not devoid of

<sup>3</sup> To the cases may be added the 1978 *Aegean Continental Shelf* case before the ICJ, the *Beagle Channel* arbitration of 1977, and the Franco-British *Delimitation of the Continental Shelf* arbitration of 1977. See Briggs, note 2 *supra*, at 471-72.



a certain legal element" and are "partially legal" because they embody the coordination of wills of states and institute an "invitation" to the participants to observe the new rules.

Tunkin concludes that there are international rules which are distinct from international *law* rules (p. 11). Because they contain a mutual promise of the parties to observe them, they are "moral obligations" (p. 18); they are more flexible, to be sure, than legal rules, but they provide the basis for moral pressure and social sanctions to assure their observance. If violated, international denunciation (p. 15) and public pressures (p. 18) are appropriate.

Tunkin sees developing out of this complex, multilevel situation a new type of international law, which he calls a law of the transitional period from capitalism to communism. Legal historians will recognize this as the title of E. A. Korovin's book of 1924, a title for which he was sharply criticized later by E. B. Pashukanis. Now Tunkin revives the term for a situation quite different from that of Korovin's time, when the Soviet Union stood alone in efforts to remake law by unilateral action. Today, more than half the world shares in resolutions of revision.

Tunkin presided at the 1976 meeting as usual. One of the major themes was the Act of Helsinki, but attention was also focused on the Law of the Sea Conference (p. 231). Danger was anticipated from majority efforts to transfer title to the seabed to an international agency and to extend territorial waters to include economic zones. Both steps looked to speakers like a potential for dictation by a quasi-superstate and a closing of the seas to navigation. Presumably the Soviet Union as a great naval and merchant marine power wants to retain as much freedom of action as possible, and also to avoid dictation to it by one or another majority. Thus, resolutions and majority lawmaking have advantages, but there are also disadvantages to be analyzed.

Since the UN General Assembly is the principal source of recommendatory resolution, speakers tried to assess its activities. Evidently, the rapporteur on the topic was reluctant to give it high praise, but he was taken to task for underplaying its "democratic progressive positions" on aggression, anti-colonialism, and racism, all of which should have been recognized as desirable from the Soviet viewpoint.

Technological advances, notably space shuttles and satellite TV broadcasting, worry some authors in this volume. One wants to define precisely "air space" so that shuttles will require the consent of ground countries before they take off. Another opposes broadcasting to peoples throughout the world without the consent of their home states. Increasingly, subjects pertaining to relations between socialist states concern Soviet legal scholars (for example, economic integration, scientific, technological and customs cooperation). Conversely, some topics are fading from view (colonialism, peaceful coexistence, and *détente*). Tunkin explains this with the phrase: "Life goes forward." Even general and complete disarmament is no longer heralded as a desideratum. Instead, an author calls

for "equal security" as the principle to be sought in arms control. Curiously, apartheid is not the topic of a single paper.

Once again the editors deserve praise for their bibliographies, which are now extended to Eastern European authors (interestingly, the Czechs and East Germans are the most prolific). The English summaries now cover all articles, as they have of recent years, and the grammar is much improved. Only the book reviews and summary minutes of the annual meeting of scholars remain solely in Russian. For the second year Western European books are reviewed. The 1975 volume treated the *Yearbooks* of France and Spain. This volume reports on the *British Year Book*.

Finally, it may be said that the annual volume has become valuable to assess possible trends in Soviet diplomacy. While disputes emerge among Soviet scholars, it is evident that the measure of coordination of thought exceeds that of Western scholarly groups. Consequently, there is more in each *Yearbook* than meets the eye.

JOHN N. HAZARD  
Board of Editors

*Foreign Relations of the United States, 1949, Volume V: Eastern Europe: The Soviet Union.* Washington: U.S. Govt. Printing Office, 1977. Pp. x, 1011. Index. \$11.25. (Dept. of State Pub. 8852.)

This volume treats events of 1949 in U.S. foreign relations with Eastern Europe and the Soviet Union, for example, the violation of the human rights clauses of the Treaties of Peace with Bulgaria, Hungary, and Romania, exports to the Soviet Union, and the Yugoslav-Cominform dispute ("Titoism"). Reading these documents reminds one of the basic principles behind much of America's foreign policy, the never-ending surprises in the world of international diplomacy, and the sometimes unexpected impact of the enforcement of domestic legislation on foreign affairs.

Various documents discuss the necessity of raising questions in the UN General Assembly on the violation of human rights in satellite countries. In deciding affirmatively upon that course of action and upon securing an advisory opinion from the International Court of Justice concerning implementation of the Treaties of Peace with Bulgaria, Hungary, and Romania, the United States made one statement that is particularly instructive: "We cannot agree that even from an humanitarian point of view we do these peoples a favor by remaining silent and inactive. That some resistance leaders should perhaps meet ruthless suppression is surely better than that entire populations should surprisingly lose everything that makes human life worthwhile" (p. 231).

The policy chosen by the United States in 1949 might well be viewed as one appropriate for emulation in the 1980's in relation to the same countries and others. Such a policy provides concrete tactics to implement a traditional tenet of the American diplomacy and gives recognition to a unique quality of the American culture in a world of nations not providing a similar reality.

George Kennan, in a note, reminded "Chip" Bohlen that the Soviet-Nazi

Nonaggression Pact of August 23, 1939, was a gesture of disgust with the West (p. 593), and that another unexpected action by the Soviets might well occur. He said the lesson to learn is that the totally unexpected ought to be expected, but is almost impossible to forecast. (Witness the recent events of 1979 alone: the Egyptian-Israeli Peace Treaty, the Iranian revolution, and the Soviet occupation of Afghanistan.)

When the Justice Department won an indictment in 1949 against Armortorg Trading Corporation, the Soviet trading company incorporated in New York, and its principal officers for failure to comply with the Foreign Agents Registration Act of 1938, and had the officers arrested, the Soviets retaliated and arrested the American consul general in Mukden. The incident was closed when Armortorg pleaded *nolo contendere* and registered under the act. With the increase of state-controlled enterprises engaged in international transactions in the postwar era and their acceptance of conforming to requirements of foreign jurisdictions, this type of dispute is unlikely to occur again. However, the attempt to apply domestic legislation to essentially foreign policy problems continues, as is exemplified by the recent OPEC litigation in California.

It is always a pleasure to read a volume of *Foreign Relations*. It often seems to this writer like reading yesterday's newspaper; similar problems exist today with changes only in names and dates, but the reader is left with a better sense of continuity and understanding.

STUART S. MALAWER  
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*Transport Laws of the World*, Volume I. Volume II projected. Dobbs Ferry, N.Y.: Oceana Publications, Inc.; Rome: UNIDROIT (The International Institute for the Unification of Private Law), 1977. \$75.00 per volume.

This compilation of treaties joins other useful works<sup>1</sup> in providing direct access to the provisions of international transportation legislation by treaty which has become vital to lawyers, operators, insurers, and users of transportation services. The present volume is prepared in loose-leaf form in order to accommodate in the future the many proposed changes in international transport law.<sup>2</sup> The work was released in October 1977, and is part of a general transnational legal service edited by Kenneth R. Simmonds. It was compiled and edited by Malcolm Evans of UNIDROIT,

<sup>1</sup> See, e.g., UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW, 2 vols. (1971); N. SINGH, INTERNATIONAL CONVENTIONS OF MERCHANT SHIPPING (8 British Shipping Laws Series 1963); A. LOWENFELD, *Documentary Supplement to TEXT ON AVIATION LAW* (1973).

<sup>2</sup> A major change in the allocation of risks between shipper and carrier was accomplished in the Hamburg Rules of 1978. See 17 ILM 608 (1978). A diplomatic conference under the auspices of UNCTAD was held in Geneva in November 1979, to deal with the subject of multimodal shipping, encompassing rail, road, air, and sea transport. The draft convention document is UN Doc. TD/B/AC.15(VI)/WG/L.1/Add.1 (March 8, 1979).

Rome, and by the late Professor D. J. Hill of Queens University, Belfast, whose lamentable passing at an early age is deeply regretted by all students of transport law.

Most of the perils of typographical errors have been eliminated by reproducing the conventions from authentic texts previously printed. Short introductory essays deal generally with the conventions in each of the four transport modes studied (road, rail, air, and sea), but the publication thus far does not present textual analysis or case law. Volume I contains 5 conventions on road transport, 5 conventions on rail transport, 8 aviation conventions, and 18 maritime conventions. The road and rail conventions are essentially European in their concerns and the United States is not party to them. The United States is party to only two of the air conventions, the Warsaw Convention of 1929 and the 1948 Convention on Rights in Aircraft, and only three of the maritime conventions (1910 Collision, 1910 Salvage, 1924 Bills of Lading). This absence of U.S. participation may be explained by the fact that many of these conventions, prepared by transport operators for their protection from claimants, are hostile to U.S. interests as users of transportation services. Obviously, the United States cannot expect the world community to defer repeatedly to its wishes, but international lack of uniformity with respect to many provisions in these conventions has been regarded in the past as preferable to anticonsumer treaty obligations which are difficult to explain to the voters.

When this project is complete there will be a worldwide topical analysis of international transportation problems which can only further the progressive development of the science of comparative law, since developments in treaty, statute, regulation, arbitration, and case law will be presented in connection with topics regarding warehousing, customs, freight forwarding, combined transport, inland waterways, and road, rail, air, and sea transport.

JOSEPH C. SWEENEY

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*Conférence de la Haye de droit international privé. Actes et documents de la Treizième session 4 au 23 octobre 1976. Tome IV, Contrats d'intermédiaires (Agency).* The Hague: Imprimerie Nationale, 1979. Pp. 440. Gld.100.

An earlier review<sup>1</sup> covered volumes II and III of the *Acts and Documents* of the 13th session of the conference, which dealt with the topics of marriage and matrimonial regimes. Volume IV has now been published on the subject of the law applicable to agency.

Agency presented special problems arising from the fundamental differences between the common law and civil law approaches to the trinity of relationships—principal-agent, agent-third party, and principal-third

<sup>1</sup> Reviewed in 73 AJIL 175 (1979).

party. An initial try in 1956 was abandoned. The project was reinstated in 1972 and a special commission completed a preliminary draft convention in 1975, which became the working paper for the 1976 session of the conference. Many essential questions were unanswered in the draft convention and were deliberately left for discussion at the 1976 session.

It was therefore no surprise that the 3 weeks of the 1976 session were insufficient to complete a final text. The Final Act of the 1976 session accordingly resolved to follow the rarely used technique of creating a new special commission to complete the final text, which would be authoritative without referral back to the 1980 session of the conference for approval. The final text was completed in June 1977.

Volume IV is necessarily a large work, containing 440 pages and perhaps more than 400,000 words, much of it in bilingual French-English text. However, it constitutes an extraordinary source of comparative law material on agency, as well as an explanation of the local law of the participating countries.

The first section of volume IV contains a report by the staff of the conference on the law applicable to agency, printed in bilingual French and English text; an extended questionnaire to governments, also printed in bilingual text; the responses of the governments to the questionnaire printed only in the language of the individual responses; staff resumes of the responses in bilingual text; the 1975 preliminary draft convention, printed in bilingual text; and a lengthy bilingual Report on the Draft Convention by Professor Karsten of London, the rapporteur. The report points out the problems faced by the special commission and lists questions that were not resolved but were left for consideration at the 1976 session.

The next section presents the text of the debates and the working papers of the 3 weeks of the 1976 session. As always, these are printed only in the language used by each speaker or draftsman, and a full understanding is available only to those who read both the official languages of the conference.

The final section, which is half the total book, reports the work of the 1977 special commission. It includes a staff report and proposed agenda in bilingual text; the debates of the 9 days of the commission's discussions and the more than one hundred working documents submitted; the final text of the convention; and an invaluable 54-page Explanatory Report in bilingual text by Professor Karsten. The report includes a general discussion of agency problems, indicates the extent and magnitude of the comparative law differences, and analyzes the convention article by article.

It remains to be seen how successfully the convention has bridged the civil law-common law conceptual and practical differences. At the time this review was prepared, the Department of State was considering the convention but had not reached a decision whether to recommend to the President to submit it to the Senate for advice and consent.

Irrespective of the ultimate acceptance of the convention, volume IV is a valuable tool for American scholars and practitioners interested in the

comparative law of agency and in the local law of the member countries of the Hague Conference.<sup>2</sup>

PHILIP W. AMRAM

*Of the District of Columbia Bar*

## BRIEFER NOTICES

*The Changing United Nations Options for the United States.* Edited by David A. Kay. (New York and London: Praeger Publishers, 1977. Pp. x, 226. Index.) The characteristic defects of symposia include unevenness in the quality of the parts, repetition stemming from imperfect understanding of the division of labor among contributors, and lack of a pattern or theme giving unity to the collection. This volume, containing essays by 18 contributors, is neither better nor worse than most other symposia in these respects. Three of the essays deal primarily with American attitudes toward, and behavior in, the United Nations and its associated organizations. The others treat selected problems of international relations that are, in some measure at least, active concerns of the United Nations system, and devote more or less attention to issues of American policy. Topics range from the protection of human rights to the perennial Conference on the Law of the Sea, with considerable concentration on North-South controversies and problems of arms control.

Perhaps the right question to ask about such a symposium is whether it includes enough good pieces to justify buying it (or requiring one's students to buy it). The easy answer is that an essay by John Holmes makes any book worth its price. Holmes's offering in this volume, "A Non-American Perspective" on the relations between the United States and the United Nations, is sufficiently wise, judicious, and thought-provoking to confirm that generalization. There are other useful papers in sufficient numbers to suggest resort to the bookstore rather than the Xerox machine. Alfred Hero's study of American public opinion concerning the United Nations can provide the raw material for a fine seminar discussion. John Temple Swing contributes a first-rate summary and analysis of the law of the sea negotiations. Maxwell Finger makes shrewd observations about the peacekeeping function of the United Nations. Edward Luck's paper on international trade in conventional arms provides a model of balanced political analysis that graduate students and most of their teachers could study with profit.

Considered as a whole, this book stands up rather well. Even the less distinguished contributions are spotted with points worth pondering. Remarkably little is shrill or silly in the discussions of North-South issues, and most of the authors display a healthy awareness of both the merits and the defects of international organizations and of both the advantages and the disadvantages of multilateral ways of doing diplomatic business.

INIS L. CLAUDE, JR.  
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<sup>2</sup> For excellent studies of the conceptual framework and the convention, see Pfeifer, *The Hague Convention on the Law Applicable to Agency*, 26 AM. J. COMP. L. 434 (1978); Hay & Müller-Freienfels, *Agency in the Conflict of Laws and the 1978 Hague Convention*, 27 AM. J. COMP. L. 1 (1979).

*Droit et Pratique de la Fonction Publique Internationale.* By Alain Plantey. (Paris: Centre National de la Recherche Scientifique, 1977. Pp. 449. Index.) Alain Plantey's book will be greeted with satisfaction by all those who in one way or another have to deal with questions of international administration. This field includes at present, according to the author, about 100,000 civil servants belonging to more than two hundred international organizations. Hence the complexity of the issues, the variety of the relevant rules, and the difficulty in assessing the legal situation.

The author has endeavored to synthesize the different juridical systems and to bring out their common features. The first part of his book contains a brief historical account and a description of the different categories of international civil servant and of the sources of law regulating the international public function. The second part—entitled "Problèmes politiques"—bears on the delicate question of the compatibility of national allegiance with international loyalty, as well as on the political rights connected with the international function. It is followed by questions relating to nomination, cessation of functions, professional obligations, financial and social advantages, privileges and immunities, and finally, administrative and judicial remedies. The work is completed by an exhaustive bibliography and a valuable index.

Plantey's study is based on a very close examination of the relevant practice. Each section contains references not only to the rules and regulations concerning civil servants but also to the main decisions of the different international administrative tribunals, especially those of the ILO and the United Nations, and the Court of the European Communities. If one thinks of the several hundreds of judgments that have been rendered by those jurisdictions, one will appreciate all the more the tremendous amount of work invested in this book.

The author does not intend to elaborate a theory of the international public function, as can be found in the already classic works of Bastid<sup>1</sup> and Bedjaoui.<sup>2</sup> Instead, he limits his inquiry to analyzing the present legal status of the international public function. A high ambition, indeed, which Plantey perfectly succeeds in fulfilling.

PHILIPPE CAHIER

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*The Organs of International Organizations.* By Zbigniew M. Klepacki. Translated by M. Paczynska, M. Zukos-Rozmaryn and A. Adamowicz. (Alphen aan den Rijn: Sijthoff and Noordhoff International Publishers BV; Warsaw: Polish Scientific Publishers, 1978. Pp. xii, 137.) The author is surely correct in arguing that we do not yet have a comprehensive comparative study of the various organs of international organizations. However, his attempt to fill the gap falls short of the mark.

After an all-too-brief review of criteria used by Polish scholars to classify organs of international organizations, Klepacki, in chapter I, discusses organs according to the legal status of their members. He then reviews their functions ("importance"; executive-governing; administrative; control; peaceful settlements; consultative and advisory; procedural; operational), and finally discusses them according to their "importance" and the number of their members. In considering the history of various organs in chapter II, he differentiates among interstate organs; organs of officials; parliamen-

<sup>1</sup> BASTID, *LES FONCTIONNAIRES INTERNATIONAUX* (Paris 1931).

<sup>2</sup> BEDJAOU, *FONCTION PUBLIQUE INTERNATIONALE ET INFLUENCES NATIONALES* (London 1958).

tary organs; organs that articulate interests of social and economic groups (e.g., ECOSOC); and principal and subsidiary organs. He then uses these categories to discuss the composition and legal status of organs in chapter II and the functions of organs in chapter IV.

From the perspective of a Western observer, his study would have been more useful had it taken into account concepts used, for instance, by Bowett in his *Law of International Institutions* or Cox and Jacobson in their *Anatomy of Influence*, where the actors, contexts, and processes of decisionmaking in international organizations are comparatively analyzed. In addition, the number of organs of international organizations has increased markedly in recent decades; yet the author gives no explanation for this phenomenon. Finally, the study is oriented to organs of the European Community and to some UN organs. Absent is a discussion of the UN Trusteeship Council, the Economic and Social Council and its subsidiary bodies, the International Law Commission, various subsidiary organs of the UN Specialized Agencies, and the Organization of American States.

Perhaps the awkward translation accounts for the difficulty in understanding the author's presentation. Yet after several readings, this reviewer believes that scholars and practitioners would be well advised to hang on to their copies of Bowett, and of Cox and Jacobson, and read the original documents of the organs of international organizations.

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*International Law Through the Cases* (4th ed.). By L. C. Green. (Toronto: The Carswell Co., Ltd.; Dobbs Ferry: Oceana Publications, Inc., 1978. Pp. xxxii, 835. Index. \$50.) Leslie Green's fourth edition retains the basic approach and organization of the third.<sup>1</sup> Long excerpts from court rulings and individual opinions illustrate various aspects of international law. Commentary remains restricted to summaries of facts in the case and to footnotes discussing technical points, citing treaties, or referring to other discussions of the same point.

Many areas of international law have changed greatly in the eight years between editions; to the extent these changes have been reflected in case law, they are treated here. Thus decisions of the European regional courts strengthening human rights and defining EEC-member state relations receive much attention. New chapters are devoted to the currently more prominent issues of air law and environmental protection. Chapters on neutrality (one 1915 case) and "world law" (four dissenting opinions now used in other chapters) which are of less interest today were dropped. Every chapter contains at least one new case (including *Western Sahara*, the *Nuclear Test* cases, and the *Namibia* Advisory Opinion); a smaller number of old cases (including *Status of South West Africa* and *The Gagara*) were dropped.

Other changes yield mixed results. Retitling of chapters in part 3, "Jurisdiction," removed an overemphasis on the territoriality principle, which reduces confusion and better matches title to content. Combining the old chapter on interpreting treaties with that on their meaning, conclusion, and effects created a chapter that attempts too much. The heavily state-centric view of the international community (human rights is treated

<sup>1</sup> Reviewed in 64 AJIL 213 (1970).



as an issue in European supranationalism) remains, as does the relative weakness of chapters on armed conflict. The balance of cases favors the new over the classic more than did the third edition.

Unless the publishers plan a paperback edition, the new edition cannot serve its intended function as a supplement to a textbook because the current price puts it beyond the reach of all but the wealthiest students.

M. J. PETERSON  
Harvard University

*EG-Staaten und Vereinte Nationen. Die politische Zusammenarbeit der Neun in den UN-Hauptorganen.* By Beate Lindemann. (Munich and Vienna: R. Oldenbourg Verlag, 1978. Pp. 277. Index.) This is an interesting book on the political cooperation of the nine Common Market member states in the principal UN organs and above all in the UN General Assembly. In a first part, entitled "Western Europe in the United Nations," it reflects on regionalism and regional groups, on the concept of "European Political Co-operation," and on the problems of such cooperation. In a second part, it describes the mechanism and effect of the cooperation of the European Community members in the UN General Assembly since 1973. A very detailed and thorough annex provides additional information on specific voting behavior.

European Political Co-operation is a system of traditional intergovernmental consultations that has been practiced in New York since 1971, mainly on the basis of the Luxembourg and Copenhagen reports of 1970 and 1973 and common instructions dating from the same years. It applies in its present, technically refined form to practically every point of the General Assembly's agenda. During the 30th General Assembly in 1975, 173 coordinating meetings took place; in 1976, 190; in 1977, 242. A rapidly increasing number of common statements have been made. The visibility of the European Community has been further enhanced by its observer status.

Lindemann is appropriately careful in drawing conclusions, however. The success rate, evaluated in terms of uniform voting, is far from spectacular (the percentage from 1973 to 1977 has hovered between 47 percent and 65 percent). A Third World observer has made the telling comment that the Common Market states vote uniformly on unimportant matters and differently on the important ones. Lindemann's research shows that in 1976 France, Denmark, the Netherlands, and Ireland most often deviated from the majority. One wonders, moreover, whether the percentage points would differ much with or without political cooperation. Evidently, this is an extremely delicate issue to quantify.

The book is sober, practical, and most informative; it is only a pity that Lindemann did not elaborate on the altogether too succinct theoretical remarks in her concluding chapter.

LUZIUS WILDHABER  
University of Basel

*Völkerrecht und internationale wirtschaftliche Zusammenarbeit. Referate und Diskussionen eines Symposiums veranstaltet vom Institut für Internationales Recht an der Universität Kiel am 9./10.11. 1976.* Edited by Wilhelm A. Kewenig. (Berlin: Duncker & Humblot, 1978. Pp. 262. DM 68.) In November 1976, the Institute for International Law of the University of Kiel organized a symposium on four compelling problems

of international law: expropriations in the North-South conflict, transfer of technology, international interdependence in the realm of raw materials, and a new monetary world order. While it is regrettable that this volume comprising the minutes of the symposium was delayed in publication well over a year, during which time numerous writings were published on these very subjects, the consistently high level of the presentations at the conference has preserved its freshness. The symposium had 36 participants, predominantly university professors, 29 of whom came from West Germany (including 10 from Kiel) and 7 from other countries of continental Europe (only 1 from an Eastern socialist country). The *rapporteurs généraux* were, listed in the order of presentation: Karl Meessen (Augsburg), who primarily explores the question of adequacy of compensation for expropriations; Kewenig (Kiel), the organizer of the symposium, whose primary subject is the necessity and nature of an international code of conduct on transfer of technology; Tomuschat (Bonn), who researches problems of world distribution of raw materials, shielded by the concept of sovereignty, to be overshadowed by other more humane and more universal principles; and, Hahn (Würzburg), who explores Bretton Woods and its sequelae—the problems of gold, the dollar, and convertibility—that are with us to stay.

Each lecture is followed by a list of the main theses of the lecturer and by a searching discussion. Most of the volume is in German, with a few parts in English.

The lectures and most of the discussions are of excellent quality. Among the discussants are some luminaries, such as Seidl-Hohenveldern. The subjects, though commonplace in literature, lectures, all types of panels, and even newspaper articles, have seldom been presented with more solid expertise, historic perspective, analytical acumen, and serious, methodical approach. The discussions are provocative.

Finally, a few observations, perhaps not weighty. The style of the symposium is serious, almost solemn. Ponderous sentences follow each other, page after page. The American reader will miss the lighter vein—the anecdotes—to which he is accustomed and, here and there, shorter sentences. In addition, the German text is practically perforated by English terms, untranslated (probably held untranslatable by the authors) into German.

ANDREW FREEMAN  
*Of the New York Bar*

*México y la zona de pesca de Estados Unidos.* By Jorge A. Vargas. (Mexico City: Universidad Nacional Autónoma de México, 1979. Pp. 140.) This comparative study examines measures taken by Mexico and the United States to manage and conserve fishery resources within their 200-mile coastal zones. The author, a leading Mexican expert on the law of the sea, focuses on the (U.S.) Fishery Conservation and Management Act of 1976 (FCMA), with special attention to those provisions of greatest importance to foreign fishermen and fisheries development in Mexico. A clear description and legal analysis of the FCMA refers to pertinent Mexican measures, which include an amendment to the renowned Article 27 of the Mexican Constitution, administrative supervision and decisionmaking, and the National Plan of Fishery Development 1977-1982. Vargas compares law enforcement and planning functions in particular, concluding that Mexico needs to develop more detailed scientific management of its fisheries and fishing industry, beyond the recital of goals and objectives set forth in the National Plan.

A comparison between Mexico's National Plan and the FCMA's National Fishery Management Program reflects contending characterizations of the coastal zone, which for Mexico is *sui generis* but for the United States, part of the high seas. Despite the conceptual disagreement, Vargas identifies an emerging framework of bilateral conflict resolution and cooperation. The municipal measures of both countries are examined within an international context, principally of UNCLOS III and a bilateral treaty on fisheries off U.S. coasts. The author regards this treaty as a diplomatic success whose advantages for Mexican fishing interests, however, have been limited, in part because Mexico insufficiently appreciates the value of both coastal and distant-water fishing. Somewhat quaint references, in a prologue, to the *vecino país del norte* and, in the text, to the *potencia marítima del norte* together remind the reader that, given the emerging custom of 200-mile zones, neighborliness and power, whether *del norte* or *del sur*, will define cooperation in fishery management between Mexico and the United States.

This book provides an excellent introduction to the FCMA for readers of Spanish. A translation of title II of that statute ("Foreign Fishing and International Agreements") and the Spanish version of the bilateral treaty appear as appendices. The comparative summary of Mexican measures, of interest in itself, highlights the contours of two different approaches to the management of interdependent resources.

JAMES A. R. NAFZIGER  
Willamette University College of Law

*Political Leadership in NATO. A Study in Multinational Diplomacy.* By Robert S. Jordan. (Boulder: Westview Press, 1979. Pp. xiii, 316. Index. \$20.) This is a study of the performance of the first four Secretaries General of NATO—Lord Ismay, Paul-Henri Spaak, Dirk Stikker, and Manlio Brosio. After a rather shaky introduction, marred by an effort to distinguish the notions of alliance and collective security that reflects a curious misunderstanding of the latter, the author examines the record of each of these men in turn. Because he is concerned primarily with their effectiveness as political leaders of the alliance, he finds it necessary to sketch the major features of the political context within which they operated. The result is a useful survey of issues and trends in NATO during the period from 1952, when Lord Ismay took office, to 1971, when Brosio resigned.

In NATO, which is fundamentally an alliance and only incidentally an international organization, the potential role of the Secretary General differs considerably from that of the administrative chief of the typical international organization. The Secretary General has a military counterpart, SACEUR, whose eligibility for political leadership is at least as great as his own. The permanent representative of the United States has, for obvious reasons, a weight that the Secretary General cannot match. In some sense, the leadership of NATO is inescapably American, and the Secretary General has to discover and develop a place for himself within the framework set by the policy of the United States. As Jordan indicates, the Secretary General tends to become a spokesman for the European members and a mediator between them and the Americans. The author is well aware that his study might have been focused with at least equal profit upon Dwight Eisenhower, Lauris Norstad, Thomas Finletter, and Harlan Cleveland.

There are, however, problems and possibilities of secretary generalship that transcend the peculiarities of organizational settings. Jordan refers only briefly to points of comparison between the styles of NATO's Secretaries

General and of those who set the patterns of the profession in the League of Nations and the United Nations. He presents a keen analysis of the approaches and methods of his four subjects, however, and thereby provides the reader with valuable material for an expanded conception of the nature of the secretary general's position in modern international organization.

INIS L. CLAUDE, JR.  
University of Virginia

*Relativno djelovanje međunarodnih ugovora.* By Budislav Vukas. (Zagreb: Školska knjiga, 1975. Pp. 179.) This is a comprehensive study of the effect of treaties on the rights and obligations of third parties. The author defines third parties as including both subjects of international law that are not parties to a given treaty and all juristic and physical persons who are not under the jurisdiction of the parties to the treaty on the basis of their personal or territorial sovereignty and do not belong to their organizational structures. After defining his subject, the author discusses the historical and comparative analogies of the law of third-party beneficiary contracts. He then examines international practice with respect to the doctrine *pacta tertiis nec nocent nec prosunt*. This background serves as the basis for a critical appraisal of the provisions of the 1969 Vienna Convention on the Law of Treaties on the subject. The concluding chapter discusses the role of treaties in creating rights and obligations for international organizations and individuals and the role of widely accepted treaties in the formation of customary international law.

Given the long history of great-power intervention in deciding the fate of the Yugoslav peoples without attention to the wishes of those involved, one might have expected the study to be highly polemical. In fact, the subject is treated in a very careful, traditional scholarly manner.

PETER B. MAGGS  
University of Illinois

*International Law Perspectives of the Developing Countries. The Relationship of Law and Economic Development to Basic Human Rights.* By Charles Chukwuma Okolie. (New York, London, Lagos: NOK Publishers, 1978. Pp. xii, 369. Index. \$22, cloth; \$8, paper.) The author suggests that the relations between developing and developed countries, as they have evolved to date, are relations of "involvement" between the parties rather than relations between equal states in "dialogue," the traditional view in international law.

. . . [T]he appearance of newly-independent states surviving at an economic level far below them has encouraged the industrialized nations to undertake certain resource transfers (aid) to sustain and develop their poorer neighbors. . . . Their "involvement" approach . . . dissolves the lines between transferor and transferee in its attention to the problems of development of the people in the transferee's country.

Whereas the law developed to meet the situation of nation states in a dialogue (or adversary) relationship, a new body of law is needed—and, in fact, is forming—in response to the new relationships.

"Involvement" is perceived by the author as a benevolent and mutually advantageous intervention. Strict notions of sovereignty are anachronistic anyway in this era of military and economic interdependence. To a de-

veloping country, the really important attribute of sovereignty is dignity. The aims of development are to achieve dignity. To the industrialized countries, however, development is perceived in terms of resource allocations and higher standards of living. This difference of perceptions sometimes leads to political controversy.

The author examines the institutions and practices related to development to find support for his view that new legal principles and new uses of law are evolving in response to the changes among states that he describes. In this process, he discusses the World Bank, UNCTAD, EEC-African relations, socialist and Western approaches to development assistance, and some historical background.

The book's main contribution lies in the author's conceptual observations; no primary research is apparent. These observations and concepts, however, are scattered throughout the book and are neither adequately developed nor tied together to form a consistent hypothesis. The author's descriptions of institutions and practices do not add to what is already well known to most readers, but, instead, they distract from the author's ideas. Since the ideas appear to be the product of considerable thought and experience, the reader with the patience and interest to ferret them out will find this book worth reading.

ALLAN ROTH  
*Rutgers University*

*Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws.* Edited by Joseph P. Griffin. (Chicago: American Bar Association, 1979. Pp. xii, 241. \$20.) This short, but significant book consists of a carefully edited and quite readable version of the proceedings of two American Bar Association panels dealing with the highly controversial questions surrounding the extraterritorial application of United States antitrust laws, especially as outlined in the Department of Justice *Antitrust Guide for International Operations*. Underlying all is the obviously sharp conflict engendered by attempts at extraterritorial enforcement in the face of conflicting rules abroad and the often injured dignity of foreign sovereigns. Special emphasis is placed upon the myriad problems posed in the *Guide* and specific topics of current interest, such as the scope of the Foreign Sovereign Immunities Act of 1976, the impact of the Supreme Court's plurality opinion in *Dunhill* relating to the so-called commercial exception, and the recurring difficulties associated with discovery and document production abroad like those raised in the complex Uranium Cartel litigation.

Like all such compilations, this is neither a formal text nor a general reference work. It does, however, touch virtually all the main areas of antitrust concern in ranging from distribution, to licensing, to mergers in its discussion of the hypothetical examples found in the *Guide*. The orderly treatment of the *Guide* is both informative and penetrating, whatever one's level of expertise or particular field of interest. Griffin has very helpfully appended the *Guide* itself for easy reference and added extensive footnotes to each presentation as an aid to further inquiry. What is most significant, though, is the insight this book offers into the thinking of the distinguished panelists such as John Shenefield, Lord Hacking, Professor Rahl, and other leading authorities. These are the practitioners, judges, and commentators who must deal most directly with the problems under discussion. The wide divergence of their views is only underscored by the attempt each makes to defend often difficult positions and, at the same time, stake out some little common ground for agreement, such as might be found in the "jurisdic-

tional rule of reason" adopted in the *Timberlane Lumber Company* case. In addition to presenting a lively debate, the book helps to bring into focus the growing seriousness of the extraterritoriality question while giving the reader exactly the perspectives the title promises.

JOHN R. LACEY

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State of Connecticut

- *The Whaling Issue in U.S.-Japan Relations*. Edited by John R. Schmidhauser and George O. Totten, III. (Boulder: Westview Press, 1978. Pp. xii, 275. \$17.) The editors of this collection of articles on whaling are professors of political science at the University of Southern California at Los Angeles. The contributors represent a number of marine sciences as well as law, economics, and international relations. The problems at issue are outlined in the introductory chapter and may be described as ideological. American conservationists and public opinion have seen the Japanese whaling industry as bent on killing as many whales as possible and on making profits before whaling becomes commercially unprofitable, while the Japanese industry and opinion have viewed the antiwhaling conservationists as hypocritical doctrinaires. Both points of view are discussed in the book in the objective spirit that characterized the deliberations at the American-Japanese interdisciplinary conferences in 1976 and 1977, described on pages 257-75.

The book is of value to the international lawyer in that it provides material for the current discussion *de lege ferenda* on the law of the sea within and outside UNCLOS. Some of the contributions can also be said to clarify what appears to be an emerging law, namely the rules concerning the 200-mile exclusive economic zone, as outlined in the UNCLOS Revised Single Negotiating Text of 1976. The articles by Elmer A. Keen, Carl G. Christol, and Kazuhiro Kurosawa ought to be considered by international lawyers as they illustrate the impact that the new law of the sea (now under preparation), and also regional or bilateral agreements, may have, not only on whaling but on fisheries in general. The essays in this book may further the understanding of international legal problems of a wider relevance than those that have given the book its title.

HILMING EEK

University of Stockholm, Emeritus

*The Australian Year Book of International Law*. Volume 6. A survey of current problems of Public and Private International Law with a section of Australian Practice in International Law for the years 1974 and 1975. Edited by D. W. Greig. (Canberra: Australian National University, 1978. Pp. xxiii, 389. Index. \$A25.) A new edition of the *Australian Year Book of International Law* is always welcome. In the past it has appeared only sporadically. Volume 5, which was published in 1975, dealt with the years from 1970 to 1973. The Faculty of Law of the Australian National University has assumed financial responsibility for the *Year Book* from the former commercial publisher. If this means an increase in the frequency of publication, it is a welcome development.

The volume under review contains a number of thought-provoking essays and a 194-page section on Australian practice which, in itself, is worth the price of the book.

The essays are not limited to 1974 and 1975. In fact, the first essay by D. H. N. Johnson of Sydney University is a challenging criticism of two

landmark UK cases decided in 1977. These are the *Philippine Admiral*<sup>1</sup> decided by the Judicial Committee of the Privy Council and *Trendtex Trading Corporation v. Central Bank of Nigeria*<sup>2</sup> in the Court of Appeal. These cases mark the abandonment by the British judiciary of the absolute theory of sovereign immunity and the adoption of the restrictive theory as more consonant with current customary international law. Johnson does not feel that either Court has sufficiently demonstrated a change in customary international law favoring the acceptance of the restrictive theory.

D. F. J. De Stroop of the Australian Department of Foreign Affairs discusses Article 75 of Protocol 1 of the 1977 Protocols to the Geneva Red Cross Convention of 1949. It is a valuable exposition of the drafting history of this provision, which extends the class of persons protected in the 1949 conventions. The essay would have benefited from the inclusion of the full text of Article 75 either in a footnote or in an appendix.

D. W. Greig, the editor, discusses the *Interpretation of treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty*, a treaty that is of special interest to Australia as a potential major supplier of uranium. He favors an evolutionary interpretation responsive to political developments rather than a purely textual interpretation.

The most original essay is by Patrick J. O'Keefe and Lyndel V. Prott, both of the University of Sydney, on *Australian protection of historic shipwrecks*.

The essay by K. B. Berry of the Australian Department of Foreign Affairs on the *Anglo-French Continental Shelf* arbitration is one of the more lucid expositions of that case. There are also notes on *Australia's bilateral trade treaties—developments 1972–1975* by R. Burnett of the Australian National University, and on *Recent developments in Private International Law—1974–1975* by P. E. Nygh of Macquarie University.

JEROME B. ELKIND  
University of Auckland

*A Source Book of Socialist International Organizations.* Edited and translated by William E. Butler. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978. Pp. xxiv, 1143. Dfl.240; \$111.50.) Dean William E. Butler, currently teaching at University College, London, has assembled, in English-language translation, the constitutions, charters, and basic documents of the main socialist international organizations: COMECON itself, of course, but also the COMECON specialized agencies and commissions, bureaus, and institutes; the Bank for Economic Coöperation, and the International Investment Bank; specialized organizations for industry (ball-bearings, metallurgy, chemical products), for transport, railways, and shipping, and for postal and telecommunications (including, here, *Intersputnik*); international scientific and technical organizations (including nuclear and computer research); agencies and procedures for arbitration of civil law and of commercial disputes; multilateral economic associations and joint enterprises; agencies and procedures for multilateral cooperation among academies of sciences. The final section is a listing of special agreements, including those on fishing in the Danube and in the Black Sea, the Convention on the Danube Commission, and the Warsaw Pact Treaty and related Convention on Privileges and Immunities.

<sup>1</sup>[1977] A.C. 373, [1976] 1 All E.R. 78.

<sup>2</sup>[1977] 2 W.L.R. 356 (C.A.), [1977] 1 All E.R. 881. It is obvious that this essay was written by Professor Johnson before the UK State Immunities Act of 1978 was adopted.

The range is vast and comprehensive. The attention is painstaking, and it is a labor of love. Rather than content himself with the too often wooden texts of official Soviet bloc translations into English, Dean Butler has consulted the original Russian-language texts of the documents and made his own corrections and translations.

EDWARD MCWHINNEY  
*Simon Fraser University*

*The Third World Without Superpowers: The Collected Documents of the Non-Aligned Countries.* Vol. I (of the projected four). By Odette Jan-kowitsch and Karl P. Sauvant. (Dobbs Ferry: Oceana Publications, Inc., 1978. Pp. lxxxii, 521. \$40.) The "Non-Aligned Countries" are a group smaller than the Third World. The term "non-aligned," moreover, is misleading. Included in the group are, for example, Cuba and North Korea (see list as of 1976 in table I at pp. xxxiii-xxxv), while no developed country is a member of it. Austria, Finland, Sweden, and Switzerland appear only as "guests" at some of the group's "summit conferences." Nevertheless, as the compilers point out in the preface (p. xxvii), this movement "now represents the most comprehensive political coalition of the Third World." As the informative introduction indicates (pp. xxxi ff.), despite the absence of a charter, constitution, secretariat, or formal rules of procedure, the group has set up a highly structured organization whose principles, concepts, and programs represent a consensus of the developing countries. This consensus is to be found in a variety of documents, at different levels of authority, which have not been systematically kept or published. It is the purpose of these volumes to present a systematic compilation of these documents covering the period to September 30, 1977.

The documents contained in the collection "are presented in both a chronological and hierarchical order" (p. liii). There is an "Overall Table of Contents" and a "Detailed Table of Contents" near the beginning of the volume. These tables cover all four of the volumes, which are divided into six chapters. Volume I, here reviewed, covers three "summit conferences" (1961, 1964, and 1970) of the group and in part the fourth "summit conference" (1973). Each chapter begins with major pronouncements of the conference followed by related documents. The last volume is to include some of the documents preparatory to the Havana conference of 1979. Volume IV is also to include a bibliography and an index.

The tables of contents are of great help in guiding the reader through the maze of documentation, which has been gathered laboriously from a variety of sources. Because of this variety and of the difficulties in obtaining some of the documents, the four volumes promise to be of unique value to scholars and others doing serious research in the field of international organization and economic development.

O. J. LISSITZYN  
*Board of Editors*

*South African Yearbook of International Law, Volume 3, 1977.* (Pretoria: The VerLoren van Themaat Centre for International Law, 1978. Pp. xi, 344. Index.) As in the earlier volumes, this latest addition follows a format of (1) a set of original articles; (2) shorter notes and comments; (3) summaries of South African and relevant foreign judicial decisions; (4) presentation of UN activities related to South Africa; (5) excerpts from South African Government speeches on foreign policy; (6) brief reports on selected international conferences and treaties; and (7) several book reviews. Unlike the other volumes, all seven opening articles treat topics of direct



concern to South Africa. Three deal with economic matters: trade relations within southern Africa, "economic coercion" by UN members, and the effect on private contracts of the Security Council actions regarding South Africa and Rhodesia. Four of the articles deal with issues of self-determination: Bophuthatswana nationality, the Bophuthatswana constitution, South-West Africa, and intervention in internal wars.

According to its editorial board, the *Yearbook* is designed "to provide a survey of developments in the sphere of public international law which affect South and southern Africa" (preface). The *Yearbook* successfully achieves this objective. International relations students will find the official foreign policy section useful. And interested scholars will discover the legal rationale for a host of official South African positions, even in the non-official sections: the legality of Rhodesian military operations inside Mozambique; South African claims to areas of the seas; South African non-ratification of the Treaty on Nonproliferation of Nuclear Weapons; the "independent homelands" policy as self-determination; and the illegality of UN economic sanctions. However, as might be suspected, the writing is infused with well-worn, self-righteous domestic jurisdiction protests, and outmoded auto-limitationist reasoning. One will search in vain for balanced, constructive, globally responsive insights or suggestions for the role international law might play in ameliorating the critical difficulties of this region and the world.

NATALIE K. HEVENER  
*University of South Carolina*

*World Wide Space Law Bibliography.* By Kuo Lee Li. (Montreal: McGill University, Institute and Center of Air and Space Law, 1978. Pp. 700. Index. \$38.) This comprehensive bibliography covers the period from the beginning of the space age through 1976, including not only legal publications but also related materials in geography, economics, technology, and politics. Recognizing that problems arising from outer space activities are multidisciplinary and that legal matters cannot be dealt with in a vacuum but must depend upon knowledge of relevant fields, the bibliography is arranged for research purposes according to a special classification system. There is a topical index, an author index, and an arrangement by research subjects. Each item is listed by number to facilitate cross-referencing to related materials.

The subjects presented concern the physical aspects of the space environment, the origins, evolution, technology, and objectives of space exploration, the science and formulation of space law, sources, national legislation and regulation, the legal status of outer space including the moon and other celestial bodies, public order in outer space, the legal status of spacecraft of different kinds, navigation and safety, private enterprise, jurisdiction and control, assistance to (and return of) astronauts and space objects, liability for damages, space telecommunications, meteorological and navigational satellites, remote sensing, international cooperation, international space authority and the common interests of mankind, and the settlement of disputes.

The documents and publications of international organizations have been included, particularly those of the United Nations Committee on the Peaceful Uses of Outer Space, its Legal Subcommittee, and the Scientific and Technical Subcommittee. There is also a section on national legislation which can be helpful to the researcher who seeks to relate national and international factors. Even though the bibliography ends with 1976, it contains leads to sources likely to produce publications on space law and re-

lated matters so that researchers will have little difficulty in adding to their materials pending the publication of a later edition. References in this volume to the entire historical development of the law of outer space are presented with imagination in a systematic form.

EILENE GALLOWAY

*International Institute of Space Law  
of the International Astronautical Federation*

*Die immerwährende Neutralität Österreichs.* By Alfred Verdross. (Wien: Verlag für Geschichte und Politik; Druck: R. Spies & Co., 1977 (in German). Pp. 80.) This is the fourth edition of a booklet that has provided a concise and authoritative exposition of Austria's international legal status as a permanently neutral country. The present volume continues to focus on the international legal basis and the direct and indirect legal implications of Austria's neutrality. Not included in this analysis are the neutrality aspects of Austria's foreign policy that are not specifically circumscribed by the country's international legal status.

A short review of the evolution of Austria's neutrality is followed by an analysis of the role the Swiss conception of neutrality must and can play as a model for Austria; of the "primary duties" of neutrality which arise temporarily for any neutral state in case of war and the "secondary duties" (those of permanently neutral countries proper) which might be epitomized as the anticipatory commitment to assure, in times of peace, that the military and economic obligations activated for any neutral state at the outbreak of war can reasonably be met. The author thus succeeds admirably in reaffirming the limited scope of Austria's legal obligations as a permanently neutral state and in grounding Austria's status firmly in the traditional law of neutrality. He thereby repudiates in particular the thesis that permanent neutrality also implies ideological neutrality.

A somewhat less satisfactory treatment is accorded the latent issue as to the proper scope and function of the concept of permanent neutrality in the present-day international system. The tension between its "secondary duties" and the growing demands on the permanently neutral state to participate in multilateral and collective decisionmaking in an increasingly interdependent world, presents obvious conceptual difficulties which are not always given adequate attention. For example, nonparticipation in Security Council action subsequent to a finding under Article 39 of the Charter would, according to the author, be legally dictated by the status of permanent neutrality. Such an abstention, however, would pit the permanently neutral state against the international community at large and might run counter to overwhelming community expectations of compliance. A case in point is the mandatory arms embargo vis-à-vis South Africa, surely one in respect of which the author would acknowledge that the traditional right to neutrality must be subordinate to the greater community interest.

A word or two on Austria's temporary membership in the Security Council in the early seventies might have evened out the chapters on permanent neutrality within the framework of the United Nations, the Council of Europe, and the economic integration of Europe. Still, this book remains an excellent primer on Austria's permanent neutrality. It is, besides, one that reflects to a high degree the official Austrian view of the international legal implications of the country's status. For that reason alone it should command a wide readership.

GÜNTHER HANDL

*University of Texas at Austin*

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## OFFICIAL DOCUMENTS

### CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA *v.* IRAN)

#### APPLICATION OF THE UNITED STATES<sup>1</sup>

I have the honor to refer to the following:

(1) the Vienna Convention on Diplomatic Relations of 1961, and Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes of that Convention;

(2) the Vienna Convention on Consular Relations of 1963, and Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes of that Convention;

(3) Article XXI(2) of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran of 1955; and

(4) Article 13(1) of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, of 1973.

Under the jurisdiction thereby conferred upon the Court, I hereby submit, in accordance with Article 40(1) of the Statute and Article 39 of the Rules of Court, this application instituting proceedings in the name of the Government of the United States of America against the Government of Iran in the following case:

#### *I. Statement of Facts*

At about 10.30 a.m., Tehran time, on November 4, 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by several hundred of the demonstrators. The Iranian Government's security personnel on duty at the Embassy compound apparently made no effort to deter or discourage the demonstrators from the takeover. Access to the compound and Chancery building was gained by cutting chains and removing bars from a Chancery basement window, and control of the first floor of the Chancery was rapidly seized. In the process the invaders took hostage the Embassy security officer, who had come out of the Chancery to negotiate with them, and four of the Embassy's Marine guards. A large group of Embassy personnel, including consular and non-American staff and visitors, took refuge on an upper floor of the Chancery.

About two hours after the beginning of the attack, and after the invaders had attempted to set fire to the Chancery building and to cut through the upstairs steel doors with a torch, the demonstrators gained entry to the upper floor and seized the remaining personnel.

During the two hours of attack on the Embassy, no Iranian security forces were sent to relieve the situation, despite repeated calls for help

<sup>1</sup> Submitted to the Registrar of the International Court of Justice on November 29, 1979.

from the Embassy to the Iranian Foreign Ministry, and despite the efforts of the United States Charge d'Affaires, who made contact with the Prime Minister's office and Foreign Ministry officials at the time the attack occurred. No attempt was made by the Government of Iran to clear the Embassy premises, to rescue the personnel held hostage, or to persuade the invaders and demonstrators to terminate their action. Nor did the Government of Iran take any action when, shortly after the Embassy seizure, the U.S. consulates in Tabriz and Shiraz were also seized.

Since the time of the takeover, the Embassy personnel have been held hostage in the compound under threatening and inhumane conditions. Some hostages have been paraded in sight of the crowd outside, blindfolded and hands bound, in full hearing of menacing, chanting crowds. Inside the buildings the hostages have been kept bound, often by hand and foot, forced to remain silent, subjected to other forms of coercion, and denied communication with their families and U.S. officials. Embassy records have been ransacked.

During the entire time and with the support and assistance of the Iranian authorities, demonstrations have been occurring outside the compound, often quite vociferous. A crowd of hundreds of thousands of demonstrators converged on the Embassy on November 22.

Those holding the hostages have refused to release them and have conditioned their release on various unacceptable demands. They have threatened on several occasions that, in certain circumstances, the hostages would be put to death. While 13 hostages were released on November 18 and 20, at least 50 Americans remain in captivity, virtually all of whom are diplomatic agents of the United States or members of the administrative and technical staff of the Embassy. The group holding the Embassy has asserted that the remaining hostages are guilty of espionage and will be tried for their "crimes" if their demands are not met. Non-Iranian outside observers have been permitted only limited access to the hostages. It is not certain that all persons held have been seen, and the conditions during these few visits did not permit free communication with the hostages.

During this continuing ordeal, the Government of Iran is failing and refusing to make any effort to secure the release of the hostages and the return of the Embassy and consular premises to the United States' control. The Government has refused any direct substantive contact with United States Government officials in Tehran or at the United Nations. It refused to admit the special emissaries sent to Iran by the Government of the United States. The United States Charge d'Affaires, who was at the Foreign Ministry at the time the attack began, has been confined to the Foreign Ministry and denied free access both to his diplomatic colleagues from other Embassies and to senior Iranian officials.

Moreover, the Government of Iran, from an early stage of the crisis, has given direct support and encouragement to the group holding the Embassy. Members of that group have been permitted to come and go freely from the compound. The Government of Iran has refused or ignored the repeated requests of the Government of the United States to free the hostages and to restore the Embassy compound to the possession of the United States. The Government of Iran has supported the demands of those holding the hostages, has endorsed the charges of espionage leveled against Embassy personnel, and has threatened to place the personnel on trial for espionage.

## II. *The Jurisdiction of the Court*

Under Paragraph 1 of Article 36 of the Statute of the Court, the jurisdiction of the Court encompasses "all matters specially provided for . . . in treaties and conventions in force." The United States and Iran are, as Members of the United Nations, parties to the Statute, and are also parties to three international conventions, each of which independently establishes the Court's jurisdiction over the present dispute.

First, the United States and Iran are parties to the Vienna Convention on Diplomatic Relations (done at Vienna, April 18, 1961) and to its Optional Protocol Concerning the Compulsory Settlement of Disputes. As set forth separately in this Application, the actions of Iran bearing on this dispute constitute multiple and profound violations of that Convention. Article I of the Protocol provides:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

Second, the United States and Iran are parties to the Vienna Convention on Consular Relations (done at Vienna, April 24, 1963) and to its Optional Protocol Concerning the Compulsory Settlement of Disputes. Article I of that Protocol is identical in its terms to Article I of the Protocol to the Convention on Diplomatic Relations, *supra*.<sup>\*</sup> The present dispute involves numerous violations of the Consular Convention.

Finally, the United States and Iran are parties to the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, signed in Tehran on August 15, 1955 (284 U.N.T.S. 93). As set forth below, numerous and serious violations of this treaty are also involved in the present dispute. Article XXXI, Paragraph 2 of the treaty provides:

"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

That a dispute exists between the United States and Iran is clear. The present dispute has not been satisfactorily adjusted by diplomacy, Iran is continuing in its violations, and Iran has refused to discuss pacific settlement of the dispute.

\* Articles II and III of the Protocols to the Vienna Conventions on Diplomatic Relations and Consular Relations both provide that the parties *may* agree on alternate procedures—arbitration or conciliation—in lieu of proceeding directly to the Court. The parties have not exercised these options in this case; no such agreements have been made. Indeed, the Iranian authorities have refused to discuss the dispute—still less modes of settlement of it—with United States emissaries.

The terms of the Preambles to both Protocols demonstrate the intent of the Protocols to make recourse to the Court unconditional and not dependent upon joint pursuit by the parties of the options of arbitration or conciliation. They provide that: "*Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period.*" (Emphasis supplied.)



In addition to the foregoing, the United States and Iran are parties to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (done at New York, December 14, 1973). Serious violations of this Convention are also involved in the present dispute. Article 13, Paragraph 1 of the Convention provides:

"Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of them may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

In light of the urgency of rectifying the present violations of the Convention and Iran's refusal to meet with United States emissaries on the subject, which renders impracticable and infeasible any prior resort to arbitration, it is submitted that the Court is competent to hear the United States' claims under this Convention in connection with its other claims.

### III. *The Claims of the United States*

The Government of the United States, in submitting the dispute to the Court, claims as follows:

(a) Pursuant to Article 29 of the Vienna Convention on Diplomatic Relations, the Government of Iran is under an international legal obligation to the United States to ensure that the persons of United States diplomatic agents be kept inviolate from "any form of arrest or detention" and that every such diplomatic agent shall be treated "with due respect" and protected from "any attack on his person, freedom, or dignity." The Government of Iran has violated and is currently violating the foregoing obligations.

(b) Pursuant to Article 37 of the same Convention, the Government of Iran is under an international legal obligation to the United States to ensure that members of the administrative and technical staff of the United States Embassy in Tehran, and members of the families of United States diplomatic agents and of administrative and technical staff, enjoy the relevant privileges and immunities specified in Article 29 of the Convention. The Government of Iran has violated and is currently violating the foregoing obligations.

(c) Pursuant to Article 31 of the same Convention, the Government of Iran is under an international legal obligation to the United States to ensure that its diplomatic agents shall be absolutely immune "from the criminal jurisdiction" of Iran and that, under Articles 31 and 37 of the Convention, such immunity is accorded to members of the administrative and technical staff of the United States Embassy as well as to the families of diplomatic agents and of administrative and technical staff. By its threats of prosecution, the Government of Iran has violated and is currently violating the foregoing obligations.

(d) Pursuant to Article 22 of the same Convention, the Government of Iran is under an international legal obligation to the United States to ensure that United States diplomatic premises in Iran "shall be inviolable." The Government of Iran has violated and is currently

violating this obligation.

(e) Pursuant to Articles 24, 25, 27, and 47 of the same Convention, the Government of Iran is under an international legal obligation to the United States to ensure the inviolability of the archives and documents of the United States Embassy in Tehran, to accord full facilities for the performance of the functions of the Embassy, to permit and assist Embassy personnel to depart from Iran, and to preclude discrimination between States in the application of the Convention. The Government of Iran has violated and is currently violating the foregoing obligations.

(f) Pursuant to Articles 28, 31, 33, 34, 36, and 40 of the Vienna Convention on Consular Relations, the Government of Iran is under an international legal obligation to the United States to ensure that the United States enjoys full facilities for the performance of consular functions; that United States consular premises, documents, and archives are kept inviolate; that the consular personnel of the United States shall enjoy freedom of movement and travel in Iran; that such personnel shall enjoy the right to communicate and contact other United States nationals; that the consular personnel of the United States be treated with respect and protected from attack on their persons, freedom, and dignity; and that United States consular officers be free from arrest or detention. The Government of Iran has violated and is currently violating the foregoing obligations.

(g) Pursuant to Article 4 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, the Government of Iran is under an international legal obligation to the United States to cooperate in the prevention of crimes against the official premises and the staff of the United States Embassy in Tehran, including an obligation to take all practicable measures to prevent preparations in its territory for the commission of such crimes. The Government of Iran has violated and is currently violating the foregoing obligations.

(h) Pursuant to Article 7 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, the Government of Iran is under an international legal obligation to the United States to submit to competent Iranian authorities for the purpose of prosecution all those persons who, since November 4, 1979, have been engaged in committing crimes against the official premises and the staff of the United States Embassy in Tehran. The Government of Iran has violated and is currently violating the foregoing obligation.

(i) Pursuant to Articles II(4) and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, the Government of Iran is under an international legal obligation to the United States to ensure that nationals of the United States shall receive "the most constant protection and security" within the territory of Iran; that such nationals shall, if placed in custody, receive reasonable and humane treatment; that the United States shall have the full opportunity to safeguard the interests of such detained nationals; and that such nationals shall, while in custody, have full access to United States consular officials and services. The Government of Iran has violated and is currently violating the foregoing obligations.

(j) Pursuant to Articles XIII and XVIII of the foregoing Treaty of Amity, Economic Relations, and Consular Rights, the Government of Iran is under an international legal obligation to the United States to accord to United States consular officers and employees the privileges and immunities accorded to officers and employees of their rank and status by general international usage and, in particular, immunity from local jurisdiction for acts done in their official capacities and within the scope of their authority; to accord to such consular officers and employees the opportunity to exercise all functions which are in accordance with general international usage; and to ensure that consular offices are not entered by the police or other local authorities except in case of fire or other disaster. The Government of Iran has violated and is currently violating the foregoing obligations.

(k) The Government of Iran, or persons acting with its support and approval, are holding United States citizens as hostages and are threatening the lives of these hostages in order to coerce the United States into taking actions which the United States has no international legal obligation to take. This exercise of coercion is in violation of Iran's obligations under the Charter of the United Nations, particularly Article 2, paragraphs 3 and 4, and Article 33.

(l) The Government of Iran is under an international legal obligation to the United States to respect and observe, and ensure respect for and observance of, the obligations of Iran under customary international law to ensure the immunities of the diplomats and staff of the United States Embassy in Tehran, the inviolability of its Embassy, and the protection of its nationals. The Government of Iran has violated and is currently violating the foregoing obligations.

#### IV. *Judgment Requested*

Accordingly, the United States requests the Court to adjudge and declare as follows:

(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts, violated its international legal obligations to the United States as provided by

- Articles 22, 24, 25, 27, 29, 31, 37, and 47 of the Vienna Convention on Diplomatic Relations,
- Articles 28, 31, 33, 34, 36, and 40 of the Vienna Convention on Consular Relations,
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, and
- Articles II(4), XIII, XVIII, and XIX of the Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran, and
- Articles 2(3), 2(4), and 33 of the Charter of the United Nations;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates.

The Government of the United States further requests the Court to indicate interim measures of protection as set forth in a separate request filed concurrently with this Application.

### REQUEST FOR INTERIM MEASURES OF PROTECTION

1. I have the honor to refer to the Application submitted to the Court this day instituting proceedings in the name of the Government of the United States of America against the Government of Iran and to submit, in accordance with Article 41 of the Statute of the Court and Articles 73, 74, and 75 of the Rules of Court, an urgent request that the Court indicate provisional measures which ought to be taken promptly to preserve the rights of the Government of the United States.

2. The compelling reasons for this request are set out in the Statement of Facts of the Application of the United States to the Court. The facts set forth therein have been verified in the appended statement<sup>2</sup> of David D. Newsom, Under Secretary for Political Affairs of the United States Department of State. The premises of the Embassy and Consulate of the United States in Tehran have been invaded by large numbers of persons acting with the support and under the apparent authority of the Government of Iran, and remain occupied without the authorization of the United States. At least fifty United States citizens, virtually all of whom are diplomatic agents or administrative and technical staff of the Embassy, are being held hostage. The conditions of their detention are harsh, demeaning, dangerous and in flagrant violation of international law. The Iranian authorities have stated that the hostages will be kept until the United States complies with various demands. The Government of Iran has also threatened to submit the hostages to criminal trial and punishment, despite their entitlement to diplomatic and other immunities. The Secretary-General of the United Nations has convoked the United Nations Security Council because of this "grave situation." In exercise of his exceptional powers under Article 99 of the United Nations Charter, he has informed the Security Council that "the present crisis poses a serious threat to international peace and security."

3. The Government of the United States submits that the interim measures of protection requested are urgently needed to preserve the rights of the United States. The United States in its Application primarily requests the Court to adjudge and declare that Iran shall release immediately and permit to depart from Iran immediately all hostages and other members of the Embassy of the United States who are not of Iranian nationality, shall restore to the United States its embassy premises, shall be held in violation of multiple international legal obligations, and shall pay to

<sup>2</sup> Not reprinted here.

the United States reparations for numerous grave violations of the international legal rights of the United States. Interim measures of protection are required to preserve the following rights of the United States: the rights of its nationals to life, liberty, protection and security; the rights of inviolability, immunity and protection for its diplomatic and consular officials; and the rights of inviolability and protection for its diplomatic and consular premises. The Court can grant and Iran can execute a decision providing effective and meaningful redress only if the lives and physical and emotional well-being of the hostages are preserved. In the volatile circumstances existing in Tehran, the hostages are, to an anguishing degree, in continuing jeopardy; their situation could sharply deteriorate at any moment. In the absence of effective measures of protection, a tragedy of an irreparable kind could result. It is these possible consequences of the Court's not indicating provisional measures that so urgently impel the United States to request them.

4. Moreover, the Government of the United States submits that the urgent need for interim measures of protection is reinforced by the dangers to the fabric of diplomatic relations and international law which are posed by the continued detention of United States diplomatic personnel. Each day that this condition continues causes irreparable damage to principles of international law and the fundamentals of diplomatic relations. Indeed, recent events in other countries demonstrate that continuation of this situation in Tehran presents a clear and present danger to the safety of the diplomatic community at large. Moreover, should the Government of Iran proceed to implement a possible course of action which it has threatened, namely, to place diplomats on trial for alleged criminal acts of espionage, the principles of international law and the fundamentals of diplomatic relations will have been irreparably damaged. No judgment of the Court will be able to undo the taking of so lawless and extraordinary a step.

5. In view of the considerations referred to in the foregoing paragraphs and in the Application of the United States, I respectfully request, on behalf of the Government of the United States of America, that, pending final judgment in this suit, the Court indicate forthwith the following:

(a) That the Government of Iran immediately release all hostages of United States nationality and facilitate the prompt and safe departure from Iran of these persons and all other United States officials in dignified and humane circumstances.

(b) That the Government of Iran immediately clear the premises of the United States Embassy, Chancery and Consulate of all persons whose presence is not authorized by the United States Charge d'Affaires in Iran, and restore the premises to United States control.

(c) That the Government of Iran ensure that all persons attached to the United States Embassy and Consulate should be accorded, and protected in, full freedom within the Embassy and Chancery premises, and the freedom of movement within Iran necessary to carry out their diplomatic and consular functions.

(d) That the Government of Iran not place on trial any person attached to the Embassy and Consulate of the United States and refrain from any action to implement any such trial.

(e) That the Government of Iran ensure that no action is taken which might prejudice the rights of the United States in respect of

the carrying out of any decision which the Court may render on the merits, and in particular neither take nor permit action that would threaten the lives, safety, or well-being of the hostages.

6. In view of the gravity of the current situation caused by the actions taken and threatened by the Government of Iran and by persons acting under its authority or with its support, the Government of the United States urges that this request be treated as a matter of extreme urgency. In this connection, the attention of the Court is invited to the letter from the Secretary of State of the United States to the President of the Court, a copy of which is attached,<sup>3</sup> which is submitted in conformity with Article 74, paragraph 4, of the Rules of Court. In view of the extreme urgency of the case, the United States further respectfully requests that the Court set a hearing on this request at the earliest possible date.

....

## INTERNATIONAL COURT OF JUSTICE

### ORDER <sup>4</sup>

*Present: President* Sir Humphrey WALDOCK; *Vice-President* ELIAS; *Judges* FORSTER, GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, TARAZI, ODA, AGO, EL-ERIAN, SETTE-CAMARA, BAXTER; *Registrar* AQUARONE.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court,

Having regard to Articles 73 and 74 of the Rules of Court,

Having regard to the Application by the United States of America filed in the Registry of the Court on 29 November 1979, instituting proceedings against the Islamic Republic of Iran in respect of a dispute concerning the situation in the United States Embassy in Tehran and the seizure and holding as hostages of members of the United States diplomatic and consular staff in Iran;

*Makes the following Order:*

1. Whereas in the above-mentioned Application the United States Government invokes jurisdictional provisions in certain treaties as bases for the Court's jurisdiction in the present case; whereas it further recounts a sequence of events, beginning on 4 November 1979 in and around the United States Embassy in Tehran and involving the invasion of the Embassy premises, the seizure of United States diplomatic and consular staff and their continued detention; and whereas, on the basis of the facts there alleged, it requests the Court to adjudge and declare:

"(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts [in the Application], violated its international legal obligations to the United States as provided by

—Articles 22, 24, 25, 27, 29, 31, 37 and 47 of the Vienna Convention on Diplomatic Relations,

<sup>3</sup> Not reprinted here.

<sup>4</sup> Dated December 15, 1979.

- Articles 28, 31, 33, 34, 36 and 40 of the Vienna Convention on Consular Relations,
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and
- Articles II(4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, and
- Articles 2(3), 2(4) and 33 of the Charter of the United Nations;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates”;

2. Having regard to the request dated 29 November 1979 and filed in the Registry of the same day, whereby the Government of the United States of America, relying on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, asks the Court urgently to indicate, pending the final decision in the case brought before it by the above-mentioned Application of the same date, the following provisional measures:

“(a) That the Government of Iran immediately release all hostages of United States nationality and facilitate the prompt and safe departure from Iran of these persons and all other United States officials in dignified and humane circumstances.

(b) That the Government of Iran immediately clear the premises of the United States Embassy, Chancery and Consulate of all persons whose presence is not authorized by the United States Chargé d’Affaires in Iran, and restore the premises to United States control.

(c) That the Government of Iran ensure that all persons attached to the United States Embassy and Consulate should be accorded, and protected in, full freedom within the Embassy and Chancery premises, and the freedom of movement within Iran necessary to carry out their diplomatic and consular functions.

(d) That the Government of Iran not place on trial any person attached to the Embassy and Consulate of the United States and refrain from any action to implement any such trial.

(e) That the Government of Iran ensure that no action is taken which might prejudice the rights of the United States in respect of the carrying out of any decision which the Court may render on the merits, and in particular neither take nor permit action that would threaten the lives, safety, or well-being of the hostages”;

3. Whereas, on the day on which the Application and request for indication of provisional measures were received in the Registry, the Government of Iran was notified by telegram of the filing of the Application and request, and of the particular measures requested, and copies of both documents were transmitted by express airmail to the Minister for Foreign Affairs of Iran;

4. Whereas, pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the Application were transmitted to Members of the United Nations and to other States entitled to appear before the Court;

5. Whereas on 6 December 1979 the Registrar addressed the notification provided for in Article 63 of the Statute of the Court to the States, other than the parties to the case, which were listed in the relevant documents of the United Nations Secretariat as parties to the following conventions, invoked in the Application:

(i) the Vienna Convention on Diplomatic Relations of 1961, and the accompanying Optional Protocol Concerning the Compulsory Settlement of Disputes;

(ii) the Vienna Convention on Consular Relations of 1963, and the accompanying Optional Protocol Concerning the Compulsory Settlement of Disputes;

(iii) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973;

6. Whereas on 30 November 1979, pending the meeting of the Court, the President, in exercise of the power conferred on him by Article 74, paragraph 4, of the Rules of Court, addressed a telegram to each of the two governments concerned calling attention to the fact that the matter was now *sub judice* before the Court and to the need to act in such a way as would enable any Order the Court might make in the present proceedings to have its appropriate effects; and whereas by those telegrams the two governments were, in addition, informed that the Court would hold public hearings at an early date at which they might present their observations on the request for provisional measures, and that the projected date for such hearings was 10 December 1979, this date being later confirmed by further telegrams of 3 December 1979;

7. Whereas, in preparation for the hearings, the President put certain preliminary questions to the Agent of the United States Government, by a telegram of 4 December 1979, a copy of which was communicated on the same date to the Government of Iran; whereas, in response to those questions the United States Agent on 7 December 1979 submitted to the Court a declaration by Mr. David D. Newsom, Under-Secretary of State for Political Affairs, together with certain documents appended thereto; and whereas copies of that letter and the declaration and documents accompanying it were immediately transmitted to the Government of Iran;

8. Whereas on 9 December 1979 a letter, dated the same day and transmitted by telegram, was received from the Minister for Foreign Affairs of Iran, which reads as follows:

[Translation from French]

I have the honour to acknowledge receipt of the telegrams concerning the meeting of the International Court of Justice on 10 December



1979, at the request of the Government of the United States of America, and to submit to you below the position of the Government of the Islamic Republic of Iran in this respect.

1. First of all, the Government of the Islamic Republic of Iran wishes to express its respect for the International Court of Justice, and for its distinguished members, for what they have achieved in the quest for just and equitable solutions to legal conflicts between States. However, the Government of the Islamic Republic of Iran considers that the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it, and in a most significant fashion, a case confined to what is called the question of the "hostages of the American Embassy in Tehran".

2. For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

3. The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, *inter alia*, all the crimes perpetrated in Iran by the American Government, in particular the *coup d'état* of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural, and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran.

4. With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction. Furthermore, since provisional measures are by definition intended to protect the interests of the parties, they cannot be unilateral, as they are in the request submitted by the American Government.

In conclusion, the Government of the Islamic Republic of Iran respectfully draws the attention of the Court to the deep-rootedness and the essential character of the Islamic revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters; any examination of the numerous repercussions thereof is a matter essentially and directly within the national sovereignty of Iran.

9. Whereas both the Government of the United States of America and the Government of Iran have been afforded an opportunity of presenting their observations on the request for the indication of provisional measures;

10. Whereas at the public hearing held on 10 December 1979 there were present in Court the Agent, counsel and adviser of the United States of America;

11. Having heard the oral observations on the request for provisional measures on behalf of the United States of America presented by the Honorable Roberts B. Owen, Agent, and the Honorable Benjamin R. Civiletti, Attorney-General of the United States, as counsel, and taking note of the replies given on behalf of that Government to further questions put at the conclusion of the hearing by the President of the Court and by two members of the Court;

12. Having taken note that the final submissions of the United States of America filed in the Registry on 12 December 1979, following the hearing of 10 December 1979, were to the effect that the Government of the United States requests that the Court, pending final judgment in this case, indicate forthwith the following measures:

“First, that the Government of Iran immediately release all hostages of United States nationality and facilitate the prompt and safe departure from Iran of these persons and all other United States officials in dignified and humane circumstances.

Second, that the Government of Iran immediately clear the premises of the United States Embassy, Chancery and Consulate in Tehran of all persons whose presence is not authorized by the United States Chargé d’Affaires in Iran, and restore the premises to United States control.

Third, that the Government of Iran ensure that, to the extent that the United States should choose, and Iran should agree, to the continued presence of United States diplomatic and consular personnel in Iran, all persons attached to the United States Embassy and Consulates should be accorded, and protected in, full freedom of movement, as well as the privileges and immunities to which they are entitled, necessary to carry out their diplomatic and consular functions.

Fourth, that the Government of Iran not place on trial any person attached to the Embassy and Consulates of the United States and refrain from any action to implement any such trial; and that the Government of Iran not detain or permit the detention of any such person in connection with any proceedings, whether of an ‘international commission’ or otherwise, and that any such person not be required to participate in any such proceeding.

Fifth, that the Government of Iran ensure that no action is taken which might prejudice the rights of the United States in respect of carrying out of any decision which the Court may render on the merits, and, in particular, neither take, nor permit, action that would threaten the lives, safety, or well-being of the hostages”;

13. Noting that the Government of Iran was not represented at the hearing; and whereas the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures;

14. Whereas the treaty provisions on which, in its Application and oral observations, the United States Government claims to found the jurisdiction of the Court to entertain the present case are the following:

(i) the Vienna Convention on Diplomatic Relations of 1961, and

Article 1 of its accompanying Optional Protocol concerning the Compulsory Settlement of Disputes;

(ii) the Vienna Convention on Consular Relations of 1963, and Article 1 of its accompanying Optional Protocol concerning the Compulsory Settlement of Disputes;

(iii) Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States of America and Iran; and

(iv) Article 13, paragraph 1, of the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

15. Whereas on the request for provisional measures in the present case the Court ought to indicate such measures only if the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded;

16. Whereas, so far as concerns the rights claimed by the United States of America with regard to the personnel and premises of its Embassy and Consulates in Iran, Article I of each of the two Protocols which accompany the Vienna Conventions of 1961 and 1963 on, respectively, Diplomatic and Consular Relations provides expressly that:

“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol”;

whereas the United Nations publication *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* lists both Iran and the United States as parties to each of the two Conventions, as also to each of their Protocols concerning the compulsory settlement of disputes, and in all cases without any reservations to the instrument in question;

17. Whereas, while it is true that Articles II and III of the above-mentioned Protocols provide for the possibility for the parties to agree, under certain conditions, to resort not to the International Court of Justice but to an arbitral tribunal or to a conciliation procedure, no such agreement was reached by the parties; and whereas the terms of Article I of the Optional Protocols provide in the clearest manner for the compulsory jurisdiction of the International Court of Justice in respect of any dispute arising out of the interpretation or application of the above-mentioned Vienna Conventions;

18. Whereas, accordingly, it is manifest from the information before the Court and from the terms of Article I of each of the two Protocols that the provisions of these Articles furnish a basis on which the jurisdiction of the Court might be founded with regard to the claims of the United States under the Vienna Conventions of 1961 and 1963;

19. Whereas, so far as concerns the rights claimed by the United States with regard to two of its nationals who, according to the declaration by Mr. David D. Newsom referred to in paragraph 7 above, are not personnel either of its diplomatic or of its consular mission, it appears from the statements of the United States Government that these two private individuals

were seized and are detained as hostages within the premises of the United States Embassy or Consulate in Tehran; whereas it follows that the seizure and detention of these individuals also fall within the scope of the applicable provisions of the Vienna Conventions of 1961 and 1963 relating to the inviolability of the premises of Embassies and Consulates; whereas, furthermore, the seizure and detention of these individuals in the circumstances alleged by the United States clearly fall also within the scope of the provisions of Article 5 of the Vienna Convention of 1963 expressly providing that consular functions include the functions of protecting, assisting and safeguarding the interests of nationals; and whereas the purpose of these functions is precisely to enable the sending State, through its consulates, to ensure that its nationals are accorded the treatment due to them under the general rules of international law as aliens within the territory of the foreign State;

20. Whereas, accordingly, it is likewise manifest that Article I of the Protocols concerning the compulsory settlement of disputes which accompany the Vienna Conventions of 1961 and 1963 furnishes a basis on which the jurisdiction of the Court might be founded with regard to the claims of the United States in respect of the two private individuals in question;

21. Whereas, therefore, the Court does not find it necessary for present purposes to enter into the question whether a basis for the exercise of its powers under Article 41 of the Statute might also be found under Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and Article 13, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

22. Whereas, on the other hand, in the above-mentioned letter of 9 December 1979 the Government of Iran maintains that the Court cannot and should not take cognizance of the present case, for the reason that the question of the hostages forms only "a marginal and secondary aspect of an overall problem" involving the activities of the United States in Iran over a period of more than 25 years; and whereas it further maintains that any examination of the numerous repercussions of the Islamic revolution of Iran is essentially and directly a matter within the national sovereignty of Iran;

23. Whereas, however important, and however connected with the present case, the iniquities attributed to the United States Government by the Government of Iran in that letter may appear to be to the latter Government, the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot, in the view of the Court, be regarded as something "secondary" or "marginal", having regard to the importance of the legal principles involved; whereas the Court notes in this regard that the Secretary-General of the United Nations has indeed referred to these occurrences as "a grave situation" posing "a serious threat to international peace and security" and that the Security Council in resolution 457 (1979) expressed itself as deeply concerned at the dangerous level of tension between the two States, which could have grave consequences for international peace and security;

24. Whereas, moreover, if the Iranian Government considers the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States Application, it remains open to that Government under the Court's Statute and Rules to present its own arguments to the Court regarding those activities either by way of defence

in a Counter-Memorial or by way of counter-claim filed under Article 80 of the Rules of Court; whereas, therefore, by not appearing in the present proceedings, the Government of Iran, by its own choice, deprives itself of the opportunity of developing its own arguments before the Court and of itself filing a request for the indication of provisional measures; and whereas no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important;

25. Whereas it is no doubt true that the Islamic revolution of Iran is a matter "essentially and directly within the national sovereignty of Iran"; whereas however a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction;

26. Whereas accordingly the two considerations advanced by the Government of Iran in its letter of 9 December 1979 cannot, in the view of the Court, be accepted as constituting any obstacle to the Court's taking cognizance of the case brought before it by the United States Application of 29 November 1979.

27. Whereas in that same letter of 9 December 1979 the Government of Iran also puts forward two considerations on the basis of which it contends that the Court ought not, in any event, to accede to the United States request for provisional measures in the present case;

28. Whereas, in the first place, it maintains that the request for provisional measures, as formulated by the United States, "in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it"; whereas it is true that in the *Factory at Chorzów* case the Permanent Court of International Justice declined to indicate interim measures of protection on the ground that the request in that case was "designed to obtain an interim judgment in favour of a part of the claim" (*Order of 21 November 1927, P.C.I.J., Series A, No. 12, at p. 10*); whereas, however, the circumstances of that case were entirely different from those of the present one, and the request there sought to obtain from the Court a final judgment on part of a claim for a sum of money; whereas, moreover, a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party; and whereas in the present case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claims but to preserve the substance of the rights which it claims *pendente lite*;

29. Whereas, in the second place, the Government of Iran takes the position that "since provisional measures are by definition intended to protect the interests of the parties they cannot be unilateral"; whereas, however, the hypothesis on which this proposition is based does not accord with the terms of Article 41 of the Statute which refer explicitly to "any provisional measures which ought to be taken to preserve the respective rights of *either party*"; whereas the whole concept of an indication of provisional measures, as Article 73 of the Rules recognizes, implies a request from one of the parties for measures to preserve its own rights against action by the other party calculated to prejudice those rights *pendente lite*; whereas it follows that a request for provisional measures is by its nature unilateral; and whereas the Government of Iran has not appeared

before the Court in order to request the indication of provisional measures; whereas, however, the Court, as it has recognized in Article 75 of its Rules, must at all times be alert to protect the rights of both the parties in proceedings before it and, in indicating provisional measures, has not infrequently done so with reference to both the parties; and whereas this does not, and cannot, mean that the Court is precluded from entertaining a request from a party merely by reason of the fact that measures which it requests are unilateral;

30. Whereas, accordingly, neither of the considerations put forward in the Iranian Government's letter of 9 December 1979 can be regarded as constituting grounds which should lead the Court to decline to entertain the United States request in the present case;

31. Whereas it follows that the Court has not found in the Iranian Government's letter of 9 December 1979 legal grounds which should lead it to conclude that it ought not to entertain the United States request;

32. Whereas the Court will accordingly now proceed to examine the request of the United States Government for the indication of provisional measures in the present case;

33. Whereas by the terms of Article 41 of the Statute the Court may indicate such measures only when it considers that circumstances so require in order to preserve the rights of either party;

34. Whereas the circumstances alleged by the United States Government which, in the submission of that Government, require the indication of provisional measures in the present case may be summarized as follows:

(i) On 4 November 1979, in the course of a demonstration outside the United States Embassy compound in Tehran, demonstrators attacked the Embassy premises; no Iranian security forces intervened or were sent to relieve the situation, despite repeated calls for help from the Embassy to the Iranian authorities. Ultimately the whole of the Embassy premises was invaded. The Embassy personnel, including consular and non-American staff, and visitors who were present in the Embassy at the time were seized. Shortly afterwards, according to the United States Government, its consulates in Tabriz and Shiraz, which had been attacked earlier in 1979, were also seized, without any action being taken to prevent it;

(ii) Since that time, the premises of the United States Embassy in Tehran, and of the consulates in Tabriz and Shiraz, have remained in the hands of the persons who seized them. These persons have ransacked the archives and documents both of the diplomatic mission and of its consular section. The Embassy personnel and other persons seized at the time of the attack have been held hostage with the exception of 13 persons released on 18 and 20 November 1979. Those holding the hostages have refused to release them, save on condition of the fulfilment by the United States of various demands regarded by it as unacceptable. The hostages are stated to have frequently been bound, blindfolded, and subjected to severe discomfort, complete isolation and threats that they would be put on trial or even put to death. The United States Government affirms that it has reason to believe that some of them may have been transferred to other places of confinement;

(iii) The Government of the United States considers that not merely has the Iranian Government failed to prevent the events described

above, but also that there is clear evidence of its complicity in, and approval of, those events;

(iv) The persons held hostage in the premises of the United States Embassy in Tehran include, according to the information furnished to the Court by the Agent of the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of "member of the diplomatic staff" within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of "members of the administrative and technical staff" within the meaning of that Convention; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Embassy;

(v) In addition to the persons held hostage in the premises of the Tehran Embassy, the United States Chargé d'Affaires in Iran and two other United States diplomatic agents are detained in the premises of the Iranian Ministry for Foreign Affairs, in circumstances which the Government of the United States has not been able to make entirely clear, but which apparently involve restriction of their freedom of movement, and a threat to their inviolability as diplomats;

35. Whereas on the basis of the above circumstances alleged by the United States Government it claims in the Application that the Government of Iran has violated and is violating a number of the legal obligations imposed upon it by the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of 1955, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973, the Charter of the United Nations, and customary international law;

36. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings;

37. Whereas the rights which the United States of America submits as entitled to protection by the indication of provisional measures were specified in the request of 29 November 1979 as:

"the rights of its nationals to life, liberty, protection and security; the rights of inviolability, immunity and protection for its diplomatic and consular officials; and the rights of inviolability and protection for its diplomatic and consular premises";

and at the hearing of 10 December 1979 as:

"the right [of the United States] to maintain a working and effective embassy in Tehran, the right to have its diplomatic and consular personnel protected in their lives and persons from every form of interference and abuse, and the right to have its nationals protected and secure";

and whereas the measures requested by the United States for the protection of these rights are as set out in paragraphs 2 and 12 above;

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38. Whereas there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and whereas the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function;

39. Whereas the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means;

40. Whereas the unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States; and whereas therefore the privileges and immunities of consular officers and consular employees, and the inviolability of consular premises and archives, are similarly principles deep-rooted in international law;

41. Whereas, while no State is under any obligation to maintain diplomatic or consular relations with another, yet it cannot fail to recognize the imperative obligations inherent therein, now codified in the Vienna Conventions of 1961 and 1963, to which both Iran and the United States are parties;

42. Whereas continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm;

43. Whereas in connection with the present request the Court cannot fail to take note of the provisions of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973, to which both Iran and the United States are parties;

44. Whereas in the light of the several considerations set out above, the Court finds that the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute of the Court, in order to preserve the rights claimed;

45. Whereas the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves, and leaves unaffected the right of the Government of Iran to submit arguments against such jurisdiction or in respect of such merits;

46. Whereas the Court will therefore now proceed to indicate the measures which it considers are required in the present case;

47. Accordingly,

THE COURT,  
unanimously,



1. *Indicates*, pending its final decision in the proceedings instituted on 29 November 1979 by the United States of America against the Islamic Republic of Iran, the following provisional measures:

A. (i) The Government of the Islamic Republic of Iran should immediately ensure that the premises of the United States Embassy, Chancery and Consulates be restored to the possession of the United States authorities under their exclusive control, and should ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law;

(ii) The Government of the Islamic Republic of Iran should ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law;

(iii) The Government of the Islamic Republic of Iran should, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran;

B. The Government of the United States of America and the Government of the Islamic Republic of Iran should not take any action and should ensure that no action is taken which may aggravate the tension between the two countries or render the existing dispute more difficult of solution;

2. *Decides* that, until the Court delivers its final judgment in the present case, it will keep the matters covered by this Order continuously under review.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifteenth day of December, one thousand nine hundred and seventy-nine, in four copies, of which one will be placed in the archives at the Court, and the others transmitted respectively to the Government of the Islamic Republic of Iran, to the Government of the United States of America, and to the Secretary-General of the United Nations for transmission to the Security Council.

#### INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES \*

##### *The States Parties to this Convention,*

*Having in mind* the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and co-operation among States,

*Recognizing* in particular that everyone has the right to life, liberty and

\* Adopted by the UN General Assembly by its Resolution 34/146 of Dec. 17, 1979, and opened for signature on Dec. 18, 1979. The text is reprinted from Report of the Sixth Committee, UN Doc. A/34/819 (1979), at 5, which contains the draft resolution at p. 4.

security of person, as set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,

*Reaffirming* the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, as well as in other relevant resolutions of the General Assembly,

*Considering* that the taking of hostages is an offence of grave concern to the international community and that, in accordance with the provisions of this Convention, any person committing an act of hostage taking shall be either prosecuted or extradited,

*Being convinced* that it is urgently necessary to develop international co-operation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism,

*Have agreed* as follows:

#### *Article 1*

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

2. Any person who:

- (a) attempts to commit an act of hostage-taking, or
- (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking

likewise commits an offence for the purposes of this Convention.

#### *Article 2*

Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences.

#### *Article 3*

1. The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure.

2. If any object which the offender has obtained as a result of the taking of hostages comes into the custody of a State Party, that State Party shall return it as soon as possible to the hostage or the third party referred to in article 1, as the case may be, or to the appropriate authorities thereof.

#### *Article 4*

States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by:

(a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages;

(b) exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences.

#### *Article 5*

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:

- (a) in its territory or on board a ship or aircraft registered in that State;
- (b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
- (c) in order to compel that State to do or abstain from doing any act; or
- (d) with respect to a hostage who is a national of that State, if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

#### *Article 6*

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall, in accordance with its laws, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. That State Party shall immediately make a preliminary inquiry into the facts.

2. The custody or other measures referred to in paragraph 1 of this article shall be notified without delay directly or through the Secretary-General of the United Nations to:

- (a) the State where the offence was committed;
- (b) the State against which compulsion has been directed or attempted;
- (c) the State of which the natural or juridical person against whom compulsion has been directed or attempted is a national;
- (d) the State of which the hostage is a national or in the territory of which he has his habitual residence;
- (e) the State of which the alleged offender is a national or, if he is a stateless person, in the territory of which he has his habitual residence;
- (f) the international intergovernmental organization against which compulsion has been directed or attempted;
- (g) all other States concerned.

3. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

- (a) to communicate without delay with the nearest appropriate repre-

sentative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;

(b) to be visited by a representative of that State.

4. The rights referred to in paragraph 3 of this article shall be exercised in conformity with the laws and regulations of the State in the territory of which the alleged offender is present, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 of this article are intended.

5. The provisions of paragraphs 3 and 4 of this article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with paragraph 1 (b) of article 5 to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. The State which makes the preliminary inquiry contemplated in paragraph 1 of this article shall promptly report its findings to the States or organization referred to in paragraph 2 of this article and indicate whether it intends to exercise jurisdiction.

#### *Article 7*

The State Party where the alleged offender is prosecuted shall in accordance with its laws communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States concerned and the international intergovernmental organizations concerned.

#### *Article 8*

1. The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

2. Any person regarding whom proceedings are being carried out in connexion with any of the offences set forth in article 1 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present.

#### *Article 9*

1. A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing:

(a) that the request for extradition for an offence set forth in article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or

(b) that the person's position may be prejudiced:

- (i) for any of the reasons mentioned in subparagraph (a) of this paragraph, or
  - (ii) for the reason that communication with him by the appropriate authorities of the State entitled to exercise rights of protection cannot be effected.
2. With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Convention.

#### *Article 10*

1. The offences set forth in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in article 1. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 1 as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. The offences set forth in article 1 shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of article 5.

#### *Article 11*

1. States Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offences set forth in article 1, including the supply of all evidence at their disposal necessary for the proceedings.
2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

#### *Article 12*

In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

*Article 13*

This Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.

*Article 14*

Nothing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations.

*Article 15*

The provisions of this Convention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those Treaties; but a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a party to those treaties.

*Article 16*

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

*Article 17*

1. This Convention is open for signature by all States until 31 December 1980 at United Nations Headquarters in New York.

2. This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention is open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article 18*

1. This Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or ac-

cession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

#### *Article 19*

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

#### *Article 20*

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at New York on . . .

# INTERNATIONAL LEGAL MATERIALS \*

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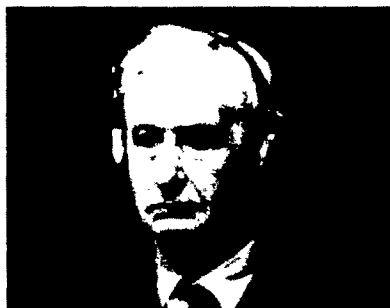
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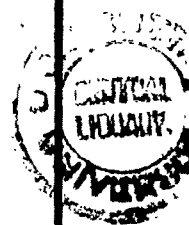
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# THE DOCTRINE OF INTERTEMPORAL LAW

By T. O. Elias \*

## EMERGENCE OF THE DOCTRINE

After the break-up of western Christendom following the Treaty of Westphalia of 1648, a number of historical changes took place in customary international law. One of the most important changes, if not the most important, was the emergence of the nation-state and the political philosophy to which it gave rise, that is to say, the theory of political sovereignty as the cornerstone of the rights and duties of the various states that came into existence. The political sovereignty of states resulted in the gradual replacement of the old international relations within Christendom, which were based upon a theocratic system of law, by a wider legal system that later embraced nations outside Christendom and engendered a universalization of international relations and, therefore, of international law.

One of the most important results of this universalization of international law has been the doctrine of intertemporal law. It is sometimes described as international intertemporal law,<sup>1</sup> sometimes as theory,<sup>2</sup> and sometimes as a principle or doctrine of intertemporal law.<sup>3</sup> Whatever name is given to it in a particular context, it seems true to say that the doctrine of intertemporal law may be regarded as a substantive rule of law in one sense, and as a rule of interpretation in another sense.

The doctrine may also be regarded as having general applicability in various fields of customary international law, although at one stage it was sometimes incorrectly seen as confined to the question of acquisition of territory, especially in regard to the establishment of dominion sovereignty over territory. This point of view was probably based on the *Island of Palmas* case; but Judge Max Huber's famous arbitral award in that case made it clear that the doctrine is of general applicability in customary international law. Indeed, the fact that the principle also applies to

\* Vice-President, International Court of Justice.

<sup>1</sup> See, e.g., G. Schwarzenberger's *Manual of International Law*, at p. 559, where the author says that international intertemporal law is the "determination of international law at successive periods in their application of a particular case."

<sup>2</sup> W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 130-31 (1964).

<sup>3</sup> Compare, e.g., H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY*, 283-85 (1933); G. SCHWARZENBERGER, *1 INTERNATIONAL LAW: INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS I*, at 21-24 (3d ed. 1957); R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 28-31 (1963); Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 320 ff. (1948); W. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 194 (1965).

treaties has been emphasized in the *Grisbadarna* case<sup>4</sup> and in the *North Atlantic Coast Fisheries* arbitration.<sup>5</sup>

#### RESTATEMENT AND ANALYSIS

The doctrine of intertemporal law may be defined, in the words of Judge Huber in the *Island of Palmas* arbitration, as follows: "... a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."<sup>6</sup> The doctrine is more fully stated, however, by Judge Huber later in the same case:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.<sup>7</sup>

There are therefore two elements, the first of which is that acts should be judged in the light of the law contemporary with their creation, and the second of which is that rights acquired in a valid manner according to the law contemporaneous with that creation may be lost if not maintained in accordance with the changes brought about by the development of international law. The first element of the doctrine of intertemporal law would seem to have been widely accepted in international law—e.g., in the *Minquiers and Ecrehos* case. The second element—namely, that the mere acquisition of rights at the time of their creation is not enough, but that they must be maintained according to the evolution of international law—has aroused a good deal of controversy among the experts, notably Philip Jessup, in his famous article on the *Island of Palmas* arbitration,<sup>8</sup> and W. J. B. Versfelt.<sup>9</sup> Both authors' main preoccupation was that states that had acquired territories might find later on, according to the second element, that they could subsequently lose the territory by operation of a new rule of international law. There is little doubt that, in theory, this fear is justified, although in practice other principles of interpretation and application of intertemporal law such as acquiescence, prescription, desuetude, and the rule against nonretroactivity of treaty provisions would operate to make it impossible for the second element of the doctrine to

<sup>4</sup> The *Grisbadarna* Case (Norway, Sweden), Hague Ct. Rep. (Scott) 121 (Perm. Ct. Arb. 1909), 4 AJIL 226 (1910); for the original French version, see Hague Ct. Rep. (Scott) at 487, or 11 R. Int'l Arb. Awards 155.

<sup>5</sup> The *North Atlantic Coast Fisheries* Case (Great Britain, United States of America), 11 R. Int'l Arb. Awards 167, 196 (Perm. Ct. Arb. 1910).

<sup>6</sup> *Island of Palmas* Case (Netherlands, United States), 2 R. Int'l Arb. Awards 831, 845.

<sup>7</sup> *Ibid.*

<sup>8</sup> Jessup, *The Palmas Island Arbitration*, 22 AJIL 735 (1928).

<sup>9</sup> W. VERSFELT, *THE MIANGAS AEBITRATION* 14-16 and also 149 (1933).

work injustices.<sup>10</sup> We shall revert to this point at a later stage of our analysis.

It is about time that we examined the facts of the leading case on the subject of intertemporal law, the *Island of Palmas* arbitration. It will be recalled that a dispute arose between the United States and the Netherlands over the U.S. claim to the island, which was based on Spain's cession of the island to the United States in the Treaty of Paris of December 10, 1898. The United States contended that because Spain had acquired its original title to the Island of Palmas (or Miangas) by means of discovery, the United States must be regarded as the territorial sovereign over it by right of its being the successor to Spain. According to Judge Huber, in the 16th century, customary international law recognized mere discovery of territory as one of the roots of title that conferred sovereignty on the discoverer; but by the beginning of the 20th century, discovery alone had ceased to confer a valid title. There had to be clear manifestation of the exercise of sovereignty in order for the title to be valid. Accordingly, the Netherlands contended that, since its title was subsequently acquired by right of peaceful and effective possession or occupation, the Netherlands was the rightful sovereign over the island. The question then arose as to what legal significance 20th-century international law was to attach to a claim to title based on discovery without evidence of maintenance or display of sovereign authority since the abstract title was first acquired. Judge Huber observed as follows:

It is admitted by both sides that international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilised peoples. Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century—or (to take the earliest date) in the first quarter of it, i.e. at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.<sup>11</sup>

In order to emphasize the point that all that the state with title, the United States in this case, has to do is to show that there has been no acquiescence in the title of the subsequent rival claimant or any abandonment of its title by the original discoverer, the arbitrator further explained as follows:

Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals

<sup>10</sup> This is the view expressed by Ian Brownlie in *Principles of Public International Law* (2d ed. 1973) at pp. 132-33.

<sup>11</sup> 2 R. Int'l Arb. Awards 845.

in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.<sup>12</sup>

As thus clarified, the principle of intertemporal law is shown to have the two elements mentioned earlier: one requires that there must be acquisition of title by discovery or in some other acceptable manner, and the other that this abstract or inchoate title must be followed by manifestation of authority by the sovereign effective enough to warrant the inference of full and continual possession at the time the dispute arises.

It seems possible to argue that the second element of intertemporal law would seem to modify or at least qualify the first element in the sense that it stipulates that, even though at an earlier stage of international law a valid title, once acquired, has conferred sovereignty, in order subsequently to prove a valid title the original acquirer must show that it has continuously maintained its authority and manifested it in an unmistakable way up to the moment when a dispute arises for determination. It is clear that contemporary international law, up to and including the time when the *Island of Palmas* arbitration was concluded, recognized the principle that acquisition of territory by acquiescence, prescription, desuetude, or abandonment, or even by nonretroactive operation of a treaty provision, already implied that these various modes would make it impossible for a subsequent possessor of the territory concerned to establish a valid title unless there was sound evidence of abandonment by the original acquirer. It is also clear that no subsequent acquisition can take place in disregard of the principle that a treaty provision is presumed by customary international law to be nonretroactive in nature. If, for example, an acquirer of title to a territory has obtained valid sovereignty under the international law of the time of acquisition, and another state later takes possession of the territory in accordance with an international treaty declaring that mere discovery does not suffice to establish title, the title of the original discoverer cannot be nullified unless all the parties have formally agreed that the new treaty should have that effect in that particular case. This was expressly done under the General Act of Berlin of 1885 in regard to the division at that time of the colonial territories in West Africa.<sup>13</sup>

It is also relevant to refer here to Article 28 of the Vienna Convention on the Law of Treaties of 1969, which provides:

Unless a different interpretation appears from the Treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation which ceased to

<sup>12</sup> *Id.* at 839.

<sup>13</sup> A. G. ROCHE, *THE MINQUIERS AND ECREHOS CASE* 83 (1959).

exist before the date of the entry into force of the Treaty with respect to that party.<sup>14</sup>

This principle was supported by the International Court of Justice in the *Ambatielos* case,<sup>15</sup> and also by the arbitral tribunal in the *Alabama* case.<sup>16</sup> In rejecting the Greek Government's argument to the contrary in the *Ambatielos* case, the Court observed:

To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.<sup>17</sup>

On the other hand, in the *Mavrommatis Palestine Concessions* case,<sup>18</sup> where there was a special clause in the treaty requiring it to be given retroactive interpretation, the Court upheld it, saying:

An essential characteristic therefore of Protocol XII [is] that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses or the Protocol for the protection of the rights recognised therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection.<sup>19</sup>

If an original discoverer or acquirer is to be ousted by a subsequent occupier of territory, the latter must show that there has been a sufficient period of time in which it would have acquired title against the first acquirer or discoverer; acquiescence or abandonment or even desuetude will require a reasonably long period in which the subsequent occupier might be deemed to have acquired a title as against the original sovereign.

If we consider the arbitral decision in the *Grisbadarna* case, we find support for the opinion expressed by Max Huber. The facts were that in the 17th century Norway and Sweden constituted one united kingdom but, under the Peace Treaty of Roskilde of 1658 between Denmark and Sweden, Denmark ceded the area known as the Bohusland Territory to Sweden. In the 19th century, it was noticed that the *Grisbadarna* banks which bordered on this territory were rich in lobster. A dispute therefore arose between Norway and Sweden regarding the precise demarcation of the

<sup>14</sup> Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).

<sup>15</sup> *Ambatielos* Case (Greece v. United Kingdom), Preliminary Objection, [1952] ICJ REP. 27, 40.

<sup>16</sup> *Alabama Claims Arbitration*, 1872 (Great Britain v. United States), 1 J. WETTER, THE INTERNATIONAL ARBITRAL PROCESS 48 (1979).

<sup>17</sup> [1952] ICJ REP. 40.

<sup>18</sup> [1924] PCIJ, ser. A. No. 2.

<sup>19</sup> *Id.* at 34.

border along the banks. The tribunal to which this controversy was submitted by the parties for judicial settlement was called upon to determine whether the maritime boundary between Norway and Sweden had been fixed, whether in whole or in part, by the boundary treaty concluded in 1661, that is, 3 years after the Treaty of Roskilde, and if not, to determine what the correct boundary should be in accordance with the principles of international law. On October 23, 1909, the court held that the boundary line had been fixed by the 1661 treaty but that beyond a certain point it was not certain. In view of this, the court fixed the boundary by applying the principles applicable at the time the original treaty was concluded in 1658, on the ground that these principles would have been applied by Norway and Sweden in the 17th century.

The arbitral tribunal decided that "in order to ascertain which may have been the automatic dividing line of 1658 (when the territory was ceded by Denmark) we must have recourse to the principles of law in force at that time."<sup>20</sup> It refused to follow either the "median" line or the "thalweg" methods of demarcation on the ground that neither of the two principles had achieved sufficient validity in international law in the 17th century. Rather, the tribunal followed "the general direction of the coast" principle, which, it observed, was valid at the time, and it presumably assumed that it was no longer valid in modern international law. The latter assumption was in effect rejected by the International Court of Justice in the *Fisheries* case, in which the majority of the Court preferred the principle that "the belt of territorial waters must follow the general direction of the coast."<sup>21</sup> This dictum may indeed be considered as having revived the ancient principle that the court of arbitration had recognized as valid at least through the 17th century. It is unfortunate, however, that the International Court of Justice seemed to have proceeded on the basis that the problems involved in the application of intertemporal law need not be gone into in settling the *Fisheries* controversy. Generally speaking, the Court recognized that Norway had abandoned the "range of vision" rule adhered to for a long time. However, it invoked the intertemporal law in one respect, in discussing Norway's title to the whole of the LoppHAVET, whose extent it held as including "all fishing banks from which land was visible, the range of vision being, as is recognised by the United Kingdom Government, the principle of delimitation in force at that time."<sup>22</sup>

The *Island of Palmas* arbitration award by Judge Huber received approval in the *Minquiers and Ecrehos* case which again raised the problem of the intertemporal doctrine.<sup>23</sup> The dispute was between the United Kingdom and France regarding certain islands in the English Channel to which both the United Kingdom and France claimed an original feudal title going back to the Middle Ages. The rule of intertemporal law in

<sup>20</sup> Hague Ct. Rep. (Scott) 127, 4 AJIL 231 (1910).

<sup>21</sup> *Fisheries Case* (United Kingdom v. Norway), [1951] ICJ REP. 116 *et seq.*

<sup>22</sup> *Id.* at 142.

<sup>23</sup> The *Minquiers and Ecrehos Case* (France/United Kingdom), [1953] ICJ REP. 47.

modern international law was accepted by both parties as applicable to the case. The International Court of Justice therefore adopted the principle laid down in the *Island of Palmas* arbitration to the effect that the maintenance of the territorial title, and not merely its acquisition in the abstract, was to be determined not only by the law contemporaneous with the creation or acquisition of the title, but also by the rules governing the matter as they evolved through the period during which sovereign authority was purported to have been exercised by the party subsequently claiming the title.

The United Kingdom based its claims partly on the Norman Conquest of England in 1066, and partly on subsequent treaties between England and France. France relied on the same treaties.<sup>24</sup> The Court found the treaties inconclusive, though it examined and interpreted them in much the same way as any other, more recent treaties. The Court, however, did not disregard the evidence relating directly to possession of the Ecrehos and Minquiers in those early days as mere ancient history; rather, it treated the evidence as facts that established the exercise of jurisdiction in an unbroken chain extending from the Middle Ages to the present day. It seems that the application of this second element of the intertemporal law is not likely to be the source of any injustice in this case since, as has been pointed out by Roche,

inter-temporal law has never been applied where a change in the law has come about in a short time, as when there is an international convention. Generally speaking, therefore, the inter-temporal law will apply in cases where international customary law has changed gradually over the years. In which case, the change of the rule of law would usually be the result of the combined practice of many States.<sup>25</sup>

It will be seen that the doctrine of intertemporal law would seem to have been based upon a view of international law as a dynamic legal system and not merely as a static interpretation of rules. The two elements in Judge Huber's formulation would seem to be both complementary to and limitative of each other in that while the one cannot operate without the other, the second acts as a limiting factor on the first. It depends a great deal upon the way the interrelationship between the first and second

<sup>24</sup> See [1953] ICJ REP. 53-56.

<sup>25</sup> A. G. ROCHE, *supra* note 13, at 83.

The *Minquiers and Ecrehos* case, it may be noted, posed the question of temporal conflict of laws, because both sides based their case on what they believed was the prevailing rule at the time when the rights claimed had been created. Both agreed that the case was one to which the intertemporal law should be applied. The Court would appear to have agreed to such a conclusion when it said:

[E]ven if the Kings of France did have an original . . . title . . . in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years. Such an alleged original . . . title of the Kings of France in respect of the Channel Islands could to-day produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement.

[1953] ICJ REP. 56; see also pp. 60-62.

elements is looked at in order to make a fair appraisal of the implications of the rule as a whole. If one looks at the cases we have mentioned so far, one gets the impression that the tendency of the majority of the decisions is to look at the rule from the dynamic standpoint.

The first element seems to be based on the principle that the origin of a right or title to territory must be valid in the sense that it must be based upon the *contemporanea expositio* idea and should derive its validity from the law in force at that time; but it also implies that, once that right or title has been validly acquired at its inception, it must continue to be valid if that first acquirer is to maintain its right or title at any given moment subsequently. If it is objected that the second element tends to wipe out the first in certain situations, as happened in the *Island of Palmas* award, it must also be remembered that a right or title, once acquired, must not in a dynamic and constantly changing system of law be regarded as good for all time, particularly if the occupation has not been continuous or if the exercise or manifestation of authority or sovereignty over the territory has not been constantly kept up by whoever wants to claim a valid title subsequently. It is a necessary principle of the balance of forces between the proprietor of the right or title at its inception and the subsequent rival proprietor that the latter must show that its subsequent acquisition of the territory or of the right is also valid in law at the time of their dispute.

There can be little doubt that the critics of the second element of the intertemporal law, especially Judge Jessup and Versfelt, have a point in their favor. For instance, Jessup asserted: "Every state would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition. . . . [T]he result would be chaos."<sup>26</sup> It must not be overlooked, however, that all that the principle of intertemporal law holds is that a state in effective possession of a territory subsequently being claimed by another state must not base its claim on a purely abstract right without any concrete act or manifestation of authority. Clearly, the state that is in effective occupation at the time of the dispute should be deemed to possess a superior title, since modern international law does not accept an abstract title unsupported by effective occupation or manifestation of authority over the territory or the right in question.

In the present study of the doctrine of intertemporal law as a principle of customary international law, it will be noticed that we have not considered the related question of the so-called critical date, by reference to which a precise date of change of sovereignty should be fixed as between the original state with title and the subsequent claimant state. While the issue is vital in the determination of title to territory *simpliciter*, it is not necessary to fix a precise date in determining whether or not a change has taken place in the evolution of a rule of general international law. All that is necessary is that the older law, whatever it was, be conclusively

<sup>26</sup> Jessup, *supra* note 8, at 740. See also VERSFELT, *supra* note 9, at 14-16.



proved to have yielded place to the new law, as claimed, and this is most clearly established by general state practice or by an international treaty laying down the specific change in customary international law. The right or title claimed must not be in a state of flux or be an inchoate title, as it is sometimes described.<sup>27</sup> It must have become concretized, so to speak, and generally acceptable as a new principle of law. It is probably for this reason that, when a claim has been made by a state before an international tribunal that a particular change has occurred in customary international law, the adjudicating body has often been reluctant to accept the claim in the absence of proof of long usage or established state practice. As the International Court of Justice pointed out in the *North Sea Continental Shelf* case:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.<sup>28</sup>

Therefore, in order to apply the doctrine of intertemporal law to a given case, it is sufficient to show that the old rule has been changed to the new one being claimed by a state party to a dispute, and that this new law has been generally accepted as part of contemporary international law.

Thus, in three recent cases before municipal courts in the United Kingdom, the United States, and the Federal Republic of Germany, the doctrine of intertemporal law was indirectly raised. In *Trendtex Trading Corporation v. Central Bank of Nigeria*,<sup>29</sup> the Nigerian Ministry of Defense in 1975 ordered 240,000 tons of cement at a price of over U.S. \$14 million from an English company, the Pan-African Export and Import Co., Ltd. The Government of Nigeria authorized the Central Bank of Nigeria to issue an irrevocable letter of credit to Pan-African, which was later transferred to the Trendtex Trading Corporation, a Swiss firm that had contracted with Pan-African to supply the cement. On arrival in the Lagos ports, the ships carrying the first deliveries of cement could not unload it for some months because of the great port congestion there, the former government having ordered some 20 million tons of cement alone to be delivered in a single year. When Trendtex asked the Midland Bank for payment under the letter of credit for some of these deliveries and demurrage, the Central Bank of Nigeria, acting on instructions, refused

<sup>27</sup> It seems as if Judge Huber himself was in doubt in the *Island of Palmas* award as to whether the United States's title was inchoate, as having been derived from the probably inchoate title of Spain.

<sup>28</sup> *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. the Netherlands), [1969] ICJ REP. 3, 44, para. 74.

<sup>29</sup> [1977] 2 W.L.R. 356, [1977] 1 All E.R. 881, reprinted in 16 ILM 471 (1977).

to authorize payment on the alleged ground of breach of various contracts arising from the delays in deliveries.

In proceedings brought by Trendtex before the High Court of Justice, however, the Central Bank's main contention was that it was a creature of a Nigerian statute under which it was incorporated as a state entity and, as such, was not subject to the jurisdiction of British courts. The English High Court therefore dismissed the plaintiff company's action on the ground that the Central Bank, being an *alter ego* of the Nigerian state, was entitled to absolute immunity from the jurisdiction of an English court. Before the High Court, however, the plaintiff company, which had already obtained an injunction restraining the Central Bank from removing its funds in the Midland Bank from the United Kingdom, argued that the injunction should be enforced so as to prevent the Central Bank from removing this means of satisfying its claims. The High Court refused to deal with the question of injunctions at that stage, since the issue could not be determined without impleading the sovereignty of Nigeria.

On appeal to the English Court of Appeal, it was held that the delay in the delivery of the cargo of cement had been the fault of the Nigerian Government not only for the limited capacity of the Lagos and Apapa harbors at the relevant time, but also for having ordered inordinate quantities of cement of that magnitude for delivery within 12 months. Lord Denning observed, however, that these points were not to be considered at this stage; the only question before the court concerned sovereign immunity. The Court of Appeal held: (1) that the Central Bank of Nigeria was not entitled to a claim of sovereign immunity because (a) it had no government status in law, and (b) it was not an *alter ego* of the state of Nigeria; (2) by a majority, that sovereign immunity should not in any event apply to state commercial transactions, which rule was now recognized by contemporary international law; and (3) that, in the opinion of one of the judges, no distinction could be drawn between commercial and "governmental" transactions for the purpose of claiming sovereign immunity until the existing law on the subject was changed either by Parliament or by the House of Lords as the final appellate court.

Without entering into the elaborate argument of counsel in the lower court and in the Court of Appeal regarding the distinction between the monistic and the dualistic schools pertaining to the relationship between municipal law and international law, the Court of Appeal briefly considered the well-known distinction between the doctrines of transformation and incorporation. Lord Denning preferred that of incorporation, according to which the rules of international law are deemed to be incorporated into English law automatically unless they are in conflict with an act of Parliament. This doctrine implies that English law incorporating a rule of international law must develop as international law itself develops. Lord Denning concluded that the bounds of sovereign immunity have changed in the last 30 years and that many countries have given effect to such a change without any express legislation for the purpose. In the United Kingdom such changes had occurred without awaiting a decision

of the House of Lords: in *The Philippine Admiral*,<sup>30</sup> the Privy Council had held that, although a foreign state may not be sued in a British court in an action in personam, even if the suit involves a commercial transaction, an action in rem can be brought against a ship owned by a foreign state if it is engaged in ordinary trade and it commits a delict within British jurisdiction.<sup>31</sup> Lord Denning further observed:

If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change—and apply the change in our English law—without waiting for the House of Lords to do it.<sup>32</sup>

More significant is the emphasis placed by the English Court of Appeal on the evolution of the doctrine of absolute sovereign immunity into one of restrictive sovereign immunity. Nigeria, through its lawyers, had claimed that the rule of absolute immunity still prevailed in the years from 1975 to 1977, whereas the Court of Appeal based its decision on the point that the rule had changed over the last 50 years or so. Lord Denning summarized the matter thus:

In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state—or creates its own legal entities—which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as *jure imperii*, but not immunity to acts of a commercial nature, *jure gestionis*.<sup>33</sup>

After mentioning the “great impetus” given the restrictive doctrine by the “Tate letter”<sup>34</sup> of 1952, Lord Denning quoted from the U.S. Supreme Court opinion in *Alfred Dunhill v. The Republic of Cuba*, as follows:

“Although it had other views in years gone by, in 1952, as evidenced by . . . (the Tate letter) . . . the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state’s public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy

<sup>30</sup> Owners of the Ship *Philippine Admiral* v. Wallem Shipping (Hong Kong) Ltd., [1976] 2 W.L.R. 214, [1976] 1 All E.R. 78, reprinted in 15 ILM 133 (1976).

<sup>31</sup> This is a departure from the rule of absolute sovereign immunity as adumbrated in *The Parlement Belge* ([1880] 5 P.D. 197) and *The Porto Alexandre* ([1920] P. 30).

<sup>32</sup> [1977] 2 W.L.R. 365–66.

<sup>33</sup> *Id.* at 366.

<sup>34</sup> Letter of May 19, 1952, addressed to Acting Attorney General Philip B. Perlman by the Acting Legal Adviser of the Department of State, Jack B. Tate, 26 DEP’T STATE BULL. 984 (1952).

of our government since that time, as the attached letter of November 25, 1975, confirms . . . 'Such adjudications are consistent with international law on sovereign immunity'."<sup>35</sup>

With respect to West Germany, Lord Denning noted that a similar case to *Trendtex* had come before the district court of Frankfurt in December 1975. It happened that, in February 1975, in consequence of an order from the Nigerian Ministry of Defense for the purchase of 240,000 tons of cement from a Liechtenstein firm, the Central Bank of Nigeria as usual issued letters of credit for payment through Deutsche Bank, its Frankfurt correspondent; after the goods had been dispatched and payment was made, there was delay in delivery at the Lagos port because of the congestion there. The holders of the letters of credit claimed demurrage and accordingly levied distress on the assets of the Central Bank of Nigeria in West Germany. Whereupon the Central Bank of Nigeria claimed the release of these assets on the grounds of absolute sovereign immunity. The Frankfurt court rejected the Central Bank of Nigeria's claim in the following words:

"According to the decisions of the Federal Constitutional Court of 1962 and 1963 . . . a foreign state may be granted immunity from German jurisdiction only in respect of its sovereign activity (*acta jure imperii*) but not in respect of its non-sovereign activity (*acta jure gestionis*), because no general rule of public international law exists under which the domestic jurisdiction for actions against a foreign state in relation to its non-sovereign activity is precluded."<sup>36</sup>

#### THE LATEST PHASE

The most recent case in which the doctrine of intertemporal law has been applied in extenso is the *Aegean Sea Continental Shelf*,<sup>37</sup> which concerns a dispute between Greece and Turkey. Although the facts and legal problems involved are complex, it is nevertheless proposed to isolate for treatment here only those that deal with the question of intertemporal law. The Government of Greece asked the International Court of Justice to adjudge and declare, on the basis of Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928, read with Article 36, paragraph 2 and Article 37 of the Statute of the Court, or on the basis of the joint declaration of Brussels dated May 31, 1975,<sup>38</sup> whether the Court was competent to entertain the dispute between the two states on the subject of the delimitation of the continental shelf appertaining to them in the Aegean Sea. But the Greek Government had attached certain

<sup>35</sup> [1977] 2 W.L.R. at 367, citing 425 U.S. 682, 698 (1976) (the date of the "attached" letter referred to by the Supreme Court was November 26).

<sup>36</sup> [1977] 2 W.L.R. 369, citing [1976] NEW JURISTIC WEEKLY J. 1044; the German case, *Nonresident Petitioner v. Central Bank of Nigeria*, is reprinted at 16 ILM 501 (1977).

<sup>37</sup> *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, [1978] ICJ REP. 1.

<sup>38</sup> We shall not touch this second ground of jurisdiction here invoked by Greece as no problem of intertemporal law is involved.

reservations to its instrument of accession to the General Act of 1928, in these words:

"The following disputes are excluded from the procedures described in the General Act, including the procedure of conciliation referred to in Chapter I:

(a) disputes resulting from facts prior either to the accession of Greece or to the accession of another Party with whom Greece might have a dispute;<sup>39</sup>

(b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication."<sup>40</sup>

The Greek Government maintained on various grounds that reservation (b) could not be considered as covering the present dispute regarding the continental shelf of the Aegean Sea since it does not cover *all* disputes relating to the territorial status of Greece but only those that relate to its territorial status and at the same time concern "questions which by international law are solely within the domestic jurisdiction of States." Greece therefore argued that, as the delimitation of the continental shelf could not be considered as a question solely within the domestic jurisdiction of states, the subject matter of the present dispute was not covered by reservation (b). The question then turned on an interpretation of this reservation. In this respect, Greece maintained that a restrictive view had to be taken of the meaning of the expression, "disputes relating to the territorial status of Greece," in the reservation by reason of the historical context in which that expression was incorporated into the reservation.

Greece also contended that, in interpreting reservation (b), regard must be paid to the intention of the Greek Government at the time when it deposited its instrument of accession to the General Act. That intention, according to Greece, was to preclude certain other neighboring states from taking advantage of the General Act by making territorial claims on Greece and that reservation (b) was not intended to exclude the jurisdiction of the Court in disputes like the present one. It must be pointed out, however, that disputes concerning territorial status were expressly mentioned in Article 39, paragraph 2 of the General Act as an example of "clearly specified subject-matters" in regard to which reservations to the act were to be permitted. The Court observed that it was reasonable to presume that "there is a close link between the concepts of territorial status in the General Act and in Greece's instrument of accession to it."<sup>41</sup> Therefore, the meaning in which the expression "territorial status" was used in Article 39 of the General Act must clearly have a bearing on its meaning in Greece's instrument of accession.

<sup>39</sup> This should not delay us, as it is not in question in the case.

<sup>40</sup> Translation quoted by Court, [1978] ICJ REP. 20-21, para. 48.

<sup>41</sup> *Id.* at 29, para. 71.

On a close view of the matter, the Court considered that

historical evidence adduced by Greece did not suffice to establish that the expression "territorial status" was used in the League of Nations period, and in particular in the General Act of 1928, in the special, restricted, sense contended for by Greece. The evidence seems rather to confirm that the expression "territorial status" was used in its ordinary, generic sense of any matters properly to be considered as relating to the integrity and legal régime of a State's territory.<sup>42</sup>

Indeed, the Court went further to state:

[T]he term "territorial status" in the treaty practice of the time did not have the very specific meaning attributed to it by the Greek Government. As the nature of the word "status" itself indicates, it was a generic term which in the practice of the time was understood as embracing the integrity and frontiers, as well as the legal régime, of the territory in question. This is implicit in the very wording of reservation (b) itself which treats disputes relating to Greece's "rights of sovereignty over its ports and lines of communication" as *included* in its reservation of disputes relating to its "territorial status."<sup>43</sup>

It must, however, be pointed out that the Greek Government advanced a further historical argument that there could be no question of the applicability of reservation (b) in respect to the present dispute since "the very idea of the continental shelf was wholly unknown in 1928 when the General Act was concluded, and in 1931 when Greece acceded to the Act."<sup>44</sup> The Greek Government referred to the arbitral award in the *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* case,<sup>45</sup> in which it was held that the grant of a mineral oil concession in 1939 was not to be understood as including the continental shelf. This is because "there is an essential difference between a grant of rights of exploration and exploitation over a specified area in a concession and the wording of a reservation to a treaty by which a state excludes from compulsory procedures of pacific settlement disputes relating to its territorial status."<sup>46</sup> On this point the International Court of Justice held as follows:

While there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appears to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind. Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.<sup>47</sup>

<sup>42</sup> *Id.* at 31, para. 74.

<sup>44</sup> *Id.* at 32, para. 77.

<sup>46</sup> [1978] ICJ REP. 32, para. 77.

<sup>43</sup> *Id.* at 31, para. 75.

<sup>45</sup> [1951] I.L.R. 144, 152.

<sup>47</sup> *Ibid.*

The Court went on to emphasize:

This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like "domestic jurisdiction" and "territorial status" were intended to have a fixed content regardless of the subsequent evolution of international law.<sup>48</sup>

It must be borne in mind that the Greek Government invoked as a basis for the Court's jurisdiction in the present case Article 17 of the General Act of 1928 under which the parties agreed to submit to judicial settlement *all* disputes with regard to which they "are in conflict as to their respective rights." But as the Court pointed out very pertinently:

Yet the rights that are the subject of the claims upon which Greece requests the Court in the Application to exercise its jurisdiction under Article 17 are the very rights over the continental shelf of which, as Greece insists, the authors of the General Act could have had no idea whatever in 1928.<sup>49</sup>

The Court continued:

If the Greek Government is correct, as it undoubtedly is, in assuming that the meaning of the generic term "rights" in Article 17 follows the evolution of the law, so as to be capable of embracing rights over the continental shelf, it is not clear why the similar term "territorial status" should not likewise be liable to evolve in meaning in accordance with "the development of international relations. . . ." <sup>50</sup>

It should also be remembered that, whereas the claims that were the subject matter of Greece's Application relate more particularly to continental shelf rights claimed to appertain to Greece in virtue of its sovereignty over certain islands in the Aegean Sea, including the islands of the Dodecanese group, nevertheless this group of islands was not in Greek possession when it acceded to the General Act in 1931. They were ceded to Greece by Italy only in the Peace Treaty of 1947. In that event, it seems clear that the term "rights" in Article 17 of the General Act should be interpreted in the light of the geographical extent of the Greek state today, not its extent in 1931. If so, it would then be somewhat "surprising if the meaning of Greece's reservation of disputes relating to its 'territorial status' was not also to evolve in the light of the change in the territorial extent of the Greek State brought about by 'the development of international relations'." <sup>51</sup>

It therefore follows inevitably that the Greek contention must fail because, in the words of the International Court of Justice, "the close and necessary link that always exists between a jurisdictional clause and reservations to it, makes it difficult to accept that the meaning of the clause, but not of the reservation, should follow the evolution of the law." <sup>52</sup>

<sup>48</sup> *Ibid.*

<sup>49</sup> *Id.* at 33, para. 78.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Id.* at 33, para. 79.

The Court could see no valid reason why one part of reservation (b) should have been intended to follow the evolution of international relations but not the other, unless such an intention should have been made clear by Greece at that time. The Court therefore came to the following conclusion:

Having regard to the foregoing considerations, the Court is of the opinion that the expression in reservation (b) "disputes relating to the territorial status of Greece" must be interpreted in accordance with the rules of international law as they exist today, and not as they existed in 1931. It follows that in interpreting and applying reservation (b) with respect to the present dispute the Court has to take account of the evolution which has occurred in the rules of international law concerning a coastal State's rights of exploration and exploitation over the continental shelf.<sup>53</sup>

The Court accordingly proceeded thereafter to examine the question

whether, taking into account the developments in international law regarding the continental shelf, the expression "disputes relating to the territorial status of Greece" should or should not be understood as comprising within it disputes relating to the geographical—the spatial—extent of Greece's rights over the continental shelf in the Aegean Sea.<sup>54</sup>

It came to the conclusion that the Greek reservation effectively excluded the dispute between Greece and Turkey in regard to the Aegean Sea continental shelf from the jurisdiction of the International Court of Justice.

It will be noticed that this must be one of the clearest cases in which an international tribunal has taken great pains to analyze the acts as well as the facts raising the problem of intertemporal law in a direct manner, even as envisaged in Judge Max Huber's award in the *Island of Palmas* case. Although the time-honored expression "intertemporal law" was not specifically mentioned in the judgment, the constant invocation of the evolution of the law or of the development of international relations nevertheless shows clearly that it is this doctrine that is in question. The decision in the *Aegean Sea Continental Shelf* case on the issue of whether or not the Court had jurisdiction to entertain a dispute involving the delimitation of the continental shelf and of the territories of both states to the dispute helps in no small measure to clarify most of the problems surrounding the application of the two elements contained in Judge Huber's formulation in the *Island of Palmas* case. It shows that, in applying the doctrine, regard must be had to the rigorous adherence to a principle of interpretation that does not allow one of the disputing states to split its contention so as to be able to apply it to one part of the claim and reject its application to another part. Thus, Greece could not be asking the Court to adjudicate on the delimitation of the continental shelf today and yet exclude the continental shelf from the exceptions con-

<sup>53</sup> *Id.* at 33-34, para. 80.

<sup>54</sup> *Id.* at 34, para. 80.



tained in its reservation clause applying to the jurisdictional treaty.<sup>55</sup> The Greek state did not then include continental shelf *simpliciter*, but it did include areas under its sovereignty with which, by reason of the evolution of international law, the concept as well as the reality of the continental shelf system later clearly became identified. Greece could not, therefore, eat its cake and have it, too.

The logical corollary must be that the term "territorial status" must have one consistent meaning between at least 1928 and 1978 when the Court was asked by Greece to consider the matter. We may also draw attention to the following observation of the Court:

The contention based on the proposition that delimitation is entirely extraneous to the notion of territorial status appears to the Court to encounter certain difficulties. Above all, it seems to overlook the basic character of the present dispute, . . . [which is] whether or not certain islands under Greek sovereignty are entitled to a continental shelf of their own and entitle Greece to call for the boundary to be drawn between those islands and the Turkish coast. The very essence of the dispute . . . is thus the entitlement of those Greek islands to a continental shelf, and the delimitation of the boundary is a secondary question to be decided after, and in the light of, the decision upon the first basic question.<sup>56</sup>

The attempt by the Greek Government to ascribe one meaning to the term "territorial status" as used with reference to the jurisdictional clause in the General Act of 1928, and a different meaning to its use in an exception clause in the 1931 reservation, neatly illustrates the nature of the dilemma to be encountered by a not sufficiently rigorous application of the doctrine of intertemporal law to the interpretation of a treaty situation. The Court's judgment also illustrates the need for consistency in applying the doctrine to specific acts or facts involved in the interpretation of particular situations to which intertemporal law is pertinent in a given case. The logic required is a fairly rigorous one, and the burden of proof on the claimant so demanding, that the parties to the dispute must be prepared to be held on the same wavelength, so to speak, throughout the argument. To say that a particular term used in the operative provision of the act upon which the Court's jurisdiction is thought to be based should be applied differently in the exception clause appears

<sup>55</sup> *Per contra* de Castro:

It is not at the level of interpretation that the evolution of law can have consequences but at another level: if a new peremptory norm (*jus cogens*) emerges, the [Vienna] Convention considers that any existing treaty which is in conflict with that norm becomes void and terminates (Art. 64).

It therefore seems permissible to conclude that the task of interpretation is to verify what was or could have been the will of Greece in 1931 when it used the expression "territorial status" in reservation (b) to its accession to the General Act. The function of intertemporal law is different; it is by the operation of the rules of intertemporal law that new sovereign or exclusive rights over the continental shelf have been attributed to Greece and Turkey.

[1978] ICJ REP. 68 (footnote omitted).

<sup>56</sup> *Id.* at 35, para. 83.

to be a clear case of non sequitur, and was accordingly rejected by the Court on that account.

This case also emphasizes the necessity for discipline in the application of the doctrine of intertemporal law, as formulated in the *Island of Palmas* and amplified by certain subsequent cases such as *Minquiers and Ecrehos* and the *Fisheries* case, to which we have referred above. It may also be pointed out that the application of the principle of intertemporal law in the judgment of the Court in the *Aegean Sea Continental Shelf* case seems to suggest that further clarification and refinement of the full implication of the doctrine may be expected in the future.

The case is important, not only for its application of rigorous logic to the interpretation of a reservation clause against the background of the invocation of the jurisdictional clause by the Greek Government, but also for the fact that the issue was resolved on the basis that it was the claimant state, basing itself on the principle of intertemporal law, that also formulated the reservation clause by which the same jurisdiction was effectively, though inadvertently, excluded. On a first view, it would seem that Greece must have been mistaken as to the logical implication of its reservation clause in the context of its dispute with Turkey. For how otherwise could one explain a party's asking the Court to adjudicate a dispute in 1978, when the same party had effectively, at least by necessary implication, excluded the Court's jurisdiction in a reservation of 1931?<sup>57</sup>

Turkey rightly drew the Court's attention to the matter, although its manner of doing so was regretted by the Court because Turkey did not participate in the proceedings but raised the issue in a letter to the Court. One important lesson to be learned from this judgment, of course, is that parties should be more careful in drafting reservations to a general multilateral treaty, such as is involved in this case.

#### THE INTERNATIONAL LAW COMMISSION AND THE DOCTRINE

It is interesting to observe at this point the International Law Commission's handling of the doctrine in its draft convention on the law of treaties. The Commission formulated paragraph 1 of Article 69, under the heading "General Rule of Interpretation," as follows:

A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:

(a) In the context of the treaty and in the light of its objects and purposes; and

(b) In the light of the rules of general international law in force at the time of its conclusion.<sup>58</sup>

In its commentary, the Commission referred to the principle embodied

<sup>57</sup> The Greek Government's argument was that there could be no question of the applicability of reservation (b) with respect to the present dispute. (See text at notes 45 and 46.) The Court, however, did not find this argument convincing.

<sup>58</sup> [1964] 2 Y.B. INT'L L. COMM'N 199.

in this paragraph as the application to treaties of the "inter-temporal" law which, in the words of Max Huber in the *Island of Palmas* arbitration, requires that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." The Commission also examined briefly the *Grisbadarna* and the *North Atlantic Coast Fisheries* arbitrations as further examples of the application of the principle to treaties. Finally, the Commission referred to the application of the principle to the *Rights of Nationals of the United States of America in Morocco*.<sup>59</sup> The Commission accordingly formulated paragraph 1 as it did.<sup>60</sup>

But the members of the Commission were divided as to this particular formulation. While accepting that the initial meaning of the terms of a treaty is governed by the law in force at the time of its conclusion, some members considered that the interpretation of the treaty might be affected by changes in the general rules of international law, and they would have preferred to omit the words "in force at the time of its conclusion." On the other hand, the majority considered

that the effect of changes in the law upon a treaty is rather a question of the application of the new law to the treaty—a question of the modification of the rule laid down in the treaty by a later legal rule rather than one of the interpretation of the terms.<sup>61</sup>

They recognized that the "scope" of a term may sometimes be altered by a change in the law. They thought, however, that whether a change in the law would have this effect must depend on the initial intention of the parties in using the terms and that the effect of the change in the law should be regarded as a matter of the application of the law rather than a rule of interpretation. They therefore preferred to confine the statement in the paragraph of the article set out above to dealing with the establishment of the initial meaning of the terms, believing that the question of the impact of a change in the general rules of international law on a treaty is sufficiently covered elsewhere in the draft convention by the provision dealing with the modification of treaties by the emergence of new rules of international law.<sup>62</sup>

When the International Law Commission again took up the matter, after receiving the comments of various governments on this point, some members of the Commission suggested that the formulation of 1964 "failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty and was therefore inadequate."<sup>63</sup> On examining the matter further, the "Commission considered that the formula used in the 1964 text was unsatisfactory, since it covered only

<sup>59</sup> Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America), [1952] ICJ REP. 176, 189.

<sup>60</sup> [1964] 2 Y.B. INT'L L. COMM'N 202.

<sup>61</sup> *Id.* at 203.

<sup>62</sup> *See id.* at 202.

<sup>63</sup> [1966] 2 Y.B. INT'L L. COMM'N 222.

partially the question of the so-called intertemporal law in its application to the interpretation of treaties and might, in consequence, lead to misunderstanding."<sup>64</sup> The Commission also thought that,

in any event, the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties, and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties. It further considered that correct application of the temporal element would normally be indicated by interpretation of the term in good faith.

The Commission therefore concluded "that it should omit the temporal element and revise the reference to international law so as to make it read 'any relevant rules of international law applicable in the relations between the parties'."<sup>65</sup> The text finally adopted reads as follows:

There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty;

(b) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.<sup>66</sup>

The shift in position within the article on interpretation (*i.e.*, following the paragraphs on "subsequent" agreement and practice) lends further support to the possible relevance of new rules of international law.<sup>67</sup>

This episode in the drafting of a portion of what later became paragraph 27 of the draft convention on the law of treaties, as put forward by the International Law Commission, illustrates something of the delicacy in the application of the doctrine of intertemporal law, and especially its application to particular cases. The divisions among the members of the Commission clearly show the divergence of opinion and approach to the precise formulation of the intertemporal law. There is, however, every reason to believe that the Commission came to the right conclusion on this point, especially when regard is paid to its formulation of the principle of the nonretroactivity of treaties in Article 24 of the 1966 draft:

Unless a different interpretation appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.<sup>68</sup>

Attention may be drawn to the general phrase, "unless a different in-

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Article 27 on General Rule of Interpretation, para. 3, *id.* at 218.

<sup>67</sup> *Id.* at 222, para. 16.

<sup>68</sup> *Id.* at 211.

interpretation appears from the treaty or is otherwise established," which is used in this context rather than the phrase, "unless the treaty otherwise provides," so as to permit cases or instances where the very nature of the treaty rather than its specific provisions may indicate that it is intended to have certain retroactive effects. In this respect, the Commission quoted the *Ambatielos* case (Preliminary Objection)<sup>69</sup> as an instance where the general rule is endorsed that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in it or is clearly to be implied from its terms. On the other hand, the case of *Mavrommatis Palestine Concessions*<sup>70</sup> was cited as a good example of a treaty that contains a special clause or special object compelling the application of retroactive interpretation.

After the Commission had reexamined the question whether it was necessary to state any rule concerning the application of a treaty with respect to acts, facts, or situations that take place or exist after the treaty has ceased to be in force, it came to the conclusion that a treaty continues to have certain effects for the purpose of determining the legal position in regard to any act or fact that took place or any situation that was created in application of the treaty while it was in force. The Commission decided, however, that this question really pertained to and was dealt with by a different set of provisions on the consequences of terminating a treaty, whereas Article 24 was confined to the principle of the nonretroactivity of treaties in general.

It is significant that the Vienna Convention on the Law of Treaties contains no specific provisions dealing with prescription, acquiescence, or desuetude. This wise course of excluding the sometimes contradictory rules of customary international law precludes the possibility of later inconsistencies in their application in actual cases. The intertemporal law seems to have been designed to govern a situation in which the necessary stability in relations between states is to be preserved, while at the same time the necessity for evolution in those relations and in the law regulating them is recognized. There is no real antithesis between the first and second element in Max Huber's formulation of the rule in the *Island of Palmas* case, and the more we have regard to this consideration, especially in the light of disputes that have arisen since that case, the better we can appreciate the delicate balance aimed at in the formulation of the doctrine as now generally accepted.

#### REAPPRAISAL AND DELIMITATION OF SCOPE

The doctrine of intertemporal law may be deemed to be fairly precise and supportable as a general principle of international law, but particular instances of its application to specific situations in dispute between two or more parties will need to be carefully worked out if difficulties, espe-

<sup>69</sup> [1952] ICJ REP. 40.

<sup>70</sup> [1924] PCIJ, ser. A, No. 2.

cially unforeseen ones, are to be avoided in the future. As Jennings has rightly observed:

If indeed the second branch of the rule of inter-temporal law is allowed to mean more than this, the result is not only that title ceases to have significance, it also means that the first part of the rule is itself virtually cancelled of its effect. It means that title has so to speak to be earned again at every moment of time. Under these conditions no title would be secure and the supposed aim of the law—stability—would be utterly defeated.<sup>71</sup>

In addition, it must be clearly recognized that Judge Huber's formulation of intertemporal law represents an *extension* of the doctrine as it was understood before 1928 when the *Island of Palmas* award was given. Thus, Sir Hersch Lauterpacht<sup>72</sup> observed as follows:

The award, which established a distinction between the creation and continuance of rights, constitutes a clear departure from the views expressed on this subject by a number of international lawyers. The conception of intertemporal law as applied by the arbitrator reveals yet another aspect of the relations between the factors of change and stability.<sup>73</sup>

He further observed that the award "shows the possible effect of a change in the customary rules of international law on existing legal rights in general. International Tribunals have not so far had frequent opportunity to apply the doctrine of intertemporal law."<sup>74</sup> It is obvious, of course, that, since Lauterpacht's book appeared in 1933, other cases like *Minquiers and Ecrehos* in 1953 and *Fisheries* in 1951, as well as *Right of Passage over Indian Territory* in 1960, have been decided in a way that has explained and clarified a good deal of the nuances of the doctrine as originally handed down in *Island of Palmas*. The fact remains, however, that the fullest implications of Judge Huber's formulation of the rule should be watched and awaited with interest.

The need for care in the application of the doctrine of intertemporal law which, in the present writer's opinion, constitutes the main point of Judge Jessup's criticism in his article written only shortly after Judge Huber's award, would seem to be understandable and vital to future consideration of the matter. Thus, Ian Brownlie, in commenting on this important point made by Jessup, was of the same opinion when he wrote as follows: "It would seem that the principle represented by extension of the doctrine is logically inevitable, but that the criticism is in point insofar as it emphasizes the need for care in applying the rule."<sup>75</sup>

<sup>71</sup> R. JENNINGS, *supra* note 3, at 30.

<sup>72</sup> H. LAUTERPACHT, *supra* note 3, at 284.

<sup>73</sup> In order to appreciate the reference to earlier writers we would do well to refer to J. WESTLAKE, 1 *INTERNATIONAL LAW* 114 (2d ed. 1910-13); C. C. HYDE, 1 *INTERNATIONAL LAW* 320 n.5 and 329 n.27 (2d rev. ed. 1945); G. H. HACKWORTH, 1 *DIGEST OF INTERNATIONAL LAW* 393-95 (1940); M. F. LINDLEY, *ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW*, at v-vi (1926), quoted in Hackworth at 395-96.

<sup>74</sup> H. LAUTERPACHT, *supra* note 3, at 284.

<sup>75</sup> In his *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, *supra* note 11, at 132.

Schwarzenberger also warned of the difficulties involved in the application of "inter-temporal international law," especially the likelihood of going astray in a specific application, by referring to the award of King William III of the Netherlands in the case of the *Veloz-Mariana and Other Ships* (1852) between France and Spain.<sup>76</sup> France had, in 1823, seized certain Spanish ships during peacetime. France later was involved in a war with Spain and claimed that the seizure was justified retrospectively on the grounds of either an anticipatory embargo in contemplation of war or an exercise of the right of seizure against merchant ships in belligerent ports immediately on the outbreak of war. The contention of France was that international law at the time of the seizure justified such a position. But a contrary rule was asserted on the premise that the law at the time when the award was made should apply. As it happened, the arbitrator in that case applied a new rule to facts that he ought to have considered in the light of the law as it stood at the time when the alleged international tort was committed. Similar difficulties could be discerned in the judgments of the International Court of Justice in the *Rights of Nationals of the United States of America in Morocco* of 1952<sup>77</sup> and the *Minquiers and Ecrehos* case of 1953,<sup>78</sup> in which, however, the Court found it comparatively easy to endorse Huber's formulation of the principle of intertemporal law in spite of its treatment of the issue of the ancient treaties.<sup>79</sup> It upheld the principle that the creation of a right must be appreciated in the light of the law contemporaneous with the acts creative of the right and that the continued validity of that right at any future date must depend on the state and requirements of international law at that particular moment.<sup>80</sup>

<sup>76</sup> G. SCHWARZENBERGER, *supra* note 3, at 21-24. *Veloz-Mariana and Other Ships* (1852) is cited at *id.*, p. 23.

<sup>77</sup> [1952] ICJ REP. 189.

<sup>78</sup> [1953] ICJ REP. 56.

<sup>79</sup> There has been some argument as to whether or not the examination of feudal law by the Court should be interpreted as an application of this law. Verzijl seems to hold the view that the Court in fact applied feudal law in this case. Verzijl, *Territorial Controversies before the International Court of Justice*, 1 NETHERLANDS INT'L L. REV. 356, 362 (1953-54). See also *id.* at 234-68 and 356-64; and Verzijl, *La validité et la nullité des actes juridiques internationaux*, 15 REV. DROIT INT'L 284-339 (1935). Roche, on the other hand, thinks that what the Court did in this case merely amounts to "ascertaining as a fact the content of another system of law." See A. G. ROCHE, *supra* note 13, at 81 n.5.

<sup>80</sup> See G. SCHWARZENBERGER, *supra* note 3, at 23-24.

## PROCEDURAL DUE PROCESS IN HUMAN RIGHTS FACT-FINDING BY INTERNATIONAL AGENCIES

By Thomas M. Franck and H. Scott Fairley \*

### INTRODUCTION

Most international organizations lack law-enforcing sanctions or, having them in legal theory, are reluctant to invoke them in practice. Instead, they increasingly resort to fact-finding.<sup>1</sup>

Invoking broadly recognized normative standards, fact-finders typically examine data, hear testimony, and consider contextual circumstances. In many contemporary instances, they also deduce whether normative standards have been violated<sup>2</sup> and may thus reach "conclusions" about "conditions," which involves them in making a quasi-judicial determination.<sup>3</sup> The fact finders' report, given full publicity, serves to clarify misconceptions, absolve or embarrass the investigated party, influence public opinion, and, where appropriate, facilitate further expressions of community disapprobation.

Fact-finding is thus, potentially, a significant weapon in the armory of world order. It is also comparatively accessible. States do not ordinarily view the dispatch of a fact-finding group with quite the same alarm as they would a United Nations brigade. Many countries, including South Africa, Britain, Equatorial Guinea, Belgium, Malaysia, Spain, Congo (Zaire), the United States, New Zealand, Israel, and South Vietnam, have permitted on-the-spot investigations at one time or another, even when they would probably have refused, for example, to submit to the jurisdiction of the International Court of Justice.<sup>4</sup>

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<sup>1</sup> One former UN official dates the firm establishment of fact-finding as a technique in the protection of human rights to 1967. Miller, *United Nations Fact-Finding Missions in the Field of Human Rights*, [1970-73] AUST. Y.B. INT'L L. 40. However, fact-finding is not a recent invention. See The Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 in FOREIGN RELATIONS OF THE UNITED STATES, 1899, at 521 (1901) and FOREIGN RELATIONS OF THE UNITED STATES, 1907, pt. II, at 1181 (1910); and such early fact-finding inquiries as those of the Dogger Bank case, Hague Ct. Rep. (Scott) 403 (1916), and the Tubantia case, *id.* at 143 (1932).

<sup>2</sup> Fact-finding groups are now rarely sent merely to gather raw data. Miller, *supra* note 1, at 41-42. However, Article 14 of the 1899 Hague Convention, *supra* note 1, at 524, provided that an inquiry commission should only determine the facts without rendering a decision as to responsibility.

<sup>3</sup> Miller, *supra* note 1. Reciprocally, judicial proceedings before the International Court of Justice have involved that tribunal in intricate fact determinations, as in the *Temple of Preah Vihear* case ([1962] ICJ REP. 6) and in the *Western Sahara* Advisory Opinion ([1975] ICJ REP. 12).

<sup>4</sup> The United Nations through various instrumentalities has conducted, supervised or observed self-determination plebiscites or otherwise ascertained the wishes of indige-



Despite these favorable auguries, the prospects for fact-finding rest upon a fragile assumption of "fairness" and "credibility" that only a conscious vigilance can sustain. Lawyers know that there are few "pure" facts. The subjective perceptive set or belief system of the perceiver is but the most salient of the intrusions into the process. All the more reason to strive for its integrity. This essay contends that, if fact-finding is to become more than another chimera, the sponsoring institutions must develop universally applicable minimal standards of due process to control both the way the facts are established and what is done with them afterwards. Otherwise, in the understated words of a former UN official, if "[t]he facts found . . . are solely to be used for propaganda purposes and to support generally pre-conceived political views on the situation investigated, then fact finding will be of limited usefulness."<sup>5</sup>

Certainly, this pursuit is of relative, not absolute, integrity of process. Fact-finding usually cannot transpire in a political vacuum; fact finders must take into account the prevalent socio-political commitments of the organ sponsoring their inquiry. In this sense, the fact finders "cannot afford an attitude of neutrality."<sup>6</sup> But they must also clearly separate what is to be assumed (the "givens") from what is to be investigated, so that the assumptions do not predetermine the outcome of the investigation. For example, a UN commission inquiring into the question of genocide in South Africa may need to *assume* that genocide is evil (a value given), violative of international law (a legal given), and that persistent and gross economic and cultural deprivation is tantamount to genocide (a mixed fact-law given). Like other tribunals, this fact-finding body cannot expect to write on a tabula rasa. But whether South African practices amount to persistent and gross economic and cultural deprivation is precisely that which is *not* given but, rather, is to be found. In such an inquiry into the alleged genocidal practices of South Africa, the pertinent facts ought to be established in accordance with strictly applied principles of procedural due process. Indeed, it can be argued that the more a fact-finding mission is circumscribed by "givens," the more manifestly rigorous it must be in pursuit of the "nongiven" facts in question.

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nous populations in British Togoland, British Cameroons, the Belgian trust territory of Ruanda-Urundi, New Zealand-administered Western Samoa and the Cook Islands, French Togoland, the U.S. Pacific Trust Territory, and the Malaysian states of North Borneo and Sarawak. South Africa allowed a visit by the chairman and vice chairman of the Special Committee on South West Africa established by the General Assembly in 1961. Israel has permitted UNESCO fact finders to visit the West Bank. Zaire (then the Congo) permitted UN on-the-spot investigation of the death of Dag Hammarskjöld and the Republic of (South) Vietnam permitted a UN team to investigate allegations of discrimination against Buddhists. The United Nations also sent a mission to report on the alleged invasion of Guinea by Portuguese forces in 1970. This list does not include the day-to-day fact-finding of the various UN peacekeeping, truce supervisory, and other observer forces.

<sup>5</sup> Miller, *supra* note 1, at 41.

<sup>6</sup> van Boven, *Fact-Finding in the Field of Human Rights*, 3 ISRAEL Y.B. ON HUMAN RIGHTS 93, 106 (1973).

There is probably more widespread agreement with this proposition in theory than in practice. While almost any government will concede that fact finders ought to be impartial, fact-finding is often employed not to discover evidence of real probity, but to amass whatever evidence there may be—even of doubtful probity—to reenforce predetermined political conclusions.

This prosecutorial marshaling of evidence is not necessarily mendacious, and it may even be the only possible form of investigatory activity when the government being investigated refuses to cooperate in genuine fact-finding. But the yield—a “case” or “indictment”—is quite different from fact-finding. Prosecutorial marshaling of evidence is most appropriate in two instances: first, where the accused state refuses to permit full-scale fact-finding, particularly as to matters that cannot be conclusively determined without its cooperation, for example, when on-site inspection and interrogation of political prisoners are necessary; and second, where the process is merely preliminary to a further proceeding. Thus, it might be appropriate for a UN body to engage in the marshaling of evidence as a part of preparing a request for an advisory opinion of the International Court of Justice, or to justify, and clarify the terms of reference of, an ad hoc fact-finding inquiry to be established by the organ.

For the sake of clarity as well as fairness, it would help if a clear distinction were always made between fact-finding and the prosecutorial marshaling of evidence. Problems arise when the activity is mislabeled, because the process and the product will then be judged by the wrong standard. For example, the Special Committee of the General Assembly to review the racial policies of South Africa has been described as “a fact-finding body,” but “only in the sense that it collects and collates facts in pursuit of a predetermined political aim.”<sup>7</sup> This is a contradiction in terms. If the description of its modus operandi is valid, the committee may be serving a useful purpose, but it is not engaged in fact-finding; nor is it helpful to meld the two quite different functions. Clarity, in this context, is much more than a matter of style. It is the position of the authors that fact-finding must be as impartial and as fair to the parties as procedural and evidentiary rules can render it without making the inquiry’s task impossible, not merely for ethical reasons but in order to maximize the credibility and impact of the facts found. To this end, fact finders must develop procedures that sharply distinguish them from those bodies that assemble prosecutorial evidence. For example, in fact-finding the results of an investigation ought to be disclosed in full, whether they support the sponsoring organ’s hypothesis or not, whereas different considerations may apply to the prosecutorial marshaling of evidence.

Since the efficacy of fact-finding rests so largely on credibility, and credibility emanates primarily from manifest integrity of process, sound procedures are not merely desirable but a functional prerequisite. In

<sup>7</sup> S. D. Bailey, *U.N. Fact-Finding and Human Rights Complaints*, 48 INT’L AFF. 250, 256 (1972).

attempting to illustrate this point, the authors have focused on the institutional experience of several UN organs and agencies working in the area of human rights because this subject has recently generated a substantial body of fact-finding practice using procedures of dramatically contrasting probity. The results of this inquiry are suggestive rather than exhaustive. Examination of the procedural practices of the regional human rights commissions, though beyond the scope of this study, might well be helpful in enlarging the experiential and normative data base from which conclusions could be ventured, and could lead to the drafting of a definitive code of minimal standards of procedural due process.

#### INDICATORS OF IMPARTIALITY

Both critics<sup>8</sup> and defenders<sup>9</sup> of the current state of international fact-finding tend to identify five key indicators of procedural probity: (1) choice of subject, (2) choice of fact finders, (3) terms of reference, (4) procedures for investigation, and (5) utilization of product.

#### *Choice of Subject*

Article 9 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 defined the subjects appropriate for fact-finding as those "involving neither honour nor vital interests." Cynics might say that this is still the unwritten rule, that states are willing to see another's mote investigated only when it does not remotely resemble their own beam. Much UN fact-finding thus has to do with problems that have few counterparts at large: vestigial colonies, apartheid in South Africa, Israeli rule in occupied territories.<sup>10</sup> There may be honest differences of opinion

<sup>8</sup> In an unabashedly pro-Israeli account of the human rights situation in the occupied territories, it is asserted that

there has been no lack of attempts by the Arab states and their supporters to impugn Israel's regard for and recognition of human rights. . . . This has been particularly the case in the forum of the United Nations. . . . Together with the states linked to them by religion, interest, and policy, the Arab states are well able to conduct a running campaign of political warfare in the form of resolutions condemnatory of Israel's administration of the occupied territories.

Greenspan, *Human Rights in the Territories Occupied by Israel*, 12 SANTA CLARA LAW. 377, 377 (1972). See also Shefi, *The Protection of Human Rights in Areas Administered by Israel: United Nations Findings and Reality*, 3 ISRAEL Y.B. ON HUMAN RIGHTS 337 (1973); Carey, *The United Nations' Double Standard on Human Rights Complaints*, 60 AJIL 792 (1966).

<sup>9</sup> van Boven, *supra* note 6.

<sup>10</sup> In 1966, a U.S. observer of the process complained of a "paradox":

Persons complaining about South Africa may petition the United Nations in writing, charging that government with denials of human rights, receive a hearing and have both their written and oral testimony mimeographed and circulated to 117 Member States and nearly 200 libraries in various countries. All other persons complaining of human rights violations by their own government rather than by a foreign or colonial government are told the United Nations cannot help them.

Carey, *supra* note 8, at 792.

as to whether these do, indeed, constitute the most flagrant abuses of human rights; but reasonable persons are unlikely to believe that they are the *only* problems. Consequently, the paucity of human rights fact-finding activity directed elsewhere has a negative effect on the credibility of the investigations that do go forward. To put the matter positively, fact-finding is likely to gain in credibility when it occurs within a broader matrix. The UN principle of "geographical distribution" may not be appropriate to the choice of subjects for investigation, but to confine investigation of so endemic a problem as the violation of prisoners' rights solely to South Africa, for example, is to invite the conclusion that the investigating institution is not serious about enforcing a uniform standard.<sup>11</sup>

Any suspicion of "ad hoc-ery" undermines the efficacy of the fact-finding process, although it is clearly appropriate to prosecutorial marshaling of evidence. In deciding which function to pursue, however, the international agency must understand that public opinion reacts most vigorously against manifest violations of *demonstrated norms*. Even prosecutorial marshaling of evidence makes tactical sense only against the background of a diligent effort to establish the norm. Yet normativeness can be demonstrated only by showing that there exists a generalized practice, which, in turn, requires that all allegations of violations be examined factually and that violators be routinely, not selectively, held to account.<sup>12</sup> With these requirements in mind, Secretary-General U Thant once urged that violations of human rights norms be investigated by standing, rather than ad hoc bodies, which, he added, "would have to be scrupulously non-political" and "should strive to offer all guarantees of impartiality, efficiency and rectitude."<sup>13</sup> This is still the ideal.

Alas, it is not invariably the reality. Theodoor C. van Boven, Director of the United Nations Division of Human Rights, has noted that it is

most unsatisfactory that, in spite of the universal vocation of the United Nations, many situations which would amount to a consistent pattern of gross violations of human rights remain unnoticed in the proceedings of its organs. . . . Many countries which strongly favour United Nations fact-finding in [southern Africa and Israeli-occupied territory] would take a different stand if it were to affect their own.<sup>14</sup>

Such selectivity could abort the promising growth of fact-finding and con-

<sup>11</sup> *Id.* at 795, 799.

<sup>12</sup> Thus, Israel was able to attack the credibility of the special committee established in 1968 by the General Assembly to examine certain practices of the authorities in the West Bank (GA Res. 2443, 23 UN GAOR, Supp. (No. 18) 50, UN Doc. A/7218 (1969)) because the committee had been established solely to investigate one nation's alleged culpability and could not, for example, examine the validity of Israeli charges of worse treatment by certain Arab states of their Jewish populations. Shefi, *supra* note 8, at 339-40. For the committee's report, see Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, UN Doc. A/8089 (1970).

<sup>13</sup> Respect for human rights in armed conflicts: report of the Secretary-General 77, UN Doc. A/8052 (1970).

<sup>14</sup> van Boven, *supra* note 6, at 117.

sign it, in van Boven's phrase, to "the limbo of odd curiosities cited in literature but not of much practical importance in safeguarding human rights."<sup>15</sup>

The equivalent of prosecutorial diligence and even-handedness is difficult, indeed probably impossible, to codify. However, the procedures by which an organ decides to proceed to an investigation are fundamental determinants of integrity. If complaints are routinely subjected to preliminary investigation by a standing group of experts—as are some complaints to the International Labor Organization to be discussed below—a record of fairness in the selection of subjects for investigation is established and norms may evolve. If each decision to investigate is treated as a matter of high political policy, the opposite result is likely to ensue.

### *Choice of Fact Finders*

There is general agreement in principle that fact finders should be impartial, but there is little understanding of what impartiality means in practice.<sup>16</sup> It certainly implies that the persons conducting an investigation should be, and should be seen to be, free of commitment to a preconceived outcome. Commenting on the selection of fact finders by some international organs, an observer notes that "[i]ndependence, integrity and impartiality are individual and not national characteristics."<sup>17</sup> Yet fact-finding groups created by the United Nations are often designated by states, which leaves governments to choose (and, sometimes, to replace) the persons to serve. The same authority charges that

UN fact-finding organs should . . . not [be] composed simply of known opponents of the situation to be investigated. . . . It is true that if a fact-finding body is composed of like-minded members, it will probably accomplish its task more quickly. . . . But the easiest and fastest procedure may not necessarily be in the long-term interests of the United Nations [if] the effect is to discredit the Organisation. . . .<sup>18</sup>

It is not always easy to avoid the appearance of bias in the selection of fact finders. Yet, in many instances, the importance of establishing the appearance of impartiality, or the consequence of an appearance of partiality on the credibility of the facts found, does not appear to have been sufficiently weighed. Would it not have been wiser if the "*ad hoc* Working Group of Experts composed of eminent jurists and prison officials"<sup>19</sup> to investigate the allegations of torture and ill-treatment in South African jails, had not been headed by a chairman who was also the Permanent UN Representative of Senegal, if the Counsellor of the Tanzanian Mission to the United Nations had not been another of the five members, and if

<sup>15</sup> *Id.* at 112.

<sup>16</sup> See T. FRANCK, *THE STRUCTURE OF IMPARTIALITY* (1968).

<sup>17</sup> Bailey, *supra* note 7, at 263.

<sup>18</sup> *Ibid.*

<sup>19</sup> Commission on Human Rights, Res. 2 (XXIII), UN Doc. E/CN.4/950, at 6 (1967).

the Indian First Secretary had not been a third?<sup>20</sup> No matter how personally suited to the task, these representatives of states in the forefront of the campaign against the South African system inevitably lent less credibility to the facts found than would have individuals with fewer prior commitments on the subject.

A similar problem was created by the makeup of the group appointed on September 12, 1969, by the Peruvian Vice-President of the General Assembly to investigate human rights in the Israeli-occupied territories, which consisted of the UN delegates of Ceylon, Somalia, and Yugoslavia.<sup>21</sup> A Jerusalem authority was quick to point out that none of these three states maintained diplomatic relations with Israel and "all have been consistent in a policy motivated by pro-Arab orientation and with an anti-Israeli attitude, which, in the case of Somalia, reached the point of a declaration that a state of war existed between it and Israel."<sup>22</sup> Such an allegation of bias need not be accepted at face value when made by an accused, but surely the credibility of the process would have benefited from the selection of fact finders against whom no plausible charge could have been made.

Surveying current practice, a former UN human rights official concludes:

The detached objectivity and balance that one customarily expects in a judicial enquiry is . . . not present when the composition of the fact-finding missions is examined. The members, although experts in their own right and drawn from the major political regions of the world have been, generally, neither independent of their Governments nor impartial to the governments whose policies they investigated.<sup>23</sup>

There is no insurmountable reason why this should be so. Indeed, as we shall see, many international fact-finding groups are normally constituted of distinguished individuals who have made no prior assumptions about the matters to be investigated and come from countries with no direct stake in the outcome. Sir Wilfred Jenks, long the jealous guardian of the fact-finding credibility of the International Labor Organization, insisted that the "key to the successful conduct of such an enquiry is that the members of the commission or panel entrusted with the enquiry should serve in their personal capacities and be responsible to their own consciences alone."<sup>24</sup> It is not really a very radical proposition. Although the United

<sup>20</sup> The majority of members appointed were government officials: Ambassador Ibrahim Boye, Permanent Representative of Senegal to the United Nations, N. N. Jha, First Secretary of the Permanent Mission of India to the United Nations, and Waldo E. Waldron-Ramsey, Counsellor of the Permanent Mission of Tanzania to the United Nations. A fourth member, Luis Marchand-Stens, was a Peruvian professor of law then serving in his country's embassy in Washington. *Id.* at 45.

<sup>21</sup> The mission was established by GA Res. 2443, *supra* note 12. For appointment of members, see Note by the Secretary-General, UN Doc. A/7495/Add.3 (1969).

<sup>22</sup> Shefi, *supra* note 8, at 338. The Israeli position was put in the form of a protest to the United Nations; see UN Doc. A/7495/Add.1 (1969).

<sup>23</sup> Miller, *supra* note 1, at 48.

<sup>24</sup> C. W. Jenks, *The International Protection of Trade Union Rights*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 210, 239 (ed. Luard 1967).

Nations system is primarily a standing conference of states, not of individuals, its political organs still have used the services of persons acting in an individual, nongovernmental capacity. The General Assembly has requested advisory opinions of the Judges of the International Court of Justice and frequently utilizes the good offices of the Secretary-General. Beneath the surface, the UN system is a mixed "economy," with some persons serving in a governmental, and others in an individual, capacity. The Organization tends to call on the latter when impartiality and credibility are likely to have a particularly significant effect on the outcome of an endeavor.

Nevertheless, during a recent attempt to draft model rules of procedure for UN bodies engaged in investigating human rights questions—to be discussed further, below—this position was rejected. Despite efforts to include the norm that "fact finding bodies should, in principle, consist of individuals in their personal capacity,"<sup>25</sup> one endorsing equally the appointment of either individuals or representatives of states was approved instead.<sup>26</sup> Even the minimalist proposal that all fact finders be required to take an oath attesting their impartiality<sup>27</sup> was rejected because "it would not be appropriate to require this solemn declaration from representatives of States. . . ."<sup>28</sup> No effort at all was made to develop principles for disqualification or recusal based on prior commitment, or otherwise to guard against the appearance of bias in the selection of fact finders. These events suggest that some parts of the UN system not only have failed to deal with the problem successfully but are, as yet, unwilling to acknowledge that it exists.

### *Terms of Reference*

Van Boven has observed:

When the Human Rights Commission decided in 1969 by Resolution 6 (XXV) to establish a Special Working Group of Experts . . . to investigate allegations concerning Israel's violations of the Fourth Geneva Convention of 1949 in the occupied territories, it had already defined its basic attitude before the investigation began: in the Resolution itself, it deplored Israel's continued violations of human rights in the territories and expressed its deep concern at Israel's refusal to abide by the Geneva Convention on the Protection of Civilians in Time of War.<sup>29</sup>

<sup>25</sup> See ECOSOC, 56 Social Committee, 2 Summary Records, at 169, UN Doc. E/AC.7/SR.749 (1974); Report of the Working Group established under Resolution 14 (XXVII) of the Commission on Human Rights, UN Doc. E/CN.4/1086 (1972), at 4, para. 10.

<sup>26</sup> UN Doc. E/CN.4/1086 (1972), Annex, rule 4.

<sup>27</sup> UN Doc. E/CN.4/1021/Rev.1 (1970), at 5, rule 6.

<sup>28</sup> UN Doc. E/CN.4/1086 (1972), at 4, rule 6. The scope of the rule was therefore restricted to members acting in their individual capacities.

<sup>29</sup> van Boven, *supra* note 6, at 102. For Israeli Government comment, see UN Docs. E/CN.4/1016 (1970), para. 9; E/4816 (1970), para. 190, 48 ESCOR, Supp. (No. 5) 49; A/8089 (1970), para. 11.

The General Assembly, in the resolution setting up the special committee in 1968, likewise had taken it for granted "that Israel was in breach of its international obligations";<sup>30</sup> it expressed "grave concern" at these human rights violations and called on Israel to "desist forthwith."<sup>31</sup> The resolution creating the Ad Hoc Working Group of Experts on South Africa similarly stated its conclusions about the very issues the experts were to examine.<sup>32</sup> In each of these instances, the terms of reference—the resolution establishing a mission—included conclusory language that palpably interfered with the integrity of the fact-finding process by violating the essential line between political assumptions and issues to be impartially determined.

By way of contrast, the International Labor Organization, as will be further shown below, treats that line as sacrosanct. It is committed "to keep[ing] political considerations outside the purview of its fact-finding. It also takes great care not to influence a commission of inquiry *a priori*, for it refrains from discussing the merits of a complaint before the Commission has done its work and reported."<sup>33</sup> Although such a strict rule of *sub judice* may not invariably be appropriate to activity that is no more than quasi-judicial, a fact-finding group created by terms of reference that seek to direct its conclusions is essentially a waste of time. Its findings, at most, will reassure those whose minds are already made up.

Observers who have shown particular regard for the potential of international fact-finding also tend to the further view that terms of reference ought ordinarily to distinguish among (1) the gathering and weighing of evidence; (2) the performance of other activities such as the drawing of inferential conclusions of law, that is, deciding whether the evidence amounts to a violation of established norms; and (3) the drafting of remedial recommendations. The Netherlands, for one, has taken the position that "fact-finding activities should at all times be divorced from decision-making functions,"<sup>34</sup> with the latter reserved for subsequent action by the political organ.

Again, this separation may not always be possible or even desirable. ILO fact-finding, which is of a very high order of probity, not infrequently also requires the fact finders to make recommendations for adjustments.<sup>35</sup> However, at the very least, fact finders should confine their policy recommendations—as does the ILO model—to matters very directly growing out of the facts found. It should also be recalled that ILO fact finders can venture forth on these rougher political seas precisely because they

<sup>30</sup> Bailey, *supra* note 7, at 261.

<sup>31</sup> GA Res. 2443, *supra* note 12.

<sup>32</sup> See comments by the South African Government on the first report of the Group of Experts, UN Doc. E/CN.4/950 (1957), paras. 36–60.

<sup>33</sup> van Boven, *supra* note 6, at 103.

<sup>34</sup> Respect for Human Rights in Armed Conflicts: Comments by Governments on the reports of the Secretary-General, UN Doc. A/8313/Add.1 (1971), at 3.

<sup>35</sup> For examples of far-reaching recommendations, see ILO, THE TRADE UNION SITUATION IN CHILE: REPORT OF THE FACT-FINDING AND CONCILIATION COMMISSION ON FREEDOM OF ASSOCIATION 118–22, paras. 525–43 (prov. ed. 1975).



have long been equipped with sturdy procedural rules that have given them a particularly high repute for objectivity and expertise.

The first draft of the Economic and Social Council's model rules of procedure, prepared by the Secretariat, provided procedures for the writing of the fact finders' report, including "conclusions and recommendations."<sup>36</sup> However, most members of the working group appear to have felt that "an *ad hoc* body should not offer policy recommendations, which would rather be the task of the parent organ,"<sup>37</sup> and, in its final form, rule 20 speaks only of a "report."<sup>38</sup>

### *Procedures for Investigation*

There are two cogent reasons why fair procedures are essential to fact-finding. One, the need to demonstrate credibility if the facts found are to be persuasive, has already been noted. The second is the importance of fair procedures to securing the cooperation of the state to be investigated.

One student of UN fact-finding has remarked that the "difficulty about facts is that there are so many of them" and that the fact finder's task comes down to distinguishing "between objective facts and slanted information provided for partisan purposes."<sup>39</sup> This task becomes much harder when the state principally concerned refuses to cooperate with an investigation. In that instance, evidence presented to the group is often insufficiently tested against contrary evidence, which is most likely to be in the possession of the noncooperating state. Consequently, specific "facts" are rebutted, if at all, only after the investigators have finished and published their report.<sup>40</sup> This result makes everyone look bad: the fact finders, the international organ, the side that presented distorted evidence, and the noncooperating state, which failed to produce in time facts peculiarly within its province.

The refusal of a state to cooperate with an international investigation may be motivated by displeasure at what is seen as a violation of its domestic jurisdiction, or by fear that the allegations against it are true, or by a belief that the fact-finding process has been stacked against it, or by all three. Not much can be done institutionally to allay the first two concerns, although the first may be confronted by evidence of recent practice and the development of "black letter" law in international covenants and resolutions of United Nations political organs, which argue that a

<sup>36</sup> Draft model rules of procedure for United Nations bodies dealing with violations of human rights, UN Doc. E/CN.4/1021/Rev.1 (1970), at 4, 13, rule 25 [hereinafter cited as Draft rules].

<sup>37</sup> Report of Working Group under Res. 14, *supra* note 25, at 8, para. 31.

<sup>38</sup> *Ibid.*; UN Doc. E/CN.4/1134 (1974), at 7, rule 20.

<sup>39</sup> Bailey, *supra* note 7, at 250.

<sup>40</sup> An instance is the detailed refutation of very specific facts found in respect of the Israeli occupation's effect on named individuals after the fact finders had reached their conclusions on the basis of the partial evidence presented by Arab witnesses. Shefi, *supra* note 8, at 342-60; Greenspan, *supra* note 8, at 380-85.

state's gross violations of human rights are not protected from scrutiny by Article 2(7) of the UN Charter.<sup>41</sup> The third basis for noncooperation, however, *can* be alleviated institutionally: by rules of procedure that manifest persuasively the fairness to all sides as well as the thoroughness of the fact-finding exercise. An essential aspect of ensuring fairness and rigor in human rights investigations is the provision of adequate procedural safeguards.<sup>42</sup> When they are provided, the state being investigated is more likely to cooperate and the facts found are more likely to "stand up" in the court of public opinion.

The evolution of fair procedural rules appears to have widespread support in theory, but has made little progress in reality because ad hoc groups have failed to seize proffered opportunities. The Ad Hoc Working Group on South Africa, for example, did almost nothing about giving itself specific rules of procedure,<sup>43</sup> even though its enabling resolution empowered it to develop "such modalities of procedure as it may deem appropriate."<sup>44</sup> It adopted only two trivial procedural principles: one requiring witnesses to take an oath or make a solemn declaration, and the other providing for the tape recording of testimony.<sup>45</sup> This lassitude has been compounded by similar inaction on the part of subsequent ad hoc human rights fact-finding missions. According to one fact finder, "[l]acking such rules of procedure, *ad hoc* investigation committees resemble bodies occupied with gathering the materials which may be helpful to support some sort of prosecution of a sovereign State: that is to say, to support the preconceived assumptions of the organisation as regards the facts."<sup>46</sup> Inevitably, the states charged with human rights violations are not anxious to accommodate such an enterprise, and their noncooperation, in turn, reenforces the partiality of the investigation.

A UN human rights official has pointed out,<sup>47</sup> however, that while there are few formal rules, at least some *de facto* procedural principles are evolving, although they must be deduced for the most part from the unenunciated practice of ad hoc groups.<sup>48</sup> One of the earliest and best sources of such principles is the record of practice of the mission sent to Vietnam in 1963 by the General Assembly in response to a complaint lodged by 14 countries.<sup>49</sup> When the Saigon regime agreed to an on-site inspection, the President of the Assembly appointed a mission consisting of repre-

<sup>41</sup> Compare, Carey, *supra* note 8, at 792-93; Bilder, *The International Promotion of Human Rights: A Current Assessment*, 58 AJIL 728 (1964).

<sup>42</sup> See Kaufman, *The Necessity for Rules of Procedure in Ad Hoc United Nations Investigations*, 18 AM. U.L. REV. 739 (1969).

<sup>43</sup> Ermacora, *International Enquiry Commissions in the Field of Human Rights*, 1 HUMAN RIGHTS J. 180, 192 (1968).

<sup>44</sup> Commission on Human Rights, Res. 2, *supra* note 19, para. 3(b).

<sup>45</sup> UN Doc. E/CN.4/950 (1967), paras. 23-25.

<sup>46</sup> Ermacora, *supra* note 43, at 205.

<sup>47</sup> Miller, *supra* note 1, at 47.

<sup>48</sup> See also p. 332 *infra*.

<sup>49</sup> The Violation of Human Rights in South Viet-Nam: Report of the United Nations Fact-Finding Mission to South Viet-Nam, UN Doc. A/5630 (1963), para. 1.

sentatives from six countries, with a staff of four seconded from the Secretariat.<sup>50</sup> Although the mission's substantive work was frustrated by the overthrow of President Diem,<sup>51</sup> the rules of procedure it adopted continue to be a useful guide.<sup>52</sup> These provided for a chairman, a rapporteur to function in the former's absence, a quorum, and a simple majority of "members present and voting" to make decisions. The principal secretary was charged with "keep[ing] the members of the Mission informed of any questions which should be brought before it for consideration."<sup>53</sup> Insisting that it would strive for "impartiality at all times," the mission determined that it was empowered to "collect information, conduct on-the-spot-investigations, receive petitions" in private from "individuals, groups and organizations" as long as they were specific as to time, date, and place, and "hear witnesses" of its own choosing, including persons under detention, on oath and "under such conditions as it may deem necessary"; it refused to entertain evidence not "relevant to the factual issue under investigation," such as "opinions concerning . . . the general political situation."<sup>54</sup>

Thus, the mission, before it set forth, had put in place some basic procedural rules; its subsequent practice demonstrated adherence to the self-imposed guidelines.<sup>55</sup> These rules were not particularly onerous and should have served as "a model for all future fact-finding groups."<sup>56</sup> For the most part, however, the model has been ignored in favor of improvisation ad hoc.

This disregard has been noted with concern by those who care about human rights enforcement. The idea that procedural rules of general application were a necessary part of any strategy for improving enforcement was embraced by the International Conference on Human Rights, held at Tehran in 1968.<sup>57</sup> It recommended that the Commission on Human Rights draw up, as soon as possible, "[m]odel rules of procedure for bodies dealing with violations of human rights."<sup>58</sup>

The Commission agreed and asked the Secretary-General to prepare a draft,<sup>59</sup> which the Commission considered at its 26th<sup>60</sup> and 27th sessions.<sup>61</sup>

<sup>50</sup> *Id.*, paras. 3, 5, and 6. The members were representatives of Afghanistan, Brazil, Ceylon, Costa Rica, Dahomey, Morocco, and Nepal.

<sup>51</sup> *Id.*, paras. 12-57; see also the Report of the Secretary-General on methods of fact-finding, UN Doc. A/5694 (1964), at 99-101.

<sup>52</sup> UN Doc. A/5630 (1963), *supra* note 49, Ann. II.

<sup>53</sup> *Id.*, paras. 1, 2, 4, and 7-11.

<sup>54</sup> *Id.*, paras. 12-20.

<sup>55</sup> See the account of the mission with supporting documentation given by Kaufman, *supra* note 42, at 753-55.

<sup>56</sup> *Id.* at 755.

<sup>57</sup> See Note by the Secretary-General, UN Doc. E/CN.4/1021/Rev.1, at 1, 1 (1970).

<sup>58</sup> Resolution X adopted by the conference at its meeting, May 12, 1968, UN Doc. A/CONF.32/41 (1968).

<sup>59</sup> By Resolution 8 (XXV), March 4, 1969, Note by the Secretary-General, *supra* note 57, at 2, para. 3.

<sup>60</sup> The debate at Tehran had disclosed differing views on what a framework of rules should be designed to achieve and the limitations any framework might impose: (1)

Unfortunately, the authors marched up the hill and back down. After discussing and revising the draft at length,<sup>62</sup> and after receiving submissions and circulating the draft for comment by member states,<sup>63</sup> a working group in February 1974, produced a consensus<sup>64</sup> arrived at by deletion of the more contentious—and important—provisions. The Human Rights Commission then recommended this text to the Economic and Social Council (ECOSOC),<sup>65</sup> which gave it a form of endorsement by adopting a resolution that takes note of the working group's reports and brings them "to the attention of all organs and bodies within the United Nations system dealing with questions of human rights and fundamental freedoms."<sup>66</sup> Thus, it is the reports on the rules, not the rules themselves, that are endorsed. And even this was further watered down. At the insistence of the Byelorussian member of the Human Rights Commission, it was decided to delete the concluding words of the resolution sponsored by Austria, the Netherlands, Nigeria, and Pakistan which proposed that the rules be "taken into account whenever the need arises."<sup>67</sup>

The concern that the rules not be made mandatory is surprising, given their modest aspirations. For those concerned with credibility and due process in fact-finding, the model rules are not the answer. They do set out some basics: that the chairman of each group is to be elected (rule 12), that decisions are to be made by a majority of members present and voting (rule 15), and that each ad hoc group shall determine its own agenda (rule 11), place of meeting (rule 7), and whether to meet in open or closed session (rule 9). The rules, however, fail to address most of the

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specific rules had the potential benefit of ensuring the performance of investigations with objectivity and impartiality; (2) "imposition of model rules on all existing or future bodies might well have the effect of hampering their operation and reducing their efficiency"; (3) minimum standards might be combined with broad flexibility to meet different situations. *Id.* at 2, para. 4. See also Conference Records, UN Docs. A/CONF.32/C.2/SR.5 and 9 (1968); UN Docs. E/CN.4/SR.1013, 1015, and 1016 (1969).

<sup>61</sup> Draft rules, *supra* note 36, at 3, para. 6.

<sup>62</sup> Resolution 14 (XXVII), March 24, 1971, in Commission on Human Rights Report on its 27th session, 50 ESCOR, Supp. (No. 4) 90, UN Doc. E/4949 or E/CN.4/1068 (1971); Report of the Working Group under Res. 14, *supra* note 25, at 1 (1972). The working group consisted of 5 members of the commission.

<sup>63</sup> The submissions may be found in UN Docs. E/CN.4/1071 and Adds. 1-4 (1972); the commentaries of member states are consolidated in UN Doc. E/CN.4/1133 and Adds. 1-3 (1973).

<sup>64</sup> Report of the Working Group under resolutions 14 (XXVII) and 15 (XXIX) of the Commission on Human Rights, UN Doc. E/CN.4/1134 (1974), Annex, Text adopted by the Working Group.

<sup>65</sup> See Commission on Human Rights, Report on its thirtieth session, 56 UN ESCOR, Supp. (No. 5) 54, UN Doc. E/5464-E/CN.4/1154 (1974).

<sup>66</sup> Report of the Social Committee, UN Doc. E/5514, at 24 (1974).

<sup>67</sup> Human Rights Comm'n report, *supra* note 65, at 35. In the original draft prepared by the Secretariat it was stated that "[t]hese model rules shall be applicable upon the decision of the competent organ to *ad hoc* bodies of the United Nations" and that they could be modified by the ad hoc body if specifically authorized by the organ establishing it. Draft rules, *supra* note 36, at 4, rules 1, 2.

key questions. Who sets the mission's itinerary? Does the group have the right to hear any witnesses it pleases, including those incarcerated? What weight is to be given hearsay evidence? May the mission conduct on-site inspections as of right? Is the accused state entitled to confront its accusers?

Rule 17 gives to the organ establishing the ad hoc group discretion to invite any state "to extend co-operation and . . . assistance," a far cry from the more comprehensive proposals of the Secretariat, which would have entitled the fact finders to request participation by "the State directly concerned" in the form of "statements and documents . . . as well as a list of witnesses and experts," and would have allowed that state "to be represented by an accredited representative," to make submissions and statements, and to "put questions to witnesses at hearings."<sup>68</sup> The Byelorussian member had even urged that the "concerned" state have the right to attend sessions of the mission whenever it deemed such attendance "advisable," not merely when it was invited to give testimony.<sup>69</sup> The Netherlands had wanted the "State directly concerned" to be "entitled to be represented by an accredited representative at those meetings of the *ad hoc* body during which witnesses or experts are being heard. . . ."<sup>70</sup> None of these proposals found their way into the completed ECOSOC text. They squarely counter-posed two values: probity and security. To compel the accuser always to confront the accused is likely to increase confidence in an inquiry's findings. On the other hand, witnesses may be reluctant to come forward if they fear retribution by the government against which their evidence is directed. These two values, as we shall see, are not inevitably irreconcilable, but the text makes no effort to seek a satisfactory compromise or to delineate the circumstances in which each value is to be given priority.

While the model rules are thus a modest start toward establishing normative procedures, they are not an answer to the problem of ensuring manifest fairness and diligence in investigations.

### *Utilization of Product*<sup>71</sup>

How states and the public perceive a mission's product will inevitably depend, also, upon the process by which the facts found are enunciated, publicized, and used. Even accurate facts, like figures, can dissemble. A nonpartisan observer has noted, for example, that some fact-finding reports sponsored by the General Assembly and the Human Rights Commission "were not in general dressed up in the restrained language of traditional diplomacy, and the reader cannot feel confident that a complete and balanced picture has been presented."<sup>72</sup> He contrasts these reports

<sup>68</sup> Draft rules, *supra* note 36, at 9-10, rule 17.

<sup>69</sup> Report of the Working Group, *supra* note 25, at 7, para. 27.

<sup>70</sup> *Id.*, para. 28.

<sup>71</sup> "Product" in this context is meant to refer to the facts found by the fact finders.

<sup>72</sup> Bailey, *supra* note 7, at 258.

with parallel factual reports of the International Committee of the Red Cross (ICRC), which "were not at variance" with those of the UN investigators but were presented in a more restrained, objective fashion, and with less editorializing.<sup>73</sup>

Evidently, the problem is one to which ad hoc fact-finding groups, as a matter of self-interest, must be sensitive. However, in this regard, the interest of the fact finders and that of the sponsoring political organ may be adversary. A carefully calibrated report of findings may help smooth the way for the mission to carry out further investigation and supervision. Moreover, it may accurately reflect the shadings and complexities of a situation. A characteristic of serious fact-finding is that, in many instances, it tends to blur the hard edges of perceived reality. But this result may not suit the political mood of the majority in the sponsoring organ, who may feel disappointed and be tempted to ignore, doctor, or exorcise the offending parts of the fact finders' report. Such reactions are an assault on the integrity of the fact finders and, even more, on the process itself.

The fact finders' product thus requires protection. The model rules unfortunately contribute only slightly. They recognize the members' right to have dissenting opinions included in the report,<sup>74</sup> but they assign exclusive control over whether or not a report is to be published to the political organ, not to the fact-finding group.<sup>75</sup> These features at least imply that a report must either be published as a whole, including dissents, or not at all. But there is no support for the proposition that even "inconvenient" reports *ought* to be published. The same applies to records. The Secretary-General's draft proposed that, in the absence of contrary provisions in the enabling resolution, the fact-finding group shall "decide on the manner in which its records may be distributed and made public."<sup>76</sup>

<sup>73</sup> *Ibid.* The General Assembly's Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, the principal object of the criticism, appears to have taken it to heart, for in December 1970, and again the following year, it recommended to the General Assembly that the ICRC take over its monitoring and reporting tasks. UN Doc. A/8389/Add.1 (1971), paras. 36-38; UN Doc. A/8828 (1972), Letter of Transmittal by the Chairman of the Special Committee and paras. 83-99; see also van Boven, *supra* note 6, at 113-14. The special committee later expressed regret that the General Assembly had failed to take its advice. UN Doc. A/8828, Letter of Transmittal, this note *supra*. The ICRC had indicated willingness to assume the duty proposed by the special committee. ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, SECOND SESSION, 1972: 1 REPORT OF THE WORK OF THE CONFERENCE, para. 5.46 (1972). After the proposal to transfer its functions to the ICRC was not acted upon, the special committee appears to have tried to tighten up its own procedural rules. This is apparent in the report of October 5, 1971, for example, which for the first time refused to accept at face value uncorroborated accounts by witnesses as to treatment in detention. UN Doc. A/8389 (1971), para. 77.

<sup>74</sup> Res. 14 and 15 Working Group Report, *supra* note 64, at 7, rule 20(b).

<sup>75</sup> *Id.*, rule 20(a).

<sup>76</sup> Draft rules, *supra* note 36, at 12, rule 24(c).

This would have made it more difficult for a political organ to suppress or alter the product. In their final version, however, the rules transfer power over distribution and publication of records to the parent political organ.<sup>77</sup>

As will become apparent from the next section, the need for protecting the integrity of the fact finders' product is not a theoretical, but a practical problem which, unresolved, can make a shambles of fact-finding.

#### A HARD CASE

While the Human Rights Commission's difficulties in drafting model rules of procedure amply demonstrate the obstacles to universal agreement on what is procedurally "fair," it may be somewhat less daunting to examine the other end of the spectrum and identify what is manifestly unfair. In this sense, hard cases may help promote better law.

A recent fact-finding exercise by UNESCO in respect of the areas under Israeli military control is particularly instructive.<sup>78</sup> This episode began when the 1972 session of the UNESCO General Conference, in a lengthy "omnibus" resolution<sup>79</sup> covering "UNESCO's contribution to peace and its tasks with respect to the elimination of colonialism and racialism,"<sup>80</sup> declared that "violation of the human rights of the peoples in occupied territories should be brought to the attention of world public opinion in order to ensure the respect of human rights in those territories."<sup>81</sup> The resolution requested that the Director-General employ all means at his disposal to gather information "on the national education and the cultural life of the populations in the occupied Arab territories" for submission to the General Conference when it reconvened in 1974.<sup>82</sup>

To gather statistics for his report, the Director-General sent a detailed questionnaire to the Governments of Israel, Egypt, Jordan, Syria, and Lebanon, and to the League of Arab States, the Arab Educational, Cultural and Scientific Organization (ALECSO), and 89 international nongovernmental organizations as well.<sup>83</sup> Next, in the summer of 1974, two Secretariat

<sup>77</sup> Res. 14 and 15 Working Group Report, *supra* note 64, at 7, rule 19.

<sup>78</sup> For a balanced evaluation of the competence and activities of UNESCO in the human rights field generally, see Marks, *UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture, and Communications*, 13 *TEX. INT'L L.J.* 35 (1978).

<sup>79</sup> This term refers to the comprehensive resolutions integrating UNESCO's efforts in three basic areas: enhancing peaceful cooperation among member states, liquidating colonialism and racialism, and promoting human rights and fundamental freedoms. This has been the practice of the General Conference since 1970. See 16 *UNESCO GEN'L CONF., 1 RESOLUTIONS* 79 (1970); see generally, D. PARTAN, *DOCUMENTARY STUDY OF THE POLITICIZATION OF UNESCO* 123-32 (1975).

<sup>80</sup> 17 *UNESCO GEN'L CONF., 1 RESOLUTIONS* 106, *UNESCO Doc.* 17C/Res.10.1 (1972).

<sup>81</sup> *Id.*, pt. III, para. 17.

<sup>82</sup> *Id.*, pt. III, para. 19.

<sup>83</sup> Report by the Director-General on the Situation with Regard to National Education and Cultural Life in the Occupied Arab Territories, *UNESCO Doc.* 18C/16, at 3, para. 1 (1974).

officials<sup>84</sup> were sent on a 3-week visit to these countries and to the occupied Arab territories. Afterwards, the Director-General was able to report that the group "was well received by the authorities at all levels everywhere and had invaluable assistance from them. . . . In the occupied territories, it was able to meet all the people it wished to see and had discussions with them, without witnesses, in an atmosphere of complete freedom."<sup>85</sup>

The resultant report was presented to the General Conference of UNESCO on September 10, 1974.<sup>86</sup> The Director-General stated that he had attempted nothing more than "a descriptive account, in the soberest possible terms,"<sup>87</sup> as fully documented as circumstances would permit. "It has not always been possible," he added, "to assess the accuracy of the observations or information transmitted" and, in such cases, he had "made a point of noting this clearly in the report."<sup>88</sup>

From the report emerges a balanced portrayal of the effects of military occupation. For example, the report describes Israel's censorship of Arab textbooks in West Bank public schools but adds that deletions were limited to certain passages that had "tended to induce hatred for Israel in the minds of the children using them" and that, moreover, the policy did not apply to private schools, which remained "comparatively free" to use whatever materials they possessed.<sup>89</sup> As for cultural life in the Gaza Strip and northern Sinai, the Director-General reported that Israeli authorities had "not modified . . . [or] taken part in it."<sup>90</sup> On the other hand, the report notes the large number of complaints about lack of press freedom and that "the local newspapers have disappeared and that books and magazines are imported only after censoring by the Israeli authorities."<sup>91</sup>

The 18th session of the UNESCO General Conference responded with a resolution submitted by the Governments of Egypt, Jordan, Syria, Lebanon, and 12 other Arab nations<sup>92</sup> which concluded that "the populations in the occupied Arab territories are not enjoying their inalienable and

<sup>84</sup> The mission was led by Mrs. M.-P. Herzog, director of the Human Rights Coordination Unit of UNESCO. *Id.* at 3, para. 5.

<sup>85</sup> *Id.* at 3, para. 6.

<sup>86</sup> *Id.* at 1. This report was prepared and presented at the conclusion of the term of René Maheu, who retired from the office of Director-General of UNESCO in November 1974. Mr. Maheu was succeeded by Amadou-Mahtar M'Bow of Senegal, who, as of this writing, still occupies the office.

<sup>87</sup> *Id.* at 4, para. 8.

<sup>88</sup> *Id.* at 4, para. 12.

<sup>89</sup> *Id.* at 18, para. 75.

<sup>90</sup> *Id.* at 12, para. 44.

<sup>91</sup> *Id.* at 12, para. 49.

<sup>92</sup> For the draft resolution, see UNESCO Doc. 18C/PLEN/DR.5 (1974). For the adoption of the resolution, see 18 UNESCO GEN'L CONF., 3 RECORDS 551-66 (1974). The resolution was adopted by 36 votes to 11, with 45 abstentions, on November 23, 1974; *id.* at 566. The adopted resolution is in *id.*, vol. 1, at 118, UNESCO Doc. 18C/Res.13.1 (1974).



inviolable rights to national education and cultural life"<sup>93</sup> and invited the Director-General

to exercise full supervision of the operation of educational and cultural institutions in the occupied Arab territories, and to co-operate with the Arab States concerned and with the Palestine Liberation Organization with a view to providing the populations in the occupied Arab territories with every means of enjoying their rights to education and culture so as to preserve their national identity.<sup>94</sup>

Faced with this revised mandate, the new Director-General, Amadou-Mahtar M'Bow, decided to draw up an inventory of educational and cultural institutions in the occupied areas and, through a detailed study of a number of these institutions, "to identify the actual needs of the peoples" so that UNESCO might help provide them with "every means of enjoying their rights to education and culture so as to preserve their national identity."<sup>95</sup>

To no one's surprise, Israel, at first, "indicated that it was unable to associate itself in any way with the implementation of the resolutions in question." Under insistent prodding from M'Bow, however, Israel did agree to send further data but refused to have another on-site inspection.<sup>96</sup> Reporting to UNESCO's Executive Board, the Director-General pointed out that little could be done without the cooperation of the Israeli Government.<sup>97</sup> The board instructed him to keep trying,<sup>98</sup> and placed the matter before the 19th session of the General Conference.

In the intervening months, the Director-General concentrated on persuading the Israeli authorities to relent, proposing a fact-finding mission of three experts to assess the educational and cultural situation in the occupied territories. Ultimately, these efforts were successful; Jerusalem agreed in principle to a visit early in 1977.<sup>99</sup> The Director-General's report to the General Conference communicated the salutary results of

<sup>93</sup> UNESCO Doc. 18C/Res.13.1, *supra* note 92, 3d preambular paragraph.

<sup>94</sup> *Id.*, para. 1. The draft resolution, *supra* note 92, did not contain the reference to the Palestine Liberation Organization included in the final version of this paragraph.

<sup>95</sup> Report of the Director-General on the Implementation of 18C/Resolution 13 concerning Educational and Cultural Institutions in the Occupied Arab Territories, UNESCO Doc. 99EX/50, at 3, paras. 4, 5 (1976) [in UNESCO Doc. 19C/73, Ann. I (1976)].

<sup>96</sup> UNESCO Doc. 99EX/50, *supra* note 95, at 6, paras. 23, 24, and 27. The Israeli information was received too late to be included in the main report but was attached as a supplement to the Report of the Director-General; *id.* at 7, para. 34.

<sup>97</sup> *Id.* at 12-14, paras. 71-84.

<sup>98</sup> Text of Decision 99EX/9.2 (May 24, 1976), in UNESCO Doc. 20C/113, Ann. II (1978).

<sup>99</sup> These negotiations are described in the Report of the Director-General on the Implementation of Resolution 13.1 Adopted by the General Conference at its Eighteenth Session, Concerning the Educational and Cultural Institutions in Occupied Arab Territories, UNESCO Doc. 19C/73 (1976), at 3-5, paras. 14, 16-22. The Israeli authorities cited, *inter alia*, the disruption attendant upon the beginning of the school year, religious holidays, and the absence of key officials as reasons for their inability to meet the Director-General's suggested schedule.

these negotiations and concluded by noting with appreciation the "new attitude of the Israeli Government," although expressing regret that "despite his repeated requests, the necessary facilities were not granted earlier. . . ." <sup>100</sup>

This ought to have been an ideal moment for a polemical cease-fire. Instead, the 19th session of the General Conference, at Nairobi, responded by adopting a resolution <sup>101</sup> whose key provisions were essentially determined by an Arab-African group over strenuous Western and Israeli objections. While, on the one hand, accepting the invitation and instructing the Director-General "to implement as soon as possible his decision to send a fact-finding mission to the Arab territories occupied by Israel," <sup>102</sup> it also prejudged the project's outcome by unqualifiedly "[c]ondemning as contrary to human rights and fundamental freedoms all violations, resulting from Israeli occupation, of the rights of the populations living in all the occupied Arab territories to national education and cultural life, and particularly the policy of systematic cultural assimilation." <sup>103</sup>

Inevitably, this conclusory wording of preambular paragraph 8 sparked debate, both in committee and in the plenary meeting, that could not help but poison the atmosphere in which the fact-finding was to occur. According to the report of the rapporteur of Commission III, the representative of Benin, speaking for the African and Arab sponsors of this provision, sought to explain that "the 'condemnation' was, at the present moment, exclusively hypothetical . . . ; moreover it appeared only in a preambular paragraph. It would only become relevant in the event that the fact-finding mission should confirm what at present were allegations." <sup>104</sup> He added that a French proposal to accommodate this labored construction by changing "condemning" to "considering open to condemnation" was unacceptable because "it was in fact unnecessary as it had the same meaning." <sup>105</sup> Disagreeing, the delegate of New Zealand characterized himself as unconvinced "that the word 'Condemning' has any other than its literal meaning and that paragraph 8 of the resolution does not prejudice the facts which the fact-finding mission are charged to uncover." <sup>106</sup> Similarly, the U.S. delegate declared that "the resolution prejudices the results . . . contrary

<sup>100</sup> *Id.* at 6, para. 26.

<sup>101</sup> For the draft resolution considered by Program Commission III, see UNESCO Doc. 19C/PRGIII/DR.5 (1976). For discussion of various Western amendments, all of which failed, see 19 UNESCO GEN'L CONF., 2 PROCEEDINGS 230 (1976). The vote on the amended draft resolution by Commission III was 73 votes to 6, with 30 abstentions, and in plenary, 61 votes to 5, with 28 abstentions. *Id.* at 230, 232. The resolution as adopted is reproduced in 19 UNESCO GEN'L CONF., 1 RESOLUTIONS 90, UNESCO Doc. 19C/Res.15.1 (1976).

<sup>102</sup> UNESCO Doc. 19C/Res.15.1, *supra* note 101, para. 1; for the terms of reference contained in the resolution, see note 99 *supra* and accompanying text.

<sup>103</sup> UNESCO Doc. 19C/Res.15.1, *supra* note 101, 8th preambular paragraph.

<sup>104</sup> 19 UNESCO GEN'L CONF., 2 PROCEEDINGS 230, para. 94.4 (1976).

<sup>105</sup> *Id.*, para. 94.5.

<sup>106</sup> *Id.*, para. 96.1.

to elementary principles of fairness and equity. The purpose of a fact-finding mission," he said, "is to find out."<sup>107</sup>

Thus, the project began with its terms of reference<sup>108</sup> shrouded in a miasma of bias. Nevertheless, an experts' mission was organized by the Director-General,<sup>109</sup> composed of admirably suited individuals, and it did visit the occupied territories from November 30 to December 9, 1977.<sup>110</sup> The chief of the mission was Paul Marc Henry (France), and other members were Samuel Cookey (Nigeria), Joaquín Ruiz-Giménez (Spain), Pierre de Senarclens (Switzerland), and Vladimer Velebit (Yugoslavia). Jacqueline Hénin (France) was appointed "to assist the mission in its work."<sup>111</sup> All of the members, as well as Mrs. Hénin, were serving in a

<sup>107</sup> *Id.*, Ann. I at 234 (Mr. Kamm).

<sup>108</sup> The terms of reference, as set out in Resolution 15.1 of the 19th session, *supra* note 101, were:

(a) to collect on-the-spot information on:

(i) the general conditions under which the right to education is ensured and instruction provided in the occupied Arab territories, with particular reference to curriculum content; the nature, origin and content of the textbooks used, the numbers, origin, situation and qualifications of teachers; the number and state of educational premises, together with the school enrollment trend;

(ii) conditions of cultural life and, in particular, cultural and artistic means of expression and self-fulfilment ensured for the populations of these territories; freedom in the matter of religious instruction and access to places of worship; freedom of access to external sources of culture and, in particular, to varied sources of information;

(iii) generally speaking, all factors permitting an assessment of the extent to which the populations of the occupied territories enjoy their natural right to an education and culture which accord with their national identity;

(b) to study and submit suggestions on activities that Unesco might undertake, in its field of competence, to assist the populations concerned.

<sup>109</sup> See United Nations Press Release, UNESCO/2281 (New York, September 21, 1977) announcing "the final agreement of Israel to receive a UNESCO mission. . . ."

<sup>110</sup> Implementation of 18C/Resolution 13.1 and 19C/Resolution 15.1 Concerning Educational and Cultural Institutions in the Occupied Arab Territories: Report of the Director-General on the Mission He Sent to the Arab Territories Occupied by Israel to Collect on-the-spot Information on the Educational and Cultural Situation, UNESCO Doc. 104EX/52, at 2 (May 31, 1978).

<sup>111</sup> No published announcement of the Director-General's appointments could be found by the authors. The list of members published in the Director-General's report, which was not published until more than 6 months after the mission began its work, lists Mrs. Hénin. However, interviews with senior UNESCO officials, members of national missions, and observers from nongovernmental organizations confirm that this was not Mrs. Hénin's original status. Letter (obtained by the authors) from Dragoljub Najman, the UNESCO Deputy Director-General, to the Israeli Permanent Delegate, dated November 15, 1977. The letter makes it quite clear that Mrs. Hénin was not a member of the mission but a staffer. It also stands to reason that two citizens of the same country would not have been named to such a small team, given the long tradition of geographical distribution applicable to such groups. In addition, the representative of Israel to UNESCO has stated publicly that in his letter to the Israeli authorities indicating the membership of the mission, the Director-General had stated that "Mrs. Jacqueline Hénin would have as her sole role to assist the mission in its work." UNESCO Doc. 104EX/SR.30, at 274, para. 13.3 (1978) (translation ours).

private capacity and could be said to have expertise useful to such a fact-finding endeavor.<sup>112</sup>

The mission visited all the occupied territories—Cisjordan, the Gaza Strip, the Golan Heights, and the Sinai Peninsula—except East Jerusalem, to which access was denied by Israel. That it was not a success is directly attributable to its failure to begin by adopting a clear and comprehensive set of procedural ground rules. For example, despite the previous questionnaires and the on-site visit by Secretariat personnel, there appears to have been a lamentable lack of preparatory staff work, so that the mission, by its own account, “had very little preliminary information on the educational system in the occupied territories” and “was in no position to prepare a programme for its visit.”<sup>113</sup> Instead, the members accepted the basic itinerary prepared by Israeli officials. Once in the area, the mission yielded to Israeli officials’ insistence that they be present at almost all discussions and interviews, ostensibly for reasons of security.<sup>114</sup> There is no evidence that the commission tried to reconcile the utility of permitting confrontation between accusers and accused with the need to protect the former against the potentially overweening power of the latter. The result is to engender doubt whether the proceedings were as free as they ought to have been. Such procedural defects could not but affect the credibility of the mission’s product.

The worst troubles began some 6 months after the mission’s return from the Middle East, when the Director-General published a brief synopsis of the events leading up to the project and a set of recommendations derived from the attached reports of members. But only four reports accompanied this submission: those of Messrs. Velebit, Cookey, and Ruiz-Giménez—and one by Mrs. Hénin.<sup>115</sup> Mr. M’Bow offered no immediate explanation of how Mrs. Hénin had become a “member” or why the extensive report of Chief of Mission Henry and a shorter one by Mr. de Senarclens were suppressed, which led to informed speculation that they had proven politically inconvenient.<sup>116</sup>

The Director-General denied this implication,<sup>117</sup> justifying his refusal

<sup>112</sup> Mr. Henry, a distinguished former international civil servant, served as special consultant to the International Development Research Center in Paris; Mr. Cookey is a former member of the staff of the Commonwealth Secretariat in London and education specialist; Mrs. Hénin is professor of Arab languages and literature at the Institut National des Langues et Civilisations Orientales in Paris; Mr. Ruiz-Giménez is professor of the philosophy of law at the University of Madrid; Mr. de Senarclens is professor of contemporary history at the University of Lausanne; and Mr. Velebit is a former Executive Secretary of the UN Economic Commission for Europe. These biographical descriptions are taken from the Report of the Director-General, *infra* note 113, at 3, para. 10.

<sup>113</sup> Report of the Director-General on Implementation of 18C/Resolution 13.1 and 19C/Resolution 15.1 Concerning Educational and Cultural Institutions in the Occupied Arab Territories, UNESCO Doc. 20C/113, at 4, para. 15 (September 28, 1978).

<sup>114</sup> *Id.* at 4, para. 16.

<sup>115</sup> Report of the Director-General, *supra* note 110, Anns. I–IV.

<sup>116</sup> See New York Times, Nov. 6, 1978, at 14, col. 1.

<sup>117</sup> UNESCO Doc. 104EX/SR.29, at 261 (1978).

to transmit the report by Mr. de Senarclens on the ground that it "did not appear to him to bring useful elements into the debate."<sup>118</sup> As for the report of the mission chief, the Director-General admitted only that there had been a "covering letter" from Mr. Henry, not a report. This letter, he said, had not been transmitted to the Council because it contained a number of points otherwise covered by "the reports" and elaborated various matters "of which the Director-General has already taken account to the extent he considered that useful, in the process of setting out his own recommendations."<sup>119</sup>

Some members of the Executive Board thought this reply lacked candor. Mr. Gopal of India complained that the "reports of Mr. Senarclens, who was a distinguished contemporary historian, and of the Chief of mission himself, were conspicuous by their absence; surely those reports contained relevant comments of a more than personal nature?" What had been transmitted by the Director-General constituted "a slender basis for any attempt by the Board to arrive at clear conclusions. . . ." <sup>120</sup> The U.S. representative, too, pressed Mr. M'Bow: why had he not "set before the Board the report which he understood to have been submitted by the Chief of mission?" <sup>121</sup> The Director-General reiterated that there was no report but only a personal and confidential letter containing no further information relevant to the current debate. <sup>122</sup>

In essence, Mr. M'Bow was invoking executive privilege. However, the United States delegate persisted. At the next meeting he asked the Director-General quite specifically whether he had not received a "general mission report . . . written on 17 April 1978. . . ." <sup>123</sup> This time, the Director-General admitted that such a report did, indeed, exist. However, he explained, concern for objectivity had led him to suppress it, once it became apparent that it did not represent a consensus of the view of all the fact finders. <sup>124</sup>

Whatever his motives, the effect of the Director-General's decision not to publish two of the reports was to create skepticism toward the summary

<sup>118</sup> *Id.* at 261, para. 1.3 (translation ours).

<sup>119</sup> *Ibid.* (translation ours).

<sup>120</sup> *Id.* at 265, para. 11.2-11.3.

<sup>121</sup> *Id.* at 262, para. 5.

<sup>122</sup>

[Mr. M'Bow] croit comprendre que M. Torres lui reproche de ne pas avoir diffusé ce qui n'est pas un rapport du chef de mission, mais, comme il l'a déjà indiqué, une lettre que celui-ci lui a adressée en lui transmettant les rapports des autres membres de la mission. Il répète que cette lettre, qui contient essentiellement des réflexions personnelles sur l'avenir des territoires occupés, n'apporte pas de complément d'information de nature à éclairer le débat; c'est pourquoi il n'a pas cru devoir la communiquer au Conseil.

*Id.* at 262, para. 7.2.

<sup>123</sup> UNESCO Doc. 104EX/SR.30, at 271, para. 3.1 (1978).

<sup>124</sup>

Comme il apparaissait que ceux-ci n'étaient pas tous d'accord sur le contenu de ce rapport, le Directeur général a organisé entre eux une réunion au terme de laquelle ils se sont entendus sur des modifications à apporter au rapport.

*Id.* at 277, para. 15.4.

of the facts which, utilizing the four published reports, he prepared for the 1978 General Conference.<sup>125</sup> By far the most critical report—that of Mrs. Hénin—receives the most attention in the summary. It deals with cultural and social matters and is the one truly scathing denunciation of Israeli policies. Speaking of censorship, she found evidence “either of wishing to commit cultural aggression against the populations of the occupied territories or of dismally failing to understand, and even of underestimating, the Arabic in language and culture. In either case the consequences could sooner or later be very serious.”<sup>126</sup>

Mrs. Hénin's status as a member would have been questioned in any event, not least because it is highly unusual to have two members of the same nationality on a small task force. But the suppression of the reports of two members, coupled with the unexpected publication of a report by someone thought not even to have been a member, strained credulity. At the same time, unauthorized copies of the suppressed Henry report began to circulate. These reenforced the supposition that it had been as largely exculpatory as Mrs. Hénin's was condemnatory.<sup>127</sup> Had one new member of the team simply been invented—and another uninvented—to effect the outcome?<sup>128</sup> Such suspicions largely vitiated any usefulness the exercise might have had.

The 20th General Conference debated<sup>129</sup> a resolution proposed by Jordan<sup>130</sup> which repeated the demands of previous resolutions, including the controversial paragraph adopted by the 19th session of the General Conference “[c]ondemning as contrary to human rights and fundamental freedoms all violations, resulting from Israeli occupation, . . . particularly the policy of systematic cultural assimilation.”<sup>131</sup> No one but Mrs. Hénin had found any evidence of cultural assimilation, and even the three other published reports had indicated strong evidence to the contrary.<sup>132</sup> After

<sup>125</sup> Report of the Director-General, *supra* note 113.

<sup>126</sup> Hénin, Report to the Director-General of Unesco on multi-purpose centres for research and creative work, cultural radio and television programmes, publications, festivals and exhibitions and school textbooks and libraries in the Arab territories occupied by Israel since 1967, Report of the Director-General, *supra* note 110, Ann. IV, at 6.

<sup>127</sup> See New York Times, *supra* note 116. The Times, on the general accusation that Israel was committing cultural aggression against the Arabs under its military rule, quotes the Henry report as stating: “Generally speaking, the policy followed seems to stem from considerations of security rather than from a deliberate desire to undermine the foundations of Arab culture.” *Id.* at col. 5.

<sup>128</sup> *Id.* at cols. 3–4.

<sup>129</sup> Draft Report of Commission V, General Programme Matters, Part II–L (Prov. Agenda Item 62), 20 UNESCO Gen'l Conf. Prov. Rec., UNESCO Doc. 20C/PRG/V/2, pt. II at 33 (November 23, 1978).

<sup>130</sup> See 20 UNESCO Gen'l Conf. Draft Res., UNESCO Doc. 20C/PRG/V/DR.16 (November 13, 1978). The draft was submitted with the endorsement of 19 Arab states.

<sup>131</sup> Draft Report of Commission V, *supra* note 129, Annex—Recommendations, at 36.

<sup>132</sup> Mr. Cookey, for example, established that the schools in the West Bank and Gaza Strip use the Jordanian and Egyptian curricula. Cookey, Education in Arab Territories Occupied by Israel, Report of the Director-General, *supra* note 110, Ann. II, at 3. In Gaza, examinations are set and graded by Egyptian authorities; in the

expressing "severe disapproval" of Israeli intransigence, the resolution concluded with a request for the Director-General "to send a further mission to occupied Arab Jerusalem in order to perform the task which the previous mission was unable to carry out."<sup>133</sup> This resolution was adopted without amendment.<sup>134</sup>

There matters stand. The Henry mission must be regarded as a failure in several significant respects:

(1) Although its enabling resolution set the fact-finding group a clearly defined task, neither the conference nor the group drew up a comprehensive set of procedures for carrying it out.

(2) The enabling resolution condemned Israel on the very points that were to be proven or disproven by the group, which undermined its integrity *ab initio* and seemed to instruct it as to its findings.

(3) The mission allowed its itinerary inside the occupied territories to be set by Israel, rather than on the basis of preliminary hearings and staff work.

(4) The mission conducted on-site interviews with Arabs in the presence of official Israeli representatives, which left open the possibility that witnesses might have felt constrained.

(5) After the members were selected, it appears that the group's composition may have been altered to affect the outcome.

(6) The Director-General, on receipt of the members' reports, failed to follow the elemental rule of due process that he must either publish all or none of the fact finders' views. Instead, selective publication and selective suppression undermined credibility.

(7) In voting on the resolution before the General Conference of UNESCO, members were forced to do so on the basis of a summary of the fact finders' reports. Being denied access to some reports, they were unable to satisfy themselves that the resolution accurately reflected all the facts found. In fact, it did not.

The failures of procedural due process evident in this investigation

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West Bank, matriculation certificates issued by the Supreme Examining Board are recognized by the Government of Jordan and Arab universities. *Id.* at 5. He also points out that there were no Arab universities in the West Bank prior to 1967 but that there are now 4 institutions of higher learning. *Id.* at 5-6. See also Ruiz-Giménez, Higher education in Arab territories occupied by Israel, Report of the Director-General, *supra* note 110, Ann. III. The Ruiz-Giménez report in this connection discusses the opening of Palestine's first "College for the Study of Islam" at Hebron under Israeli occupation. *Id.* at 3. The Arab authorities at Hebron appear to have told the mission that "imported books are revised by the occupation authorities, but they only suppress tendentious or anti-Israeli passages." *Id.* at 4. Ruiz-Giménez found that the Hebron Centre "respects and encourages the religious, Islamic, character inherent to the 'cultural identity' of the Arab population of these territories. From this point of view, praise is certainly due to the economic backing that the Israeli Government has given to the College." *Ibid.*

<sup>133</sup> Draft Report of Commission V, *supra* note 129, Annex—Recommendations, at 37.

<sup>134</sup> The vote in Commission V was 64 votes to 4 (Australia, Canada, Israel, and the United States), with 26 abstentions. *Id.* at 35.

should not be generalized. What makes the instance noteworthy is that it is the worst case discovered by the authors, and thus richly suggestive of the most pernicious consequences of inadequate rules. It is not, fortunately, the only standard of UN practice.

#### THE BETTER CASE: HUMAN RIGHTS INVESTIGATIONS BY THE ILO

The Henry mission lacked a clear set of procedural expectations—rules of the game—shared by all the parties *ab initio*. The fact-finding missions of the International Labor Organization could have served as a model in this respect.

Since its adoption of the Philadelphia Declaration in 1944, the ILO has evinced fundamental concern for economic and social rights.<sup>135</sup> It has also developed a network of positive law, an International Labor Code,<sup>136</sup> as well as machinery for giving effect to its concerns and implementing its

<sup>135</sup> Declaration concerning the Aims and Purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944, and incorporated by Article 1 of the ILO Constitution as an annex thereto. See CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE 23 (Geneva 1977). Part II of the declaration states in part:

the Conference affirms that—

(a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;

(b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;

(c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;

(d) it is a responsibility of the International Labour Organisation to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;

(e) in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

*Id.* at 24.

For discussion, see C. W. JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS 3 (1960); E. B. HAAS, BEYOND THE NATION-STATE 336 (1964); Gormley, *The Emerging Protection of Human Rights by the International Labour Organization*, 30 ALBANY L. REV. 13 (1966); Wolf, *ILO Experience in the Implementation of Human Rights*, 10 J. INT'L L. & ECON. 599 (1975) [hereinafter cited as *ILO Experience*].

<sup>136</sup> This term was originated by C. Wilfred Jenks to embrace the sum total of international labor legislation, including the Constitution, conventions, and recommendations of the ILO; for discussion, see Gormley, *supra* note 135, at 26-29. There are now 149 conventions and 157 recommendations of the ILO; see generally ILO, CONVENTIONS AND RECOMMENDATIONS 1919-1966 (Geneva 1966); ILO, THE IMPACT OF INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1976).



laws. This machinery includes an elaborate system of credible fact determination.<sup>137</sup>

Fact-finding, to varying degrees, constitutes part of the task of five ILO instrumentalities: the Committee of Experts for the Application of Conventions and Recommendations, the ad hoc tripartite<sup>138</sup> commissions established by the Governing Body to consider representations, the commissions of inquiry established by the Governing Body to consider complaints, the Fact-Finding and Conciliation Commission on Freedom of Association, and the Committee on Freedom of Association. Not all of these are equally effective, but several have proven themselves in potentially contentious situations.

The Committee of Experts for the Application of Conventions and Recommendations consists of 19 persons named by the Governing Body on the recommendation of the Director-General, based on their "international renown as experts in the fields of labour, social security and international law, as well as [on their] impartiality and practical experience."<sup>139</sup> According to the ILO's Legal Adviser, they are "neither appointed by the Governments, nor do they represent them,"<sup>140</sup> but "are normally drawn from the judiciary or from academic circles. . . ."<sup>141</sup> The task of the committee, which is set out in a 1926 resolution of the International Labor Conference<sup>142</sup> rather than in the ILO's Constitution, is to survey the annual reports of governments to see that ratified conventions are carried out and to publish country-specific comments in an impartial and informed report."<sup>143</sup>

That the Committee of Experts has had little success in getting its often "inconvenient" reports approved by the Organization's large political body, the Conference, has in no way hindered their publication, which has its effect on world opinion. The effect is heightened when egregious cases are put on a "special list" or, in lesser circumstances, in a "special paragraph" by the Conference's Committee on the Application of Conven-

<sup>137</sup> See Rossillon, *ILO Examination of Human Rights Situations*, INTERNATIONAL COMMISSION OF JURISTS, THE REVIEW 40 (No. 12, June 1974). Rossillon notes that member states traditionally attribute "a spirit of objectivity" to the work of the ILO, especially in fact-finding. *Id.* at 41. See generally C. W. JENKS, *SOCIAL JUSTICE IN THE LAW OF NATIONS: THE ILO IMPACT AFTER FIFTY YEARS* (1970); and Wolf, *At the Apex of the Value Hierarchy—An International Organisation's Contribution*, 24 N.Y.L.S.L. REV. 179 (1978) [hereinafter cited as *Value Hierarchy*].

<sup>138</sup> The ILO is unique in its "tripartite" configuration. The Governing Body of the ILO has 50% government membership balanced against employer and worker representation, each accounting for 25%. Each member state is entitled to 4 delegates to the International Labor Conference in accordance with this basic distributional formula. See C. W. JENKS, *THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM* 68-87 (1957).

<sup>139</sup> Wolf, *Value Hierarchy*, *supra* note 137, at 187.

<sup>140</sup> *Ibid.*

<sup>141</sup> Wolf, *ILO Experience*, *supra* note 135, at 608.

<sup>142</sup> See ILC, 1 RECORD OF PROCEEDINGS, 8TH SESSION 238-57 (1926).

<sup>143</sup> Wolf, *Value Hierarchy*, *supra* note 137, at 188; Wolf, *ILO Experience*, *supra* note 135, at 608.

tions and Recommendations. In a number of instances, criticism in reports has led the offending governments—among others, the British, Swiss, Pakistani, Sudanese, Finnish, and Irish—to change laws pertaining to terms or conditions of employment.<sup>144</sup> In researching the facts, the experts are not limited to national reports but use “information from national and international occupational and professional organisations, reports of other international bodies, published and unpublished studies and examinations of the prevailing factual and legal situation.”<sup>145</sup> For example, as a result of such independent research, from 1971 through 1974 the Committee of Experts became aware that some workers in Czechoslovakia may have lost their jobs on the basis of a new law permitting discharge for “breach of the Socialist social order.”<sup>146</sup> In 1975, this law was repealed.<sup>147</sup>

However, the facts concerning Czech labor policies did not thereby cease to interest the ILO. Under Article 24 of the Organization’s Constitution, any “industrial association of employers or of workers” may make a “representation” to the International Labor Office “that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party. . . .” The Governing Body may refer such a representation to an ad hoc committee consisting of three of its members, one each chosen from among the government, and employers’ and employees’ groups. In 1978, it did just that, acting on a “representation” by the International Conference of Free Trade Unions that Czech political dismissals were continuing. An ad hoc committee verified some of the allegations and, when the Czech Government failed to respond adequately, the Governing Body decided to publish the facts found. This procedure, which is used sparingly,<sup>148</sup> was also recently used by the General Confederation of Italian Agriculture to provoke a review of whether the ILO’s Employment Service Convention<sup>149</sup> was being violated by the Italian Government.

Whereas industrial associations may only make “representations,” under Article 26 states may make “complaints” alleging that another member is violating a convention that both have ratified. In neither case is the agreement of the alleged violator necessary for further action. After receiving a complaint, the Governing Body of the ILO makes a representation of nonobservance to that government, and, if no convincing reply is

<sup>144</sup> Wolf, *Value Hierarchy*, *supra* note 137, at 188. The ILO Legal Adviser has stated that in a recent 12-year period over 920 legal discrepancies were thus rectified. Wolf, *ILO Experience*, *supra* note 135, at 609–10.

<sup>145</sup> Wolf, *Value Hierarchy*, *supra* note 137, at 188.

<sup>146</sup> Czechoslovak Labour Code §46(1)(e) (amended 1969). See ILO, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 175 (Report III, Pt. A, 56th Sess. 1971).

<sup>147</sup> Wolf, *Value Hierarchy*, *supra* note 137, at 189.

<sup>148</sup> There have been only 11 cases altogether. For more details on the Czech inquiry, see Meron, *Violations of ILO Conventions by the USSR and Czechoslovakia*, 74 AJIL 206 (1980).

<sup>149</sup> Convention concerning the Organization of the Employment Service (1948), No. 88, 70 UNTS 85.

received, it may then appoint a commission of inquiry "to consider the complaint and to report thereon."<sup>150</sup> Member governments are required to provide "all the information in their possession which bears upon the subject-matter of the complaint."<sup>151</sup>

Commissions of inquiry are made up of "three independent highly qualified and competent persons appointed by the Governing Body on the proposal of the Director-General. . . ."<sup>152</sup> The procedures include assemblage of documentation, hearing of parties and witnesses and, where necessary, on-site inspections. The commission of inquiry transmits its report to the Director-General who must communicate it to the Governing Body and to the "governments concerned in the complaint." Concurrently, he "shall cause it to be published."<sup>153</sup> Although, under certain circumstances, a report may be referred to the International Court of Justice<sup>154</sup> and there is even the possibility that the Governing Body may back a report with sanctions,<sup>155</sup> in practice publication is probably the most important remedy and has demonstrated its significance in provoking reform.

Complaint procedures remained virtually dormant until 1961,<sup>156</sup> but since then there have been four commissions, on alleged violations of labor conventions by the Governments of Portugal, Liberia, Greece, and Chile,<sup>157</sup> of which two (Portugal and Chile) involved the dispatch of fact-finding missions into the territory of the accused state. Their consistently high standard of procedural due process has enhanced the credibility and effectiveness of the investigations.

The first complaint, brought by Ghana, alleged oppression by Portugal of workers in Angola and Mozambique. After evaluating the complaint and receiving particulars from both Governments, the Governing Body in June 1961, approved the appointment of a commission<sup>158</sup> and authorized

<sup>150</sup> ILO CONST., *supra* note 135, Art. 26, paras. 2 and 3.

<sup>151</sup> *Id.*, Art. 27.

<sup>152</sup> Wolf, *ILO Experience*, *supra* note 135, at 616.

<sup>153</sup> ILO CONST., *supra* note 135, Art. 29, para. 1.

<sup>154</sup> *Id.*, Art. 29, para. 2; Art. 32.

<sup>155</sup> *Id.*, Art. 33.

<sup>156</sup> A complaint concerning application of the Hours of Work (Industry) Convention, 1919 (No. 1), to Indian railways was submitted by the Indian workers' delegate to the International Labor Conference in 1934; the Governing Body, however, did not consider it necessary to appoint a commission of inquiry. 20 ILO OFF. BULL., No. 1, at 15 (1935). See C. W. JENKS, *SOCIAL JUSTICE*, *supra* note 137, at 48.

<sup>157</sup> The reports of the commissions may be found, respectively, in 45 ILO OFF. BULL., No. 2, Supp. II (1962); 46 ILO OFF. BULL., No. 2, Supp. II (1963); 54 ILO OFF. BULL., No. 2, Spec. Supp. (1971); ILO, REPORT OF THE COMMISSION APPOINTED UNDER ARTICLE 26 OF THE CONSTITUTION TO EXAMINE THE OBSERVANCE BY CHILE OF THE HOURS OF WORK (INDUSTRY) CONVENTION, 1919 (No. 1), AND THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION, 1958 (No. 111) (prov. ed. 1975).

<sup>158</sup> Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaint Filed by the Government of Ghana concerning the Observance by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105), 45 ILO OFF. BULL., No. 2, Supp. II, at 5-7 (1962). The Portuguese colony of Guinea, which was not visited by the commission, was also mentioned in the complaint. *Id.* at 1.

it to "determine its own procedure in accordance with the provisions of the Constitution of the Organisation. . . ." <sup>159</sup> Those named were Paul Ruegger (Switzerland); member of the Permanent Court of Arbitration and former chairman of the ILO Committee on Forced Labor, to serve as chairman; Enrique Armand-Ugón (Uruguay), a former Judge of the International Court of Justice; and Isaac Forster (Senegal), first president of the Supreme Court of the Republic of Senegal and soon to be elected a Judge of the ICJ. <sup>160</sup> Each appointee took the ICJ Judges' oath <sup>161</sup> and was instructed by the Director-General to "have but one master and but one allegiance—the truth. You are responsible to your own consciences alone." <sup>162</sup>

At its first session, held in Geneva on July 11 and 12, 1961, the commission solicited further information from the parties and other governments. <sup>163</sup> Lists were compiled of potential witnesses in positions "involving responsibility for matters concerning which allegations had been made," <sup>164</sup> and the commission decided to supplement "on the spot" the information otherwise available to it and so informed the Lisbon authorities. <sup>165</sup> However, the group did not rush into its field visit but carefully continued to lay the groundwork, reconvening in September at Geneva to deal with the information received from solicited sources and to hear witnesses for each side. <sup>166</sup> These hearings were held in accordance with previously adopted procedures, <sup>167</sup> which ensured not only that agents or counsel could accompany and examine witnesses but also that each party to the complaint could be present throughout and had the right to cross-examine. <sup>168</sup> As to the scope of testimony, each witness was warned

<sup>159</sup> *Id.* at 5, para. 9. The instructions given the commission included the following:

The Commission shall begin its work by examining the particulars furnished by the Government of Ghana and the observations of the Government of Portugal with a view to determining on what matters it needs fuller information. The Commission will then, through the Director-General, consult the Governments of Ghana and Portugal, but without being bound by the views of either of them, concerning the arrangements necessary to ensure that it has at its disposal thorough and objective information concerning the questions at issue; in the event of any difficulty being encountered, the Commission will so report to the Governing Body.

*Id.* at 6, para. 9.

<sup>160</sup> *Id.* at 6, para. 11.

<sup>161</sup> The oath was adapted to the circumstances of the case as follows:

I solemnly declare that I will honourably, faithfully, impartially and conscientiously perform my duties and exercise my powers as a member of the Commission appointed by the Governing Body of the International Labour Office in pursuance of article 26 of the Constitution of the International Labour Organisation to examine the complaint filed by the Government of Ghana concerning the observance by Portugal of the Abolition of Forced Labour Convention, 1957.

*Id.* at 7, para. 12.

<sup>162</sup> *Id.* at 6, para. 12.

<sup>163</sup> *Id.* at 10, paras. 17-19.

<sup>164</sup> *Id.* at 11, para. 23.

<sup>165</sup> *Id.* at 12, para. 26.

<sup>166</sup> *Id.* at 13-15.

<sup>167</sup> *Id.* at 17-18, para. 46. The 14-paragraph decision establishing these procedures is fully reproduced in the report.

<sup>168</sup> *Id.* at 20, para. 51; *id.* at 18, para. 46(9).

that the "function of the Commission is to ascertain facts. Politics are outside its scope. It therefore seeks factual evidence. The Commission will give you all reasonable latitude to furnish evidence, but it will not permit statements of a political character."<sup>169</sup>

In December 1961, the fact finders spent one week in Angola and another in Mozambique. Since the group was already well informed by prior staff work, examination of evidence, and hearing of witnesses, it was able to draw up its own comprehensive itinerary,<sup>170</sup> carefully reserving "the right to determine, at each place, the programme which it might consider appropriate."<sup>171</sup> It also decided "that it did not appear necessary for the Commission to be accompanied in the course of its present visits in the field by the agent, counsel or representative of either party. . . ."<sup>172</sup> Once in the colonies the group selected the places it wanted to visit and whom it wished to interview, questioning many African workers, directors, personnel managers, medical staff, engineers, and recruiters, as well as colonial administrators, native chiefs, and trade union officials.<sup>173</sup> According to the mission, it was able to fulfill its purpose of speaking directly to African workers by refusing to choose whom it would interview until the last moment.<sup>174</sup> This procedure helped it "to talk freely and spontaneously" <sup>175</sup> with persons who had not been screened or primed.

The members met in Geneva in February 1962 <sup>176</sup> to write their report, which was duly published by the ILO in April. Even before it appeared, the Portuguese Government announced that it was enacting new labor legislation for the territories,<sup>177</sup> the investigation having prompted at least the appearance of change. Although the report concluded that Portugal had not yet completely complied with the 1957 Forced Labor Convention (No. 105),<sup>178</sup> some rapid improvement was noted and Portugal was thanked for its full cooperation throughout the proceeding.<sup>179</sup>

The other three cases need be summarized only briefly. In what has

<sup>169</sup> *Id.* at 19, para. 48.

<sup>170</sup> The itinerary was based on "a detailed study of the regions, activities and undertakings in respect of which allegations had been made and the information at the Commission's disposal on the economic and social situation in Angola and Mozambique." *Id.* at 22, para. 57.

<sup>171</sup> The report indicates that the Portuguese Government had conferred complete freedom of movement on the commission. However, the itinerary of visits was conveyed to the authorities "shortly before" they were scheduled to take place, "for confirmation that they were practically possible." *Id.* at 22-23, para. 58.

<sup>172</sup> *Id.* at 23, para. 59. The full text of the decision is reproduced in the report.

<sup>173</sup> *Id.* at 24, paras. 61, 62. For a specific account of the visits, see §§I-III of ch. 5 of the report, *id.* at 22-29.

<sup>174</sup> *Id.* at 29, para. 80.

<sup>175</sup> *Ibid.* "The Commission or one of its members was able in many instances to talk to workers without any representative of management or of the authorities being present." *Id.* at 29, para. 81.

<sup>176</sup> *Id.* at 32, para. 88.

<sup>177</sup> *Id.* at 33, para. 91; see generally ch. 10 of the report, *id.* at 71 ff. and 234-36.

<sup>178</sup> *Id.* at 234. For the findings and recommendations of the commission, see ch. 14 of the report, *id.* at 227 ff.

<sup>179</sup> *Id.* at 247, para. 779.

generally been described as a retaliatory act,<sup>180</sup> Portugal submitted a similar complaint against the Government of Liberia. Despite suspicions about the motives, another commission of inquiry was established. Adhering scrupulously to the procedural norms adopted in the Portuguese investigation—although no on-the-spot investigations were considered necessary<sup>181</sup>—the commission found Liberia in violation of the 1930 Forced Labor Convention (No. 29).<sup>182</sup> As with Portugal, however, the commission commended the Liberian Government for making prompt improvements once the investigation had begun and for its cooperation.<sup>183</sup>

A third complaint filed in 1968 against the Government of Greece,<sup>184</sup> was investigated in accordance with the same procedures,<sup>185</sup> although the commission was unable to conduct an on-site visit because of political upheaval in Athens<sup>186</sup> and the subsequent withdrawal of Government cooperation.<sup>187</sup> An investigation of a complaint against Chile, after first being referred to a commission of inquiry, was ultimately dealt with by another ILO process, the Fact-Finding and Conciliation Commission on Freedom of Association.<sup>188</sup>

Overall, the foregoing cases constitute a slim but instructive volume of minimum standards of procedural due process in human rights investigations. Except in the Greek case, fairness, formality, and precision, together with flexibility in the proceedings, served to elicit cooperation from the accused state. A tradition of procedural fairness and thoroughness also significantly increased the impact of the facts found, and thereby helped the Organization accomplish its objectives.

The Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) is another ILO instrument of enforcement, this one designed to support two key conventions in the International Labor Code: the Convention Concerning Freedom of Association and Protection of the Right to Organize of 1948, and the Convention Concerning the Right to

<sup>180</sup> Gormley, *supra* note 135, at 37; E. B. HAAS, *supra* note 135, at 367.

<sup>181</sup> See Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaint Filed by the Government of Portugal concerning the Observance by the Government of Liberia of the Forced Labour Convention, 1930 (No. 29), 46 ILO OFF. BULL., No. 2, Supp. II, pts. I and II (1963).

<sup>182</sup> *Id.* at 179.

<sup>183</sup> *Id.* at 169-76, 179-81.

<sup>184</sup> Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaints concerning the Observance by Greece of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Made by a Number of Delegates to the 52nd Session of the International Labour Conference, 54 ILO OFF. BULL., No. 2, Special Supp. (1971).

<sup>185</sup> *Id.*, chs. 1 and 3.

<sup>186</sup> *Id.*, ch. 5.

<sup>187</sup> *Id.* at 20, para. 82.

<sup>188</sup> The Governing Body appointed to the commission those persons who had been appointed in advance as members of the panel of the Fact-Finding and Conciliation Commission. Report of the Commission for Chile, *supra* note 157, at 3.

Organize and to Bargain Collectively of 1949.<sup>189</sup> Because freedom of association enjoys the highest priority in the hierarchy of ILO values,<sup>190</sup> a special complaint procedure was created to help protect it.<sup>191</sup> Authorized by the Governing Body in January 1950,<sup>192</sup> the FFCC has nine members serving in their private capacities, many of them judges of national courts. They may, "when appropriate,"<sup>193</sup> work in panels of not less than three or more than five. Through negotiations with ECOSOC, a procedure was devised to make the services of FFCC also available to UN organs.<sup>194</sup> While the FFCC is primarily a fact-finding body, it may also talk to the parties "with a view to securing the adjustment of difficulties by agreement."<sup>195</sup>

An allegation that trade union rights are being infringed can be made by organizations of workers or employers as well as by governments. Complaints may also originate with the UN General Assembly or the Economic and Social Council.<sup>196</sup> In practice, however, almost all come from national or international workers' organizations.<sup>197</sup> The complaint may then be referred to the FFCC for "impartial examination" by either the ILO's Governing Body or its Conference.<sup>198</sup>

The FFCC has been used only rarely,<sup>199</sup> in part because, unlike proceedings under Article 26, these require prior specific or general consent of the government named in the complaint (except in cases based on Article 26).<sup>200</sup> Although this restriction is a handicap,<sup>201</sup> the ILO's Legal Adviser

<sup>189</sup> No. 87, 68 UNTS 17, and No. 98, 96 UNTS 257.

<sup>190</sup> "From its inception, the ILO has recognised that freedom of expression and of association are the conditions *sine qua non* of the Organisation's existence." Wolf, *Value Hierarchy*, *supra* note 137, at 193-94; *see also* Declaration of Philadelphia, *supra* note 135.

<sup>191</sup> E. B. HAAS, HUMAN RIGHTS AND INTERNATIONAL ACTION: THE CASE OF FREEDOM OF ASSOCIATION 27-29 (1970).

<sup>192</sup> *See* ILO, SIXTH REPORT OF THE ILO TO THE UNITED NATIONS 171 (Geneva 1952).

<sup>193</sup> *Id.* at 172, para. 12. The initial composition of the FFCC was: Carl V. Bamsnaes (Denmark), governor of the National Bank of Denmark; Mahmoud Hassan Pasha (Egypt), former ambassador to the United States; J. N. Majumdar (India), member of the All-India Industrial Tribunal; François de Menthon (France), member of the French National Assembly; Frank J. Murray (United States), associate justice of the Massachusetts Superior Court; Arsenio Roldán (Philippines), presiding judge, Court of Industrial Relations; Oscar Schnake (Chile), former minister of development; Arthur Tyndall (New Zealand), judge, New Zealand Court of Arbitration. *Id.* at 172, para. 11.

<sup>194</sup> *Id.* at 171, paras. 7, 8.

<sup>195</sup> *Id.* at 173, para. 13.

<sup>196</sup> *Id.* at 173, para. 14.

<sup>197</sup> ILO, THE IMPACT OF INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 70 (1976).

<sup>198</sup> *Id.* at 172, para. 13.

<sup>199</sup> Wolf, *Value Hierarchy*, *supra* note 137, at 195.

<sup>200</sup> If the Governing Body is of the opinion that a complaint should be investigated it must first seek the consent of the Government concerned. If such consent is not forthcoming, the Governing Body has to give consideration to such refusal

has argued convincingly that "the prestige of the Commission and its guarantees of impartiality are so considerable that in the face of international public opinion it is difficult for a government to withhold consent."<sup>202</sup> Moreover, the FFCC procedure has one advantage over the Article 26 commission of inquiry: it may be used when the country complained against has not acceded to the ILO Convention on which the complaint is based.<sup>203</sup>

Four cases did go before the FFCC: against Japan, Greece, Chile, and Lesotho.<sup>204</sup> In Japan and in Chile the commission performed on-site investigations; in the case of Lesotho, only the panel's chairman visited the territory. In almost all instances the FFCC has operated with procedures analogous to those employed by commissions of inquiry under Article 26.<sup>205</sup> Clearly emerging from the four cases are the following procedural norms:

#### A. Before an On-Site Visit

(1) The terms of reference of a panel, its charge by the Director-General and the declaration made by members, all emphasize the fact-finding, nonpolitical nature of its task.<sup>206</sup>

(2) Its terms of reference are nonconclusory and nonprejudicial to the mission's objectivity.<sup>207</sup>

(3) Missions treat as admissible only complaints that are written, specific allegations of fact and—at least theoretically—are capable of

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with a view to taking any appropriate alternative action, designed to safeguard the rights relating to freedom of association involved in the case, including measures to give full publicity to charges made. . . .

SIXTH REPORT OF THE ILO TO THE UNITED NATIONS, *supra* note 192, at 173, para. 15.

<sup>201</sup> Cornley, *supra* note 135, at 41.

<sup>202</sup> Wolf, *Value Hierarchy*, *supra* note 137, at 196.

<sup>203</sup> "For nonratifying States, the machinery is based on their membership of [*sic*] the International Labor Organization and on the fact that the ILO Constitution has affirmed the principle of freedom of association so that the Organization can promote the realization of this principle through inquiry and conciliatory bodies." Wolf, *ILO Experience*, *supra* note 135, at 620.

<sup>204</sup> See, respectively, the Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Persons Employed in the Public Sector in Japan, 49 ILO OFF. BULL., Nos. 1-4 (1966) [hereinafter cited as Japan Report]; Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Trade Union Situation in Greece, 49 ILO OFF. BULL., No. 3, Special Supp. (1966) [hereinafter cited as Greece Report]; ILO, THE TRADE UNION SITUATION IN CHILE: REPORT OF THE FACT-FINDING AND CONCILIATION COMMISSION ON FREEDOM OF ASSOCIATION (prov. ed. 1975) [hereinafter cited as Chile Report]; Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning Lesotho, ILO Governing Body, 197th Session, ILO Governing Board Doc. 197/3/5 (1975) [hereinafter cited as Lesotho Report].

<sup>205</sup> Wolf, *ILO Experience*, *supra* note 135, at 622.

<sup>206</sup> See Japan Report at 10-13, paras. 57-66; Greece Report at 6 and 14, paras. 23, 76, and 77; Lesotho Report at 10-11, paras. 47-48; Chile Report at 15-16, paras. 76-77.

<sup>207</sup> *Ibid.*



verification or disproof, rather than more political generalities and accusations.<sup>208</sup>

(4) The respondent (complained against) state is given an early opportunity to answer the list of admissible allegations, followed by an opportunity for counter-replies by complainants and respondent.<sup>209</sup>

(5) The panel is supported by its own staff work which generates further data relevant to the allegations, usually including an analysis of applicable laws and regulations of the respondent.<sup>210</sup>

(6) The respondent has the right to comment in writing on these staff-engendered facts or on other facts before the panel that were not presented by the parties.<sup>211</sup>

(7) The complainants, respondent, and other interested parties are invited to present lists of relevant witnesses. The panel, however, makes its own decisions as to which witnesses it will hear, and summons them.<sup>212</sup>

(8) During this stage of hearing of witnesses, the complainants and respondent are entitled to be represented throughout, to cross-examine witnesses, and to make opening and closing statements.<sup>213</sup>

(9) The respondent government is required to guarantee non-retaliation against hostile witnesses.<sup>214</sup>

(10) On the basis of all data produced by these preliminary efforts, the panel determines whether an on-site inspection is necessary and, if so, draws up its own agenda, indicating where it wants to go and with whom it wants to meet. The respondent is required to expedite the carrying out of this agenda.<sup>215</sup>

#### B. *During an On-Site Visit*

(11) The panel conducts its on-site interviews, *in camera*, without the presence of representatives of complainants or respondent.<sup>216</sup>

<sup>208</sup> Japan Report at 13-14, paras. 68-71; Greece Report at 7-8, paras. 28-34; Lesotho Report at 7-9, paras. 32-45; Chile Report at 9-14 and 16-17, paras. 42-75, 81-82.

<sup>209</sup> Japan Report at 14, para. 73; Greece Report at 8-9, and 15-16, paras. 36-41, 87; Lesotho Report at 9 and 11, paras. 46, 50; Chile Report at 16 and 17, paras. 79, 83.

<sup>210</sup> Japan Report at 14, para. 73; Greece Report at 16, para. 88; Chile Report at 17, para. 84.

<sup>211</sup> *Ibid.* See also Lesotho Report at 11, para. 53.

<sup>212</sup> Japan Report at 14, paras. 75-77; Greece Report at 16, paras. 90-92; Chile Report at 17, paras. 87-89. These preliminary hearings were not instituted by the Lesotho panel.

<sup>213</sup> Japan Report at 14, para. 75; Greece Report at 17, para. 94 and rules 2 and 8 of note 1; Chile Report at 17-18, paras. 86, 90.

<sup>214</sup> This problem arose only in the Chile case, discussed in the text at p. 343. For a passing reference to fear of retaliation in the Lesotho investigation, where it appears to have been treated as a less serious problem, see Lesotho Report at 20-21, paras. 108-09.

<sup>215</sup> Japan Report at 23, paras. 108-10; Chile Report at 6, 19, and 26, paras. 37, 93, 138. No on-site visit was made by the panel in Greece. Greece Report at 18, para. 97. In the Lesotho case, only the panel chairman conducted an on-site inspection, although the same rules applied. Lesotho Report at 13 and 14, paras. 57-58, 70.

<sup>216</sup> Lesotho Report at 20, para. 106; Chile Report at 28 and 29, paras. 150, 157. One exception was made by the Lesotho panel in the case of Shakane Mokhele, the former opposition and labor leader interviewed in the presence of prison officials.

(12) The members of the panel may operate separately at this stage, to broaden coverage.<sup>217</sup>

(13) Members demand, as of right, access to any persons they wish to interview, even when witnesses are incarcerated.<sup>218</sup>

### C. *Final Stage*

(14) An informal preliminary set of findings is drawn up and submitted to respondent for comment (or remedial action) before a final report is made.<sup>219</sup>

(15) The panel keeps under review the matter of nonreprisal against hostile witnesses.<sup>220</sup>

(16) The final report is written, submitted to the Governing Body, and, invariably, made public.<sup>221</sup>

A panel's terms of reference are generally to be found in the report of the Governing Body's Committee on Freedom of Association which screens complaints. This report is phrased in neutral terms, summarizing questions of fact that appear salient. However, there was one near-exception to this practice, the panel on Chile. That group was constituted under the usual neutral charge by the Governing Body, but it was augmented by a very political resolution of the Conference whose preamble bristles with conclusory paragraphs that accept as proven the very matters the panel was asked to investigate. It expressed "deep concern" at the "arrest, execution and deportation of trade unionists, violation of human and democratic rights, dissolutions of trade union organisations and restrictions of the right to organise and collective bargaining."<sup>222</sup> It charged that Chilean authorities had dismissed tens of thousands of employees in violation of ILO Convention No. 111 of 1958 on Employment and Occupation (to which Chile is a party). In all, the resolution prejudged several of the central issues before the panel. However, when the Director-General convoked the panel and summarized its charge and terms of reference, he neutralized the rash language of the Conference resolution. Members were merely asked to "examine the observance" by Chile of Convention No. 111. They were earnestly reminded of their status as "essentially a fact-finding body" empowered to "establish the facts without fear or favour" and that they were to exercise their powers "honourably, faithfully, impartially and conscientiously."<sup>223</sup> The Director-General

<sup>217</sup> Japan Report at 24-25, paras. 114-21; Chile Report at 26, para. 137. The procedure was not applicable to the panels on Greece (no on-site visit) or Lesotho (visited by chairman only).

<sup>218</sup> Lesotho Report at 21, para. 109; Chile Report at 29, para. 154. In several instances, however, the panel's efforts to interview incarcerated persons were frustrated by their transfer to other locations. *Id.* at 29, paras. 155-56.

<sup>219</sup> Japan Report at 25-26, para. 127; Lesotho Report at 21, para. 111; Chile Report at 30-32 and 103-07, paras. 159, 445-65.

<sup>220</sup> Chile Report at 102-03, paras. 436-44.

<sup>221</sup> See note 204 *supra*.

<sup>222</sup> Chile Report at 7, para. 41.

<sup>223</sup> *Id.* at 15-16, paras. 76-77.

thus drew the prejudicial sting from the General Conference's resolution by carefully transforming it into neutral terms of reference.

Of particular importance is the protection the ILO procedures seek to provide witnesses testifying against their governments. This may be done by *in camera* proceedings that exclude all representatives of the disputing parties, a practice usually followed during the on-site inspection stage. The panels have generally been successful in obtaining this procedural protection, even for incarcerated persons.<sup>224</sup> When a witness prefers to be heard during the preliminary stage—when the mission is determining, in effect, whether there is a *prima facie* case and formulating the presumptions to be tested by on-site inspection—government agents are allowed to be present, but the panel has required them to make a formal commitment “that no persons who had been in contact with the Commission would for that reason be subjected to coercion, sanctions or punishment. . . .”<sup>225</sup> When, in the Chilean investigation, it was subsequently alleged that this promise had been broken in several instances,<sup>226</sup> the panel insisted on, and was given, an accounting by the authorities.<sup>227</sup>

On the other hand, the effort of the FFCC to protect witnesses has been thoughtfully balanced against the right of the accused government to know the nature of the allegations to which it must respond. For example, during the Chilean investigation, at the preliminary (off-site) stage of hearings when the parties are represented and may cross-examine, one complainant refused to provide evidence to back his allegations and another to supply a supporting document unless the Chilean representative was first excluded. The panel considered the matter and ruled: “At this stage in the proceedings, that is to say, during the examination of witnesses, which of necessity involves cross-examination, the Commission cannot receive from any one party or from a witness produced by one party, any document which cannot be revealed to another party. . . .” However, as to the names of sources and informants, “disclosure may be made in confidence to the Commission” alone.<sup>228</sup>

In sum: although there have been only four FFCC panels, the record of those proceedings provides a considerable trove of procedural concepts that are of universal applicability, and most of them ought to be applied by any fact-finding mission seeking credibility for its product.

An additional source of procedural norms is the record of the Committee on Freedom of Association of the Governing Body, which was established in 1951 on the tripartite basis.<sup>229</sup> As noted, it serves the “doorkeeper”

<sup>224</sup> See note 216 *supra*.

<sup>225</sup> Chile Report at 29, para. 158.

<sup>226</sup> *Id.* at 102, paras. 436–40.

<sup>227</sup> *Id.* at 103, paras. 441–44. For example, in the case of a prisoner allegedly transferred to a military prison on Quiriquina Island, the Government replied that he had been transferred to “Tres Alamos” for climatic reasons. *Id.* at para. 441.

<sup>228</sup> *Id.* at 25, para. 125. See also *id.* at 24, paras. 123–24.

<sup>229</sup> This is a group designated by the Governing Body, consisting of 9 of its own officers. See Wolf, *ILO Experience*, *supra* note 135, at 620–21.

function for the FFCC, determining if a complaint is sufficiently substantiated to warrant further inquiry and whether it should be submitted to an FFCC panel for further investigation. The committee may also propose recommendations to be addressed by the Governing Body to a respondent. No consent is required for this stage of proceedings, and therefore, in its first 25 years, the committee has examined over 800 cases.<sup>230</sup> According to the ILO's Legal Adviser, this preliminary fact-finding is governed by many of the same basic procedural tenets as those followed by the FFCC and other panels.<sup>231</sup> The same is true of certain special study groups which may be set up at the request of a government to examine the facts underlying a specific labor problem or condition and to propose remedies.<sup>232</sup>

### CONCLUSIONS

There is a considerable procedural jurisprudence applicable to fact-finding in the human rights field that has been developed through practice. No fact-finding group established by any of the various international organs need any longer begin its life without an awareness of the normative practices that have proven themselves "in field conditions"—or of those practices responsible for avoidable problems that undermine the credibility of the product.

This is not to say that every fact-finding mission should operate with identical procedural rules. Flexibility is necessary in response to the varying circumstances being examined. However, the experience of some inquiries, both good and bad, suggests that there are minimal requisites of procedural due process that ought to apply in all but the most extraordinary instances; in the latter, they should be specifically excluded by the parent organ at the outset of the investigation.

A fact-finding mission should not begin its quest without clearly defined terms of reference that circumscribe the precise area in which it is to operate. These terms of reference should be neutrally stated in the form of questions of fact. The mission should insist that within this area it be free to apply the best available tools of perceptive objectivity, insulated from socio-political passions and assumptions. Ordinarily, the members should be distinguished individuals not beholden to governments—certainly not to governments with a direct stake in the issues. Appointment to a fact-finding panel should be irrevocable until the completion of the mission. Evidence should be taken in such a way as to facilitate informed cross-examination and rebuttal, and at the same time to protect witnesses against reprisal. The panel should have its own staff capable of researching issues as well as preparing agendas and itineraries independently. The fact finders' on-site freedom of movement and access should be

<sup>230</sup> *Id.* at 620.

<sup>231</sup> *Id.* at 621.

<sup>232</sup> See, e.g., Report of the Study Group to Examine the Labour and Trade Union Situation in Spain, 52 ILO OFF. BULL., No. 4, 2d Special Supp. (1969).

assured *ab initio*. Draft findings should be circulated to the parties for comment. The final product should accurately reflect the result, whether it is a consensus, a majority, or a wide diversity of views as to the facts. Members should be free to write separate or dissenting reports. Every report should be published, or none; and in their entirety, or not at all.

There is an important role for fact-finding in the protection of human rights. But as the champions of universal human rights have discovered, the key to protecting substantive rights is fair procedure, and the implementation of fair procedures must begin with the human rights organs themselves.

## INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS

By Carl Q. Christol \*

### INTRODUCTION

The exploration and use of the space environment, consisting of outer space per se, the moon, and celestial bodies, may result in harm to persons and to property. International law and municipal law have focused on rules allowing for the payment of money damages for harm caused by space objects and their component parts, including the "payload." Both forms of law have accepted the basic proposition that money damages should compensate for harm. Principal attention will be given in this analysis to the kinds of harm caused by space objects that are considered to be compensable under international law at the present time.<sup>1</sup>

In assessing this problem it must be remembered that international space law has been constructed on the basis that lawful uses of space objects are those that are peaceful, i.e., nonaggressive, and beneficial to mankind. Although access to the space environment for the purposes of exploration and use has proven beneficial to mankind's important needs and wants, it has been recognized that space objects also carry the possibility of causing great harm, as was illustrated by the ill-fated *Cosmos 954*.

On January 23, 1979, Canada presented a claim to the Soviet Union for damages from the *Cosmos* mishap in the amount of \$6,041,174.70. This sum, later reduced to \$6,026,083.56, represented "those costs in respect of the operations which would not have been incurred had the satellite not entered Canadian territory."<sup>2</sup>

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<sup>1</sup> Articles calling attention to U.S. statutes, such as the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 (1970), and NASA's authority to dispose of certain classes of claims, 42 U.S.C. §2473(c)(13) (1970), as amended in 1979, where the amount in controversy is no more than \$25,000, have been written by Dula, *Management of Inter-party and Third-Party Liability for Routine Space Shuttle Operations*, 26 *DRAKE L. REV. INS. L. ANN.* 741, 746-54 (1976-77); Hosenball, *Space Law, Liability and Insurable Risks*, 12 *THE FORUM* 141, 153-54 (1976); Wilkins, *Substantive Bases for Recovery for Injuries Sustained by Private Individuals as a Result of Fallen Space Objects*, 6 *J. SPACE L.* 164-69 (1978). The Federal Tort Claims Act, as a waiver by the United States of its sovereign immunity from suit, is subject to exceptions. One is that a U.S. district court may not adjudicate in a situation where the tort has occurred abroad. *M. WHITEMAN*, 8 *DIGEST OF INTERNATIONAL LAW* 813 (1967).

<sup>2</sup> Government of Canada, Department of External Affairs, Communiqué No. 8, January 23, 1979. Canada also indicated that its claim was for compensation and was "without prejudice to the right of Canada to make additional claims for compensation in this matter in respect of damage not yet identified or determined." Letter, Canadian Secretary of State for External Affairs to the Ambassador of the Soviet Union to Canada,

The Canadian claim is based on relevant international agreements and the 1972 Convention on International Liability for Damage Caused by Space Objects,<sup>3</sup> and will require an assessment of the meaning of "compensation for damage," both in the indicated agreements and in international law generally. For example, the issue of what constitutes a "taking of property" as a result of the deposit of *Cosmos 954* fragments will have to be resolved. Undoubtedly, it will be necessary to determine if such taking includes, in the language of the 1961 Harvard draft convention on responsibility of states for injuries to aliens,

not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.<sup>4</sup>

However, in an early 1978 assessment of Canada's position, it was observed that "[n]o physical or property damage had been suffered by Canadian citizens. It also appeared that no *measurable* damage had been caused to the Canadian environment by the nuclear debris of the *Cosmos*."<sup>5</sup>

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File No. FLA-268, January 23, 1979. Correspondence between the two states relating to the claim down to March 15, 1979, is set out in 18 ILM 899 (1979). In its note of March 15, 1979, to the Soviet Union, reference was made by Canada to its "claim for damage caused to Canada upon the crash of Soviet Satellite *Cosmos 954*." *Id.* at 909. Canada also referred to costs incurred as a result of search and recovery operations "undertaken as a consequence of the events giving rise to Canada's claim." *Ibid.* Canada reserved its right to "claim from the Government of the Union of Soviet Socialist Republics payment of interest at an appropriate rate on the amount of compensation declared payable by a Claims Commission, such interest to accrue from the date of the decision or award of the Claims Commission." *Id.* at 908. Canada had not received a substantial response from the Soviet Union as late as September 1979. However, on September 28 a discussion took place between the Canadian and Soviet representatives to the United Nations in New York. The latter stated that a response could be expected. Communication to the author from the Canadian Department of External Affairs, October 31, 1979. As of that date, the promised response had not been received by Canada.

<sup>3</sup> 24 UST 2389, TIAS No. 7762. The Soviet Union is also a party, as are about 60 other states. The agreement entered into force for the United States on October 9, 1973. It will be referred to hereinafter as the Liability for Damages Convention. An assessment of international space law agreements and general principles of international law applicable to the *Cosmos 954* incident is provided by Galloway, *Nuclear Powered Satellites: The U.S.S.R. Cosmos 954 and the Canadian Claim*, 12 AKRON L. REV. 401 (1979); Matte, *Cosmos 954: Coexistence pacifique et vide juridique*, 3 ANNALS AIR & SPACE L. 483 (1978).

<sup>4</sup> Art. 10, para. 3, Draft No. 12, April 15, 1961, 55 AJIL 548, 553 (1961); compare RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §192 (1965).

<sup>5</sup> Haanappel, *Some Observations on the Crash of the Cosmos 954*, 6 J. SPACE L. 147, 148 (1978) (emphasis in original). Canada, beginning in February 1978, has submitted statements to COPUOS describing materials and contamination found on Canadian territory following the *Cosmos 954* mishap. UN Doc. A/AC.105/214 (Feb. 8, 1978); UN Doc. A/AC.105/217 (March 6, 1978); UN Doc. A/AC.105/220, at 3-8 (May 20, 1978); and UN Doc. A/AC.105/236 (Dec. 22, 1978). The same information was provided directly to the Soviet Union. 18 ILM 912, 920-22, 929-30

To the present, it has been assumed that launches of space objects will be conducted by legal entities possessing substantial financial resources, such as nation-states or international intergovernmental organizations whose potential liability would ultimately be that of the states composing the organization. Further, when the launch is made by a private national company, such as COMSAT, the United States, through the National Aeronautics and Space Administration (NASA), "requires every non-United States Government user of its launch services to provide a third party liability policy covering each launch and naming as additional named insureds the U.S. Government, its contractors and subcontractors."<sup>6</sup> In 1976, the coverage per launch was \$100 million, with the possibility of a \$500 million limit at a later date.

#### THE SHUTTLE AS A SPACE OBJECT

When the space shuttle becomes fully operational, the space environment will be used much more extensively than at present because the vehicle was designed to provide routine access to space. Moreover, during the coming decade there will undoubtedly be a progressive and wide-ranging build-up of increasingly large and specialized space objects and attendant services to meet commercial, scientific, and industrial needs in space.<sup>7</sup> The larger number of space launches will increase the possibility of accidents and the prospect for catastrophic hazards.

If operational space shuttles facilitate the manufacture in space of very large space objects, there will be a more substantial prospect for collisions between such spacecraft. This prospect, however, must be weighed against the possibility that the shuttle will be able to retrieve or redirect orbiting objects. The return of such objects to earth will reduce the amount of solid debris and nonfunctioning space objects and component parts.

Much analysis has been devoted to the legal characterization to be accorded the shuttle. Since international space law has not provided a formal definition of the boundary between airspace and outer space, the shuttle can best be characterized on the basis of its function or the activity in which it is engaged. The principal function of the shuttle is to enter orbit, engage in the missions assigned to it while in orbit, and return safely to earth. Thus, though the shuttle transits airspace, it is not confined to

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(1979). The Soviet Union has also filed with COPUOS a statement concerning its policy on nuclear power for space objects. UN Doc. A/AC.105/220/Add.1, at 14-19 (June 27, 1978).

<sup>6</sup> Hosenball, *supra* note 1, at 153. Section 308(a), (b), (c), (d), and (e) of the National Aeronautics and Space Administration Authorization Act, 1980, makes provision within the context of insurance and indemnification for conduct resulting in "death, bodily injury, or loss of or damage to property resulting from activities carried on in connection with the launch, operations or recovery of the space vehicle." Pub. L. 96-48, 93 Stat. 349 (Aug. 8, 1979). Risks that can be insured against include pre-launch, launch, in-orbit, and third-party liability. Thoma & Shimrock, *Insurance of Satellites*, ESA BULL. No. 16, Nov. 1973, at 65.

<sup>7</sup> Disher, *Space Transportation, Satellite Services, and Space Platforms*, ASTRONAUTICS & AERONAUTICS, No. 4, Apr. 1979, at 42.



airspace, and it does not engage in its principal activities while in airspace. It is conceded that the shuttle has a hybrid quality, but it resembles a space object more than an aircraft because it is intended to go into orbit.<sup>8</sup> It has been stated that "the Space Shuttle's very limited atmospheric flight capabilities emphasize its spacecraft nature over its admitted technological aircraft nature."<sup>9</sup>

This limited technological capability of the space shuttle to act like an aircraft as it approaches and engages in its landing stage has not prevented the emergence of the general opinion that the shuttle will be treated from the legal point of view as a space object.<sup>10</sup> It has been pointed out that the definition of "space object" in the 1972 Liability Convention does not "exclude flight instrumentalities that are so designed as to be sustained by the reactions of air while passing through the atmosphere prior or subsequent to passage through outer space."<sup>11</sup>

The present shuttle, as well as future generations, will come within the provisions of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon, and Other Celestial Bodies (Outer Space Treaty),<sup>12</sup> and the 1972 Liability

<sup>8</sup> For a depiction of the profile of the shuttle's projected reentry into the atmosphere from outer space, see Doyle, *Reentering Space Objects: Facts and Fiction*, 6 J. SPACE L. 107 (1978); Menter, *Relationship of Air and Space Law*, in PROCEEDINGS OF THE 19TH COLLOQUIUM ON THE LAW OF OUTER SPACE 164 (1977).

<sup>9</sup> Sloup, *The NASA Space Shuttle and Other Aerospace Vehicles: A Primer for Lawyers on Legal Characterization*, 8 CAL. W. INT'L L.J. 403, 453 (1978); Mossinghoff & Sloup, *Legal Issues Inherent in Space Shuttle Operations*, 6 J. SPACE L. 47 (1978).

<sup>10</sup> This will clearly be the case regarding anything launched from the shuttle while the shuttle is in orbit. In 1972 when the U.S. Senate was seeking to understand the meaning of the term "space object" as it appeared in the Convention on International Liability for Damage Caused by Space Objects, the Department of State supplied a memorandum stating:

It appears to be the view of most international lawyers that the term "space object" includes any object launched by man for the purpose of orbiting or escaping the celestial body from which it is launched. . . . The test is not only whether the object does go into orbit or beyond, but also whether any object that is launched by rocket propulsion is intended to go into orbit or beyond. . . .

SENATE COMM. ON FOREIGN RELATIONS; CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS, S. EXEC. REP. 92-38, 92d Cong., 2d Sess. 9 (1972) [cited hereinafter as S. EXEC. REP. 92-38].

Pursuant to the terms of sec. 308(f)(1) of the National Aeronautics and Space Administration Authorization Act, 1980, adopted on August 8, 1979, dealing with insurance and indemnification relating to launch, operations, or recovery of the space vehicle, the shuttle was treated as a space vehicle. Thus, "the term 'space vehicle' means an object intended for launch, launched or assembled in outer space, including the space shuttle and other components of a space transportation system, together with related equipment, devices, components and parts." Pub. L. 96-48, 93 Stat. 349 (1979). Prior to the 1979 statute, the U.S. Federal Aviation Administration had decided not to treat the shuttle as an aircraft under the 1958 Federal Aviation Act.

<sup>11</sup> Foster, *The Convention on International Liability for Damage Caused by Space Objects*, 10 CANADIAN Y.B. INT'L L. 137, 159 n.73 (1972).

<sup>12</sup> 18 UST 2410, TIAS No. 6347, 610 UNTS 205, reprinted in 6 ILM 386 (1967). This treaty entered into force for the United States on October 10, 1967. The Soviet Union is also a party, as are about 80 other states. This treaty will be referred to hereinafter as the 1967 Outer Space Treaty.

for Damages Convention. Thus, the rules relating to the nature of damages applicable to the shuttle will unquestionably be the same as those applicable to the *Cosmos 954*.

#### POLICY CONSIDERATIONS

In forming a policy relating to the prompt and adequate recovery of damages, it has been necessary to weigh the benefits to be obtained from the exploitation of advanced space science and technology against the possibility of substantial harm and compensation for damages that could result from an incident involving a space object. These considerations, in turn, have demonstrated the need to obtain agreement on the standards to be applied in evaluating losses and on a formula for determining the specific amount of monetary harm stemming from such losses.

In formulating policy it has also been necessary to take into account the large financial resources of nation-states and the availability to non-governmental entities of liability insurance at premiums ranging from "\$25,000-\$60,000 per launch depending on the number of launches being covered by the purchaser of the policy and the insurance market at the time of purchase."<sup>13</sup> In addition, policy on this subject has been influenced by the fact that by August 1979, with approximately 4,700 identifiable space objects in orbit, only the *Cosmos 954* event had produced measurable monetary harm.<sup>14</sup> This harm was unique because it resulted from the presence of a sizable nuclear power plant on board. United States spacecraft have relied for electric power primarily on solar cells, rechargeable batteries, and related electromechanical and electronic equipment. Some used for deep space missions have been served by very small nuclear-powered equipment. Three nuclear-equipped U.S. space objects have suffered mishaps.<sup>15</sup>

The formulation of policy must also take into account the probability that over time the number of launches will increase, that space objects will become larger, that as they become larger their functions will become

<sup>13</sup> Hosenball, *supra* note 1, at 154.

<sup>14</sup> Monetary harm for which compensation is to be paid pursuant to Article 12 of the Liability for Damages Convention is based on the duty of the international tortfeasor to "restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred."

By October 15, 1978, a total of 4,621 objects had been observed in space by the Space Detection and Tracking System (SPADATS) of the North American Air Defense Command (NORAD). Of this number, 3,574 were earth orbiting and space probe debris. The United States was responsible for the introduction of 2,573 and the Soviet Union for 935. Menter, *Space Objects: Identification, Regulation and Control* (paper delivered at the Symposium on International Law and the Environment, University of Virginia School of Law, October 20, 1978). The landing of *Skylab* in and off the coast of Australia on July 11, 1979, relieved anxieties over prospective harm of considerable magnitude. In November 1979, the U.S. space object *Pegasus II* made an ocean landing without incident.

<sup>15</sup> Dembling, *Cosmos 954 and the Space Treaties*, 6 J. SPACE L. 129, 131 (1978). Compare Galloway, *supra* note 3, at 405-07.

more varied and complex, and that more orbital areas will become more heavily used.

While international space law has been designed to facilitate the exploration and use of the space environment for peaceful, including scientific and technical, purposes, it has also imposed constraints on the use of spatial areas. An attempt has been made to assure responsible use by providing liability for misuse. This area of international law, particularly because of the 1972 Liability for Damages Convention, is now regarded as victim or claimant oriented. These claimants will normally consist of foreign states and foreign nationals.<sup>16</sup>

Policy considerations relating to damages also raise the question whether there should be an international limit on liability. Such limits have been established for international nuclear, maritime, and air transport activities. Analogies have been made between the hazards involved in those activities and in space environment activities. It has been asserted that a low limit of liability would encourage poorer states to become operationally involved; but a low limit has also been justified on the ground that all peoples benefit from the space activities of the wealthier states, which should therefore not be unduly restricted. It has also been contended in some states that the establishment of limits on liability violates constitutional rights to the monetary value of a life or property. The proponents of unlimited liability, who come mostly from the poorer states, have pointed out that damage costs may be very small in comparison with investments in space activities. When liability limits have been fixed to assist in the development of infant industries, the limits have been enlarged over time; they have frequently been avoided altogether in practical situations. The space-resource states have concluded that a full-fledged space program is more important than trying to arrive at a policy of limited liability. This decision has made it important to identify the kinds of harm for which money damages can be recovered as compensation in the event of a dysfunction of a space object.

#### THE DEVELOPMENT OF INTERNATIONAL SPACE LAW RELATING TO DAMAGES

Since 1958, the United Nations has been the focal point for the establishment of an international legal regime for the space environment. It was perceived from the beginning that space activity would produce injuries for which recovery should be allowed. Following a series of proposals presented by the United States and the Soviet Union, agreement was reached by the General Assembly on January 25, 1967, when it adopted Resolution 2222 (XXI) containing the Outer Space Treaty. Articles 3<sup>17</sup>

<sup>16</sup> However, Article VII of the 1972 Liability for Damages Convention excluded from coverage "foreign nationals" who are participating in a launch, who are engaged in the launch until its descent, or who are at a launching site as the result of an invitation by the launching state.

<sup>17</sup> States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of

and 7<sup>18</sup> have direct application to the matter of damages. Article 3 requires that such activities conform to the general principles of law as they have found their way into international law, customary international law, and such subsidiary sources as the holdings of international tribunals and the writings of publicists.<sup>19</sup> During the formulation of these articles, as well as of the entire Liability for Damages Convention, the United States maintained that any international agreement would have to contain a "meaningful statement as to the standards to be applied to evaluate losses suffered and the amount of compensation to be paid. Ideally, to the extent that money can ever adequately compensate for injury, the objective must be to restore a claimant to the condition existing prior to the injury."<sup>20</sup> In taking this position, the United States was accepting the principle of international law identified in the *Chorzów Factory* opinion,<sup>21</sup> according to which, reparation for unlawful conduct "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."<sup>22</sup>

An assessment of the terms of Articles 3 and 7 of the 1967 treaty makes it clear that international law is generally relevant to the liability of states for launching space objects and for the space activities resulting from those launches. Because international law is applicable to such conduct, it is important to identify some international principles concerning space activities that do not derive from formal treaties.

Article 3 of the 1967 treaty allows for the application of customary international law to space activities. The following statement supports the validity of this conclusion:

In the absence of any specific agreement to the contrary, there is a customary rule of international law which provides that States, either individually or together with other States in international organizations, are liable for damages caused to other States through acts committed within their jurisdiction, particularly where those acts are committed with a high degree of State participation and supervision.

maintaining international peace and security and promoting international co-operation and understanding.

See note 12 *supra*.

<sup>18</sup> Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies.

*Ibid.*

<sup>19</sup> Article 38 of the Statute of the International Court of Justice. Whiteman (note 1 *supra*, at pp. 1241 and 1263) notes that customary international law and general principles of law may be taken into account in dealing with the subject of damages.

<sup>20</sup> Reis, *Some Reflections on the Liability Convention for Outer Space*, 6 J. SPACE L. 126 (1978).

<sup>21</sup> [1928] PCIJ, Judgment No. 13 (Merits), ser. A, No. 17, at 47.

<sup>22</sup> *Ibid.* See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, *supra* note 4, §188.

Launching of space objects would appear to fall within that kind of category.<sup>23</sup>

Customary international law has found expression in the declarations of international conferences, such as in Principle 21 of the 1972 UN Conference on the Human Environment, which asserts that states have "the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." This principle was confirmed by General Assembly Resolution 2996 (XXVII) on December 14, 1972, as "laying down the basic rules governing" the international responsibility of states concerning the preservation and protection of the environment.<sup>24</sup>

The duty to avoid causing damage to other states and to natural persons, as well as the duty to pay for damage, has also been established in international case law. In the well-known *Corfu Channel* case, the International Court of Justice held that there is an obligation of every state "not to allow knowingly its territory to be used for acts contrary to the rights of other states."<sup>25</sup> The same principle, coupled with the duty to pay monetary damages for identified harm to property, was promulgated in the earlier *Trail Smelter* arbitration.<sup>26</sup> The foregoing resolutions and judicial holdings must be taken into account both in identifying the duty under international law to compensate for harm and for their influence on the formulation of standards relating to the measure of damages.

From the outset of the space age it was accepted that priority should be accorded to formulating an international agreement on liability for damage. As the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) turned its attention to this subject and sought to arrive at a set of general principles, it reviewed various proposals that had been put forward as early as 1963.<sup>27</sup> The preponderant outlook was summed up by the representative of Argentina in 1966: "States should bear international responsibility for damage caused to other States as a result of their space activities and those of international organizations to which they belonged."<sup>28</sup> Consensus in COPUOS was quickly reached that liability should extend to both natural and juridical persons and to damage caused by a space object or a component part on the earth, in airspace, and in outer space, including the moon and other celestial bodies.

However, during the negotiations several views were advanced as to the nature of the liability to be included in the agreement. On September 24, 1965, the United States submitted a draft convention that proposed that

<sup>23</sup> STAFF OF SENATE COMM. ON AERONAUTICAL AND SPACE SCIENCES, 92D CONG., 2D SESS., REPORT ON CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS, ANALYSIS AND BACKGROUND DATA 44 (Comm. Print 1972).

<sup>24</sup> General Assembly Resolution 2995 (XXVII) of December 15, 1972, also acknowledges the legal significance of Principle 21.

<sup>25</sup> [1949] ICJ REP. 4, 22, reprinted in 43 AJIL 558 (1949).

<sup>26</sup> 3 R. Int'l Arb. Awards 1965-66 (1949), reprinted in 35 AJIL 684 (1941).

<sup>27</sup> GA Res. 1963 (XVIII), Dec. 13, 1963; GA Res. 2130 (XX), Dec. 21, 1965; GA Res. 2222 (XXI), Dec. 19, 1966.

<sup>28</sup> UN Doc. A/AC.105/C.2/SR.60, at 4 (1966).

the launching state be "absolutely liable" for launch activities<sup>29</sup> and that a defense against such liability be "a wilful or reckless act or omission" on the part of the claimant state.<sup>30</sup> By contrast, the proposal of the Soviet Union of June 16, 1966, provided that a launching state would be "internationally liable for damage."<sup>31</sup> In the interest of incorporating a general provision on liability in the treaty, the United States withdrew its proposal for absolute liability, even though it was favored by some states.<sup>32</sup> Agreement was reached on Article 7 when it was understood that its terms on liability for damage were not exhaustive and that ample opportunity remained for a more detailed assessment of the numerous aspects of damages. This understanding made it easier to accept Article 7 without its taking into account the 1965 proposal of the United States that the "compensation which a State shall be liable to pay for damage under this Convention shall be determined in accordance with applicable principles of international law, justice, and equity."<sup>33</sup>

At the time that the treaty was being reviewed by the United States Senate, attention was given to the meaning to be assigned to Article 7. Ambassador Arthur Goldberg, the principal U.S. negotiator, told the Committee on Foreign Relations that those who launch space objects are "internationally liable for damage to another state party by such object or its component parts on earth, in air space, or in outer space. I think any reasonable interpretation of that clause would mean physical damage."<sup>34</sup> He also stated that interference with telecommunications, such as jamming an electronic broadcast, did not constitute physical damage. In his view, disputes over such interference would be resolved through the consultative procedures in Article 9 of the treaty.<sup>35</sup> Because the committee wished to preclude U.S. liability for any damage that might result from the jamming of transmissions, it provided an interpretation of Article 7 in its report to the Senate: "The committee wishes to record its understanding that article VII pertains only to physical, nonelectronic damage that space activities may cause to the citizens or property of a signatory state."<sup>36</sup>

<sup>29</sup> UN Doc. A/AC.105/C.2/L.8/Rev.5 (1965). A comparison of the U.S. proposal with those of Belgium and Hungary is contained in UN Doc. A/AC.105/C.2/W.2/Rev.3 (1965). It has been reprinted in S. H. LAY & H. J. TAUBENFELD, *THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE* 277-87 (1970).

<sup>30</sup> UN Doc. A/AC.105/C.2/L.8/Rev.5 (1965).

<sup>31</sup> UN Doc. A/6431, Ann. 3, at 12 (1966).

<sup>32</sup> UN Doc. 105/35, Ann. 3, at 10 (1966).

<sup>33</sup> UN Doc. A/AC.105/C.2/L.8/Rev.3 (1965). However, this provision later became a key part of Article XII of the Liability for Damages Convention.

<sup>34</sup> *Treaty on Outer Space: Hearings before the Senate Comm. on Foreign Relations on Executive D*, 90th Cong., 1st Sess. 59 (1967).

<sup>35</sup> *Id.* at 71. An assessment of the relationship between Articles 7 and 9 is contained in C. Q. CHRISTOL, *SATELLITE POWER SYSTEM (SPS) WHITE PAPER ON INTERNATIONAL AGREEMENTS* 138-41 (Department of Energy/National Aeronautics and Space Administration, 1978).

<sup>36</sup> SENATE COMM. ON FOREIGN RELATIONS, *TREATY ON OUTER SPACE*, S. EXEC. REP. No. 8, 90th Cong., 1st Sess. 5 (1967).

With the entry into force of the 1967 Outer Space Treaty, it became evident that use of the space environment was subject to limitations and that space activities could produce liability for damage in the event of misuse. In ratifying the treaty, the United States became bound to the general proposition that a launching state may incur international liability for damage from space objects occurring in the space environment, in airspace, and on the earth's surface. While Article 7 formally established the principle of liability for damage, it did not "specify the conditions under which liability is to be assessed and paid."<sup>37</sup>

Although the acceptance in Article 7 of the principle of international liability for damage caused by space objects had wide-ranging legal consequences, its focus was quite narrow. It looked to physical harm of the kind that would result from collisions with space objects or aircraft, or from impacts on individuals or their property on the earth. It focused on nonelectronic and physical injury and did not take into account such possibilities as environmental harm or events producing pollution in outer space.

#### THE LIABILITY FOR DAMAGES CONVENTION OF 1972 AND COMPENSABLE HARM

Following the drafting and entry into force of the 1967 Outer Space Treaty, which left uncertain the scope of the term "damage," COPUOS resumed its deliberations on what was to become the Convention on International Liability Caused by Space Objects.<sup>38</sup> The General Assembly adopted resolutions encouraging action by COPUOS annually from 1967 through 1971.<sup>39</sup> In 1969, the General Assembly particularly identified the need for a liability convention "intended to establish international rules and procedures concerning liability for damages caused by the launching of objects into outer space and to insure, in particular, the prompt and equitable compensation for damages."<sup>40</sup> The following year, the General Assembly was concerned over the inability of COPUOS to draw up a liability convention with suitable provisions on the question of applicable law. Thus, on December 16, 1970, it adopted Resolution 2733B (XXV), in which it pointed out that "until an effective convention is concluded an unsatisfactory situation will exist in which the remedies for damage caused by space objects are inadequate for the needs of the nations and peoples of the world." The same resolution expressed the view that a future agreement should "contain provisions which would insure the payment of a full measure of compensation to victims and effective procedures which would lead to the prompt and equitable settlement of claims."

The Liability for Damages Convention contains a set of rules that supplements the provisions of the 1967 treaty. Its coverage is broad since it "makes no distinction between civil and military space objects and applies

<sup>37</sup> S. EXEC. REP. 92-38, *supra* note 10, at 1.

<sup>38</sup> See note 3 *supra*.

<sup>39</sup> GA Res. 2260 (XXII), Nov. 3, 1967; GA Res. 2345 (XXII), Dec. 19, 1967; GA Res. 2453B (XXIII), Dec. 20, 1968.

<sup>40</sup> GA Res. 2601B (XXIV), Dec. 16, 1969.

equally to each."<sup>41</sup> It provides for the possibility of collisions and mal-functionings and their consequences, including the identification of certain kinds of harm for which damages might be recovered. Moreover, the convention contains provisions that define space objects and component parts.

Unlike the 1967 treaty, this agreement identifies spatial areas in which varying standards of proof of harm are applicable, identifies principles of liability, makes precise the parties who can be held responsible, defines who can be a claimant, establishes claims procedures, fixes the rule of law to be applied to damages, and formalizes the dispute settlement process. It has been criticized because the parties were not able to agree that the decisions of the claims commission should be binding on litigants.

By its terms the convention allows claims to be made against a launching state by natural or juridical persons. However, it does not afford protection to the nationals of a launching state, who must make use of municipal remedies. The convention does allow claims to be made by foreign countries directly against the launching state.

The term "launching State" is defined in Article 1 as follows: "(i) A State which launches or procures the launching of a space object; (ii) A State from whose territory or facility a space object is launched." A launching includes an attempted launching. The term "space object" is defined to include the "component parts of a space object as well as its launch vehicle and parts thereof." The quoted definitions are also contained in the 1975 Convention on Registration of Objects Launched into Outer Space.<sup>42</sup>

#### *Definitional Problems: The Term "Payload"*

In the aerospace industry and among the managers of launches, the term "payload" is commonly used to identify the space object per se and its contents. Recent U.S. legislation uses the term "space vehicle" rather than the treaty term "space object."<sup>43</sup> "Space vehicle" is defined as "an object intended for launch, launched or assembled in outer space, including the Space Shuttle and other components of a space transportation system, together with related equipment, devices, components and parts." The statute also refers to "property to be flown on a space vehicle."<sup>44</sup>

During the negotiation of the Liability for Damages Convention, the Government of Italy proposed that a space object be defined to include the payload and property on board a space object, but this proposal was not adopted.<sup>45</sup> One commentator has suggested that the expressions, "component parts" and "payload and property on board," refer to different things, which implies that only those parts of a payload and property that

<sup>41</sup> S. EXEC. REP. 92-38, *supra* note 10, at 7.

<sup>42</sup> TIAS No. 8480, GA Res. 3235 (XXIX), Sept. 15, 1976. The agreement entered into force for the United States on September 15, 1976.

<sup>43</sup> Sec. 308(f)(1), Pub. L. 93-48, 93 Stat. 349 (1979).

<sup>44</sup> *Id.*, sec. 308(f)(2).

<sup>45</sup> Foster, *supra* note 11, at 159 n.79.



constitute an integral part of a space object may qualify as component parts.<sup>46</sup>

When the Senate Committee on Foreign Relations addressed itself to this definitional problem, it was advised by the Department of State that "payload" was the equivalent of the space object, its component parts, and all property on or within the space object. The Department's memorandum stated that a space object included "even those parts which are not intended to go into orbit or beyond (that is, all objects launched with the primary object or payload)." <sup>47</sup>

Others who have assessed the expression "payload" have indicated that it is an operational concept equivalent to space object and component parts. Nicolas Matte has written that "not only damage caused by the object itself, but also that caused by the payload, by the functioning of scientific instruments on board, and by anything that has become detached from or thrown out of the space object will be covered by the Convention." <sup>48</sup> One of the U.S. negotiators, Herbert Reis, has noted that it was considered that the convention covered injuries resulting from the "re-entry of fragments of a foreign man-made space payload or launch vehicle." <sup>49</sup>

The term "payload" has come to be used as the equivalent of a space object, its component parts, and everything else that is either on or within a launched space vehicle. Since component parts have not been defined in such a way as to exclude the property contained within a space object or attached to it in order to facilitate the objectives of the launch, and since the amount of room on board is so severely restricted that the contents must be selected with the purpose of contributing to the success of the launch, it is reasonable to include within the concept of space object or component parts all of the payload. In a practical sense it would undoubtedly be difficult to set apart a specific instrument launched in a space object by urging that it was a part of the "payload" but not of the space object per se, and was not a component part. Thus, to the extent that national laws may make references to "payload" or property on board, this should not prevent such materials from being treated under the convention as space objects and component parts.

### *Recovery of Damages*

For the purposes of the 1972 Liability Convention, Article I defines "damage" as "loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations." Article II applies the foregoing concept of damage to "damage caused" on the surface of the earth or to aircraft in flight. Article III applies the concept

<sup>46</sup> *Ibid.*

<sup>47</sup> S. EXEC. REP. 92-38, *supra* note 10, at 9.

<sup>48</sup> N. MATTE, AEROSPACE LAW 157 (1977). He finds support for this generalized conclusion in the definition of a space object and in the *travaux préparatoires* of the Liability Convention, citing UN Docs. A/AC.105/C.2/SR.94, 95, and 97 (1968).

<sup>49</sup> Reis, *supra* note 20, at 127.

to harm caused elsewhere than on the surface of the earth to a space object of one launching state or to persons or property on board such a space object by a space object of another launching state.

Article XII of the 1972 convention provides:

The compensation which the launching State shall be liable to pay for damage under this Convention shall be determined in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred.

In this form the convention followed with remarkable similarity the U.S. proposal of September 25, 1965, that the amount of damages payable "shall be determined in accordance with applicable principles of international law, justice, and equity."<sup>50</sup> Further, as previously noted, the *Chorzów Factory* opinion, which relied on established international practice and in particular on the decisions of arbitral tribunals, had confirmed that the function of international tort law is to restore an injured person to the condition that would have existed had the harm not been experienced.<sup>51</sup>

The negotiators arrived at the indicated formula because of disagreement over whether the laws of the claimant state or the launching state should govern the nature of damages. The provisions of Article XII calling for the application of international law, justice, and equity constitute a new approach to international tort law.<sup>52</sup>

It has been suggested that the joining of "justice" and "equity" means that "equity," as contemplated by the convention, is "used in its popular sense to signify moral justice and not in an Anglo-American legal sense."<sup>53</sup> Pursuant to such a formulation, it would be possible to avoid the rigors of strictly legal approaches to the measurement of damages and adapt relief to the circumstances of any given case. In determining how far such an approach might be taken, Article XII, as previously noted, requires that damages be assessed so as to allow the injured person to be restored "to the condition which would have existed if the damage had not occurred."

*Direct Damages.* Although the basic legal concept of damages is variously identified and defined, it is elementary that the concept deals with the compensation allowed by law for an injury. One American scholar refers to damages as the sum of money awarded to a person injured by the tort of another.<sup>54</sup> The varied nature of the harm experienced by those who have been injured has allowed for the refinement of the damages concept. Thus, one classification is that of actual or direct damages—with

<sup>50</sup> UN Doc. A/AC.105/C.2/L.8/Rev.3 (1965).

<sup>51</sup> [1928] PCIJ, ser. A, No. 17, at 47.

<sup>52</sup> It will be recalled that this convention also allows foreign natural or juridical persons to make direct claims against the launching state.

<sup>53</sup> Alexander, *Measuring Damages Under the Convention on International Liability for Damage Caused by Space Objects*, 6 J. SPACE L. 151, 153 (1978).

<sup>54</sup> W. L. PROSSER, *LAW OF TORTS* 49-51 (4th ed., 1971).

general, foreseeable, or compensatory damages falling within the same category. A standard view in the United States of this kind of damages calls for compensation that would put the injured party into the position occupied by him before the injury. Thus, the American concept of actual damages is essentially identical with the recovery mandated by Article XII of the convention.

The convention has been characterized as victim oriented. If taken literally, this description means that the victim is to be assured not only of adequate access to available dispute-resolving processes but also of full restoration of pecuniary losses. It raises the question of the full nature of such losses and the causative forces that have produced harm. Considerations of justice and equity will influence any assessment of the proper measure of the compensation.

Article I of the convention straightforwardly enumerates four kinds of recoverable harm, namely, loss of life, personal injury, other impairment of health, and loss of or damage to property. These all fall within the actual, direct, general, foreseeable, or compensatory classification. Within the context of these concepts, a claimant would be required to show that the harm flowed directly or immediately from, and as the probable or natural result of, the malfunctioning of the space object.

Malfunctioning that produces liability can take numerous forms. It may result from launch failure, with harm to persons and objects on the ground or in the air. Although quite unlikely, there is the possibility of collisions between space objects. Loss of function can take place after successful entry into orbit, which may result in fragments or radiation or other forms of contamination-pollution reaching the earth. Harm for which recovery is in fact allowed can be produced by contamination as well as by solid debris in the form of fragments.<sup>55</sup> When the contamination-pollution takes the form of radiation that causes damage to property, as in the *Cosmos 954* incident, recovery could be based on this source of damage.<sup>56</sup> The space object and its component parts, or payload, would be shown to have been the proximate cause of the harm.

If the required causation were present and harm were experienced pursuant to U.S. practices, compensation for the following would be appropriate: lost time and earnings; impaired earning capacity; destruction or deprivation of use of property; rendering the property unfit for the use for which it was intended; loss of profits resulting from an interruption in business activities; loss of rents; reasonable medical, hospital, and nursing costs occasioned by harm to the person; physical impairment, including impairment of mental faculties; pain and suffering; humiliation; reasonable costs for the repair of property that has been wrongfully harmed; costs incurred in mitigating existing wrongful harm; and loss of the services of a third party to which the injured party was entitled. The Department of State regularly has taken the position that international law authorizes the

<sup>55</sup> Christol, *Protection of Space from Environmental Harms*, 4 ANNALS AIR & SPACE L. 433 (1979).

<sup>56</sup> Dembling, *supra* note 15, at 133 *et seq.*

recovery of damages for harm produced by personal injury or pecuniary loss.<sup>57</sup> In the event of loss of life, a valid claim could also be made for "contributions made by the deceased toward support of claimant."<sup>58</sup>

In referring to personal injuries, W. F. Foster has concluded that recovery can be had when the harm results from physical impact with the debris of a space object or from contamination emanating from such an object, and that compensable harm does not require "physical impact with a space object."<sup>59</sup> Relying on the broad terminology of Article I(a), he concludes that "it is clear that all injuries to persons are covered whether or not they are accompanied by objective or substantially harmful physical or psychopathological consequences provided they at least result in an 'impairment of health.'"<sup>60</sup> The World Health Organization has identified health as "a state of complete physical, mental, and social well-being."<sup>61</sup> Thus, the terms of the Liability Convention, "other impairment of health," can be interpreted as extending beyond the harm associated with loss of life and physical injury. Impairment of mental resources or faculties would support claims for monetary compensation.

Undoubtedly the clearest, but not the only, case for recovery of damages is where there is a direct relationship between the cause of the harm and the harmed individual or property. Direct damages traditionally are those resulting from an act without the intervention of any intermediate controlling cause.

*Indirect Damage.* The question has been raised whether the convention covers indirect or consequential or remote or unforeseeable consequences. These concepts relate to harm produced by a tortious act that flows naturally but indirectly from the wrongful act. Consequential damage has been identified as "such damage, loss or injury as does not flow directly and immediately from the act, but only from some of the consequences or results of such act."<sup>62</sup> At one point in the negotiations, the United States attempted to make a distinction between direct and indirect damages. It was stated that the convention

holds a launching State liable for damage traceable directly to the launching, flight and re-entry of a space object or associated launch vehicle but does not cover what some delegations earlier called remote or indirect damage and for which there is only a hypothetical causal connection with a particular space activity.<sup>63</sup>

<sup>57</sup> Recovery depends on a showing of the medical and hospital expenses occasioned by the injury, the extent of the injury and the physical suffering resulting therefrom, loss of time from gainful employment, extent of impairment of earning capacity, and, where there is personal injury, "mental suffering, shock, grief, worry and the like." M. WHITEMAN, *supra* note 1, at 887.

<sup>58</sup> *Id.* at 900.

<sup>59</sup> Foster, *supra* note 11, at 155.

<sup>60</sup> *Ibid.*

<sup>61</sup> Preamble, Constitution of the World Health Organization, WORLD HEALTH ORGANIZATION, 2 OFFICIAL RECORDS 100 (1948).

<sup>62</sup> COMM. ON AERONAUTICAL AND SPACE SCIENCES REPORT, *supra* note 23, at 24.

<sup>63</sup> *Ibid.*

Is a heart attack resulting from the impact of space debris near the victim a direct or indirect injury? Despite the position taken by the United States during the negotiations, it has been noted that "the question remains whether the heart attack is 'remote' or 'indirect' damage not recoverable under the Convention."<sup>64</sup> Another example might be physical damage by a space object to a business enterprise that has borrowed funds from a lending institution. In this situation, "international law does not authorize the protection of the legitimate interests and expectancies of creditors in the good financial situation and economic solvency of their debtors."<sup>65</sup> On the other hand, it has been noted that if the harmful act were directly and simultaneously to affect the legal rights of both persons, then a valid claim might be filed on behalf of the creditor because of the unfavorable repercussions on the latter's interests or expectancies.<sup>66</sup>

In international tort law, as in law generally, causation conditions the allocation of damages for harm. Both Articles II and III of the Liability Convention specify that damages can only be recovered if the harm is "caused by" the space object of a launching state. In this context, Foster has observed that "no indication is given as to whether claims will lie for both direct and indirect damage."<sup>67</sup> He has pointed out that the matter of indirect damage was only briefly considered by the Legal Subcommittee; Hungary and the Soviet Union opposed recovery on that basis, while Italy and Japan favored it. Of those voicing an opinion, a majority thought that indirect damage should not be mentioned in the convention and "that the question [should] be left open to be dealt with as individual cases arose."<sup>68</sup> India, Japan—despite its earlier position—the United Kingdom, and the United States favored the last approach. In Foster's view, nothing could have been achieved by attempting to draw a strict distinction between direct damage and its association with foreseeability on the one hand, and indirect damage and its association with unforeseeable consequences on the other. He has written:

These considerations, it is suggested, are irrelevant to a determination of whether compensation should be paid for specific damage arising out of a space object accident. The word "caused" should be interpreted as merely directing attention to the need for some causal connection between the accident and the damage, while leaving a broad discretion so that each claim can be determined on its merits and in the light of justice and equity, for it is difficult, if not impossible, to foresee all the circumstances that may result in damage.<sup>69</sup>

Matte also has concluded that the negotiators did not determine specifically if indirect damage was to be compensable; as a result, if there were

<sup>64</sup> Hosenball, *supra* note 1, at 151.

<sup>65</sup> M. WHITEMAN, *supra* note 1, at 993.

<sup>66</sup> *Ibid.*

<sup>67</sup> Foster, *supra* note 11, at 157.

<sup>68</sup> *Id.* at 158 n.65.

<sup>69</sup> *Ibid.* Such an approach, by focusing on causality and avoiding the direct-indirect debate, would allow for the greatest amount of flexibility in determining individual cases.

the required degree of causality to bring about liability, the measure of damage would be "decided in each case by the parties concerned, or, failing their agreement, by a claims commission."<sup>70</sup> Matte accepts the view that direct damage to health can include harm of a physical, mental, or psychic nature. He also believes that recovery for damage resulting in "loss of profits, interest, sentimental value, pain and suffering" might be agreed upon by the parties or allowed by a claims commission.<sup>71</sup>

The *Cosmos 954* incident has been used by Peter Haanappel to illustrate how clean-up costs might be treated as indirect or consequential damage. This illustration assumes that the presence of nuclear debris in Canada did not cause measurable damage and that precautions taken by Canada were designed to prevent possible damage. Nonetheless, Haanappel concludes that "it could be argued that Canada's search and rescue costs were caused by fulfilling its common law duty to *mitigate* probable damages and that these costs would therefore qualify as indirect or consequential damage in the sense of Article VII of the Outer Space Treaty."<sup>72</sup>

The language "caused by" needs to be examined from two perspectives. It might be interpreted as providing that only a direct hit by space debris would allow for the recovery of damages. Or, more reasonably, it would allow for the additional consequences produced as a result of the initial hit. Thus, this expression would allow for the recovery of damages both for a direct hit and for the indirect or consequential aspects of an accident involving a space object. The term "caused by" also can be interpreted in the context of causality, which means that there "must be proximate causation between the damage and the activity from which the damage resulted."<sup>73</sup> Nonetheless, in the light of the positions put forward during the negotiation of the Liability Convention, since no conclusion was reached as to "direct" versus "indirect" cause, clearly the term "cause" should only require a causal connection between the accident and the damage. As noted by Foster, it will be difficult, if not impossible, to foresee all the circumstances that may result in damage.<sup>74</sup> Despite the several views put forward by commentators, it may be anticipated that the convention will be interpreted as covering both direct and indirect damage resulting from the malfunctioning of a space object and its component parts. International law, rather than municipal law, will be invoked in reaching a decision about the exact amounts to be recovered as damages, and the convention requires that, in arriving at this decision, international law and the principles of justice and equity must be applied.

*The Problem of "Moral Damage."* During the negotiations, the issue was also raised whether "moral damages" might be recovered within the terms of the convention. Understanding of this issue has been complicated by the fact that different meanings and implications relating to moral damage

<sup>70</sup> N. MATTE, *supra* note 48, at 157.

<sup>71</sup> *Ibid.*

<sup>72</sup> Haanappel, *supra* note 5, at 148 (emphasis in original).

<sup>73</sup> Gorove, *Cosmos 954: Issues of Law and Policy*, 6 J. SPACE L. 141 (1978).

<sup>74</sup> Foster, *supra* note 11, at 158 n.65.

exist in international law and in municipal law. In international law it has been identified as damage both to states and to natural persons. Moral injury has been contrasted with material injury in the context of international law: the former would consist in injury to the dignity or sovereignty of a state, whereas the latter would involve damage to persons or property. Illustrative of a moral injury in international law would be the breach of a treaty obligation. The mere breach would not produce material injury. However, the moral injury would oblige the violating state to make suitable monetary amends to the injured state.<sup>75</sup>

Moral damage is also recognized in municipal law, including that of both civil and common law countries. Not all municipal systems, however, contain provisions for awarding compensation in this area. One of the problems has been to identify what specific kinds of harm have been treated as constituting moral damage. When the Senate Committee on Foreign Relations was considering the Liability for Damages Convention, it was informed by the Acting Legal Adviser of the Department of State that under the agreement "a claim may be presented that covers in some Western legal systems what is called 'moral damages,' namely damage for pain, suffering, and humiliation. The Convention makes such claims possible by providing that compensation shall be determined 'in accordance with international law and the principles of justice and equity.'" <sup>76</sup> Illustrations of moral damage vary: in Belgium and France a woman can claim compensation for the loss of her husband, and in the United States loss of consortium is compensable.<sup>77</sup>

In an effort to clarify the substantive issue, Hungary submitted a draft article to COPUOS providing that a claim of moral damage could be put forward.<sup>78</sup> According to Foster,

this issue was not discussed in any great detail in the Legal Sub-Committee, nor does the Convention specifically deal with it. Thus, it can be said that, despite the problems involved in placing money values on pain and suffering and loss of capacity to enjoy life, compensation may be awarded for such losses.<sup>79</sup>

The United States has adopted this last-mentioned position. In offering testimony to the Senate Committee on Foreign Relations, the spokesman for the Department of State said that "claims covering moral damage aspects are well-known in international legal and United States domestic practices, and hence the United States would not hesitate to include them in claims we might present."<sup>80</sup> This position has recently been affirmed by the

<sup>75</sup> CASES AND MATERIALS ON INTERNATIONAL LAW 843 (eds. Friedmann, Lissitzyn, & Pugh, 1969), citing L. OPPENHEIM, 1 INTERNATIONAL LAW (8th ed. Lauterpacht, 1955), at 352.

<sup>76</sup> S. EXEC. REP. 92-38, *supra* note 10, at 7.

<sup>77</sup> For a listing of potentially recoverable types of harm, including consortium, see Reis, U.S. Discusses "Applicable Law" for Outer Space Claims, 62 DEP'T STATE BULL. 18 (1970).

<sup>78</sup> COMM. ON AERONAUTICAL AND SPACE SCIENCES REPORT, *supra* note 23, at 24.

<sup>79</sup> Foster, *supra* note 11, at 173.

<sup>80</sup> S. EXEC. REP. 92-38, *supra* note 10, at 7.

General Counsel of NASA, who said that the United States "would not hesitate to include them in the claims we may present."<sup>81</sup> A recent commentator has also interpreted the Liability Convention as permitting remuneration for moral damage in the form both of pain and suffering experienced by a person injured by a space object and of mental anguish experienced by a survivor of a person killed by such an object.<sup>82</sup> Thus, no matter what specific kinds of harm might be contained in a classification of damages as actual, compensatory, general, direct, or foreseeable, it is certain that the foregoing illustrations of moral damage are compensable under the convention.

Among the types of recovery allowed by international tribunals has been the value of lost or destroyed property, including compensation for lost profits. In cases where claims have been based on personal injuries, recovery has included medical expenses, loss of earnings, pain and suffering, and mental anguish. Further, such tribunals have reduced damages when the claimant has contributed to the injury.<sup>83</sup>

Perhaps some of the preoccupation in the United States with such aspects of moral damage as humiliation, loss of consortium, mental anguish, and pain and suffering goes back to the Senate interpretation of Article 7 of the 1967 Outer Space Treaty. It will be recalled that the Senate interpreted Article 7 as dealing only with physical harm and excluded from its coverage electronic interference by one country in the radio broadcasts of another. That was a very limited application of the concept of physical harm, and, with the entry into force of the 1972 Liability for Damages Convention, a much wider framework of international tort law was established. A valid conclusion is that "direct damage and moral damage resulting from a collision or malfunctioning of space objects are recoverable. . . . To the extent that indirect damages fall under the heading of moral damages they would be included."<sup>84</sup>

It should be noted in passing that although the municipal tort law of a given state by no means provides an unerring perception into what may become the operational elements of the Article XII provision relating to "international law and the principles of justice and equity," national outlooks are still relevant. In the United States it is possible to refer to the American Law Institute's *Restatements* for authoritative guidance. In the field of tort law, direct or compensatory damages include both general and special damages. General damages include harm resulting from loss of property or from loss of use. Special damages in personal injury cases include harm to earning capacity and expenses for medical treatment and similar items.<sup>85</sup> It is also accepted that there may be direct or compensatory damages for nonpecuniary harm. Falling within this category are fear

<sup>81</sup> Hosenball, *supra* note 1, at 151.

<sup>82</sup> Alexander, *supra* note 53, at 155. He bases his conclusion on the convention's goal of serving "moral right."

<sup>83</sup> Friedmann, Lissitzyn & Pugh, *supra* note 75, at 845.

<sup>84</sup> C. Q. CHRISTOL, *supra* note 35, at 135.

<sup>85</sup> 4 RESTATEMENT (SECOND) OF TORTS 2D §904 (1979).



and anxiety, loss of companionship, and loss of freedom.<sup>86</sup> Additionally, there can be harm in the form of injury to feelings, with direct or compensatory damages being awardable depending on the intensity or duration of the harm.<sup>87</sup> The foregoing is premised on a factual situation in which the harm produced by the space object is accidental and unintentional.

The municipal jurisprudence of other states has developed along equally particularistic lines. The municipal tort law of the Soviet Union, for example, is different from that of the United States. The Soviets "approach compensation questions principally in the context of institutional costs (hospitals, schools, state pensions) rather than personal loss to the individual."<sup>88</sup> During the negotiations, the Soviet Union proposed that the law of the place of launch govern the damage for which recovery might be had and the measure of damages. The Soviet proposal would have allowed for a limited approach, as compared to U.S. concepts and practices, and was not acceptable to the United States. Many proposals were received on the subject of "applicable law," as is indicated by the fact that they filled 22 single-spaced typewritten pages.

In national laws there is no universal understanding of distinction between "direct" and "indirect" harm, nor is there a total acceptance and uniform interpretation of the concept of "moral" damage. It is only in the sense of Article 38 of the Statute of the International Court of Justice that out of the totality of outlooks of states there may be a possibility of identifying "the general principles of law recognized by civilized nations"; and only in these circumstances do the laws and practices of separate states become relevant. Such laws and practices must depend on principles of law "which are just and equitable, or, better, which lead to such a result [and] will be taken into account when compensation has to be determined."<sup>89</sup>

*Nominal and Punitive Damages.* The peaceful exploration and use of the space environment is considered to be both beneficial and hazardous. To the extent that human conduct is ultrahazardous, extrahazardous, or abnormally dangerous, a situation exists in which risk cannot be eliminated by the exercise of reasonable care. During the negotiations for the Liability Convention, an attempt was made to fix limits of liability, especially since it was considered that some of the harm that might result from a space accident might cause nuclear damage. The parties failed to reach agreement on this matter.

Since liability for a space object accident is unlimited, there was no need to impose either nominal or punitive damages. Under the terms of Article XII, it was considered that claimants would have optimum protection.

<sup>86</sup> *Id.*, §905.

<sup>87</sup> *Id.*, §912; compare, C. T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, ch. 11, "Personal Injuries," 299 ff. (1935).

<sup>88</sup> Hosenball, *supra* note 1, at 150.

<sup>89</sup> N. MATTE, *supra* note 48, at 169.

Space activities were needed because of their inherent importance; therefore, no extra encouragement was required in the form of limited liability.

With unlimited damages the rationale for nominal damages was eliminated, since nominal damages serve merely to confirm the existence of a right when there has been no substantial loss or injury. Punitive damages also were not within the scope of the 1972 convention. Punitive damages are intended as a punishment to the tortfeasor. Since the declared objective of the convention was to provide compensation, and since neither nominal nor punitive damages are designed to serve this purpose, they do not fall within the convention.<sup>90</sup> It has nonetheless been suggested that silence as to nominal damages "need not preclude their availability."<sup>91</sup> In support of this view, it has been urged that "the goals of equity and justice could permit an award-making tribunal to determine that the rights of an injured party had been wrongfully infringed by the space object's launching State."<sup>92</sup> Still, such an approach is unlikely to eventuate in practice because of the lack of limits on liability and because absolute liability is provided only for harm occurring on the surface of the earth and to aircraft in flight. In this situation, "all that need be established is the presence of the requisite damages."<sup>93</sup>

Although it is generally acknowledged that the basic theme on damages of the Liability Convention is to provide compensation in order to restore the injured natural or juridical person to the condition existing prior to the harm, and that the absence of a reference to punitive damages was intended to exclude claims based on this consideration, an argument has been made for the relevance of such claims. That states might accept punitive damages by means of negotiations carried out at the diplomatic level is hardly conceivable, yet one commentator has suggested that "it is possible that a claims commission might consider the appropriateness of such a remedy."<sup>94</sup> He argues that a launching state must in all cases comply with international law, including the UN Charter and the 1967 treaty. These sources support the proposition that it would be unlawful for a state to engage in a launch intended to cause damage. The argument on punitive damages then associates the provisions of Article 3 of the 1967 treaty with Article VI of the Liability Convention.

Article VI of the Liability Convention is a limited and particularistic response to the terms of Article II, which imposes absolute liability on the launching state for damage caused by its space object on the surface of the earth or to aircraft in flight. Paragraph 1 of Article VI exonerates the launching state if it can establish that "the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State." However, pursuant to paragraph 2, the benefit accorded the launching state from the

<sup>90</sup> Foster, *supra* note 11, at 172.

<sup>91</sup> Alexander, *supra* note 53, at 154.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Id.* at 157.

gross negligence or intentional conduct of the claimant state is disallowed if the launching state has embarked on activities violative of the UN Charter and the 1967 Outer Space Treaty. In the light of these prescriptions, it has been stated that

[i]f a claims commission were to refuse to exonerate a launching state for its failure to comply with such international law, that finding of failure would approach the standard of malice which is often sufficient to justify an award of punitive damages. If the claims commission further found that the purposes of punitive damages to punish or deter would be served, then that commission might well designate an award that included a measure of punitive damages.<sup>95</sup>

These observations present several problems. First, punitive damages normally are assessed only in the event of intentional conduct by the original tortfeasor. The Liability Convention only refers to intentional conduct by the claimant state. Second, the basic theme of the convention, including its reference to the UN Charter and to the 1967 treaty, refers to accidental conduct producing harm for which there is, depending on spatial situations, absolute liability or liability based on fault. Harm may be caused accidentally or unintentionally as well as intentionally. It is possible to imagine that the intentional creation of harm might call for the invocation of the concept of punitive damages. However, if such a situation were to arise as a result of the launch of a space object, the United States undoubtedly would contend that damages would have to be claimed on a legal basis other than the 1972 Liability Convention. The Senate gave its advice and consent to ratification after having been advised by the Department of State that the convention did not apply to intentional damage.<sup>96</sup>

Third, the provision of punitive damages in some national legal systems does not warrant their application in international law unless it is demonstrated that punitive damages are a general principle of law common to all major legal systems and therefore can be applied by international tribunals. Furthermore, the Liability for Damages Convention was adopted, as is confirmed by many of its articles, in order to allow for restoration by way of compensation for damage rather than to impose other sanctions.

As an alternative to punitive damages, it has been suggested that Article VI, paragraph 2 imposes stricter international liability for damage resulting from a violation of its mandate on conduct than has "resulted from activities conducted by a launching State which are not in conformity with international law." Ineligibility of the launching state to claim exoneration has been interpreted to mean that

even if the claimant State is responsible for the damage it sustained, it is entitled to claim full compensation for the damage. In this respect international liability for damage caused as a result of activities not in conformity with international law on the part of a launching State

<sup>95</sup> *Ibid.* The author also states: "While such a measure might constitute a 'damage' arising from the launching State's activity, it would certainly go beyond the remedial goal of restoration" (footnote omitted). *Ibid.*

<sup>96</sup> S. EXEC. REP. 92-38, *supra* note 10, at 10.

differs from international liability for damages caused as a result of routine, normal space activities.<sup>97</sup>

In the absence of limitations on liability, the application of a stricter standard for launching state activities in violation of the UN Charter and the 1967 treaty may eliminate any need to have recourse to punitive damages.

Although international lawyers have occasionally contemplated the assessment of punitive damages as a result of breaches of international law, the acceptance of this concept has been rather limited.<sup>98</sup> On this subject an American expert in the field has concluded that "punitive damages are but rarely and then only reluctantly allowed."<sup>99</sup> Further, where damages are called for in an international treaty, there is a need for clear and unambiguous language specifying the availability of such damages. Often when large settlements have been reached in the dispute-resolving process, "such damages might well be considered in their nature, although they are not so denominated."<sup>100</sup> With this in mind, and particularly in light of the terms of the 1972 Liability Convention, which call for restoring the condition of the injured person prior to the injury and reject limits of liability, the prospect for punitive damages is remote. Or, if there were a valid case for such damages, the award might take the indicated conduct into account without characterizing the award as punitive.

#### *Lacunae in the 1972 Convention*

The convention did not attempt to deal with all of the possible situations in which harm might result from activities in space. One example is the absence of a meaningful provision for general problems "that may arise when injuries are sustained in the environment of space or on a celestial body."<sup>101</sup> Article III provides for the payment of compensation for damage only to a foreign space object or to persons or property on board such a space object when the damage occurs elsewhere than on the surface of the earth. Such liability depends on the fault of the launching state or the fault of the persons for whom it is responsible. The failure to define "fault" also has been seen as a defect in the convention.<sup>102</sup> Other perceived defects are its failure to set out guidelines for standards of care or to provide the meaning of a reasonable man. In addition, no provision was made for imputing negligent conduct to others or for the attribution of a principal's vicarious liability for an agent or employee.<sup>103</sup> It is true that the Liability Convention did not explicitly resolve such details—important as they may be, particularly in certain municipal legal systems—

<sup>97</sup> INTERNATIONAL SPACE LAW 170 (ed. Piradov, trans. Belitsky, 1976).

<sup>98</sup> G. H. HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW 723-26 (1943).

<sup>99</sup> M. WHITEMAN, *supra* note 1, at 1215. Compare M. WHITEMAN, 1 DAMAGES IN INTERNATIONAL LAW 716, 722 (1937); 3 *id.* at 1874 (1943).

<sup>100</sup> M. WHITEMAN, 1 DAMAGES, *supra* note 99, at 627-30; quotation at p. 628.

<sup>101</sup> Reis, *supra* note 20, at 127.

<sup>102</sup> DeSaussure & Haanappel, *A Unified, Multinational Approach to the Application of Tort and Contract Principles to Outer Space*, in PROCEEDINGS OF 21ST COLLOQUIUM ON THE LAW OF OUTER SPACE 138 (1978)

<sup>103</sup> *Ibid.*

but it was a conscious decision of the negotiators to avoid such a specific approach. Had the negotiations moved in this direction, as was attempted at one point, it is most unlikely that the Liability Convention would ever have been completed. Similarly, had it not been for the decision to use the formulation on applicable law set out in Article XII, namely, international law and the principles of justice and equity, an extended effort to review and agree on municipal law standards would have prevented reaching a final agreement.

Happily, it was possible to agree on a formal process for the resolution of disputes. Undoubtedly, some of the lacunae in the convention will either be pointed up or resolved through the use of this process. If resolved, it will be because there will be a reference to the general principles of law as a source of international law. Through this method, for example, it may be possible to obtain the required understanding of the meaning of "fault," if it should prove to be necessary. Overall, one must make allowance for lacunae in an international agreement of this sort, since the formulation of a detailed code of conduct by COPUOS or any other international legislative body for activity in space would constitute a very large undertaking indeed.

#### CONCLUSION

All things considered, the substantive principles and rules in the 1967 Outer Space Treaty and the Liability for Damages Convention for obtaining money damages for harm resulting from the malfunctioning of space objects satisfactorily meet the goal of providing prompt and adequate compensation to injured parties. This substantive and procedural law is needed since it is expected that over time there will be increasingly heavy traffic in the space environment. While higher orbits will probably become more common in the future, for the present the heavier amount of traffic at the lower orbital levels constitutes potential hazards. When space objects are in lower orbit, they are more likely to return to earth, either as whole objects or in the form of debris, and in either event they may cause contamination or pollution.

This assessment has considered only international legal problems, and in particular it has been concerned with identifying the availability of compensation that, pursuant to Article XII of the Liability for Damages Convention, "will restore the person . . . to the condition which would have existed if the damage had not occurred." Although its framers intentionally did not attempt to deal in all of the complexities of a legal code on liability for damages, the convention does meet the basic criteria for a specialized international tort law on hazards in the space environment. It is attentive to public and social needs. It favors the continuing use of both civilian and military space objects for peaceful, that is, beneficial and nonaggressive, purposes. It makes clear that these socially desirable purposes cannot be pursued without important legal limitations. Suitable standards are clearly identified, and a valid framework is provided that

allows for the prompt and adequate payment of compensation for provable harm. Under present international law, claimants will be entitled to compensation for direct damages. Moral damages based on pain, suffering, and humiliation, as well as on other things, are considered to be recoverable.

Although the negotiators were not able to provide explicitly that there would be recovery for indirect damage, it was understood that this issue might be raised in specific cases and would be dealt with as such claims arose. However, the negotiations produced a very clear expectation that if a valid causal relationship could be established between the malfunctioning of a space object, including its component parts, property on board, or payload, and an injury to persons or to property, recovery would be allowed for such indirect damage.

Both the 1967 treaty and the Liability for Damages Convention provide that international law in general is applicable to the measurement of damages. Thus, recourse to the general principles of law accepted by states will provide guidance in ascertaining what kinds of harm to persons or to property may be treated as compensable and what measure of damages may be applied. Moreover, reference must be had to principles of justice and equity. It has been noted that such concepts may not be overly precise when it comes to identifying compensable harm and making monetary awards, but this should not be considered a serious defect in the present law.<sup>104</sup> An enhanced use of the concept of equity in the allocation of damages will result from the implementation of Article XII of the Liability Convention.

The provisions of the 1967 Outer Space Treaty and the Liability for Damages Convention will require the exercise of choice by diplomats and arbitrators when practical cases come before them. Pragmatic interpretations will result, but they can be made on the basis of those practical considerations that have a prior background in international law, justice, and equity. If this process is found to be inadequate after it has been tried, COPUOS can be asked to remedy known defects. In the meantime, the applicable law will conform to a world standard rather than to diverse national outlooks.

Pending such an outcome, those engaged in the formation of this aspect of international space law have done all that could reasonably have been required of them. As we look at the *Cosmos 954* and *Skylab* events, and even beyond such experiences to prospects for harm caused by the space

<sup>104</sup> It is clear that the concept of equity is frequently finding its way into important international agreements at present. For example, Article 33 of the 1973 Telecommunication Convention of the International Telecommunication Union provides that the natural resources of the space environment must be used so that countries may have equitable access. TIAS No. 8572, October 23, 1973. The convention entered into force for the United States on April 7, 1976. The Third United Nations Conference on the Law of the Sea in its revised Informal Composite Negotiating Text provides for the delimitation of the continental shelf pursuant to equitable principles. UN Doc. A/CONF.62/WP.10/Rev.1, Art. 83(1), April 28, 1979, reprinted in 18 ILM 725 (1979).

shuttle or even larger space stations in the future, we have the assurance that the general criteria for a fair international tort law for the space environment are now in place. Liability will fall upon those having the capacity to bear the losses. The imposition of damages will serve as an inducement to the exercise of the utmost care. The prescribed processes can be engaged immediately so that inordinate delays will not cause additional harm to deserving claimants. While the 1972 convention did not dot all of the possible *i*'s or cross all of the possible *t*'s on the recovery of damages, it is likely that unresolved doubts will be decided in favor of the claimants. The requirements that justice and equity be invoked would lend credence to such a conclusion. If any doubt remains on this score, it should be recalled that during the negotiations it was made manifestly clear that the convention was designed to benefit potential claimants.

## RESERVATIONS TO MULTILATERAL TREATIES: A MACROSCOPIC VIEW OF STATE PRACTICE

*By John King Gamble, Jr.\**

### I. INTRODUCTION

Many vexing, complicated, and important problems of international law relate in some way to reservations to multilateral treaties. No doubt, the right of states to make reservations to multilateral treaties is important to the functioning of an international legal system, a major component of which is multilateral treaties. As Edwin Hoyt pointed out two decades ago, the unanimity rule has given way to a much more flexible standard which permits reservations under many circumstances.<sup>1</sup> Thus, the position adopted here is that many important questions should be asked about when and how reservations are used and what their aggregate impact has been. This approach contrasts with most others which concentrate on the legality of reservations. Reservations to multilateral treaties are a fact of life that can be evaluated and analyzed.

Conceptually, the issue of the desirability of reservations is straightforward. Most arguments in favor of the liberal use of reservations have as their cornerstone the belief that the liberal admissibility of reservations will encourage wider acceptance of treaties. H. G. Knight, in discussing the potential use of reservations to the treaty being negotiated by the Third United Nations Conference on the Law of the Sea, stated: "[I]t can be asserted that the permissive use of reservations encourages adherence to multilateral treaties and thus encourages universality, an objective of the current law of the sea negotiations."<sup>2</sup> The International Law Commission, in its deliberations about the law of treaties, put the issue well:

[A] power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty. Moreover, in the case of general multilateral treaties, it appears that not infrequently a number of States have, to all appear-

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<sup>1</sup> E. HOYT, *THE UNANIMITY RULE IN THE REVISION OF TREATIES* 12 (1959).

<sup>2</sup> H. G. Knight, *The Potential Use of Reservations to international agreements produced by the Third United Nations Conference on the Law of the Sea*, in *POLICY ISSUES IN OCEAN LAW* 1, 5 (Studies in Transnational Legal Policy No. 8, 1975).



ances, only found it possible to participate in the treaty subject to one or more reservations.<sup>3</sup>

The other edge of the sword, as it were, is that reservations necessarily reduce the uniformity and consistency (if not the integrity) of a treaty. Again, the International Law Commission discussed the issue insightfully:

[I]t is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it. A reserving State proposes, in effect, to insert into a convention a provision which will exempt that State from certain of the consequences which would otherwise devolve upon it from the convention, while leaving the other States which are or may become parties to it fully subject to those consequences in their relations *inter se*.<sup>4</sup>

The quintessential element to the reservations issue is where, on balance, the cumulative weight of state practice rests. In other words, which one of these compelling arguments seems most valid, given the totality of state practice vis-à-vis the use of reservations? Of course, the exact nature of this balance between uniformity/consistency and universality may be complex. For example, it is possible that a point exists in the liberal use of reservations beyond which participation will be reduced as those states satisfied with a treaty feel its integrity is being stretched to the breaking point by the permissibility of reservations. This problem may be both latent and practical, *i.e.*, *perceived* because the treaty does not restrict the use of reservations, and an *actual* reaction to reservations that have been made. The point is that a *direct* proportionality between the liberal admissibility of reservations and wider acceptance of a treaty cannot be assumed.

The approach adopted here is decidedly macroscopic. State practice in the area of reservations will be surveyed, in very general terms, for the period from 1919 to 1971. The post-World War II period (1947-1971) will be examined in somewhat more detail in order to classify and categorize reservations. Adopting a broad (rather than a narrow) view of all multilateral treaties permits a more accurate overall assessment of the constructiveness of the role played by reservations. First, it is necessary to adopt a workable definition of reservations.

## II. DEFINITION OF RESERVATIONS

This matter of a definition, while relatively simple in the abstract, can be difficult in practice. However, there is considerable consistency among authoritative sources that have grappled with the problem. The Vienna Convention on the Law of Treaties defines a reservation as "a unilateral

<sup>3</sup> Reports of the International Law Commission on the second part of its 17th session and on its 18th session, [1966] 2 Y.B. INT'L L. COMM'N 169, 205-06, UN Doc. A/6309/Rev.1 (1966).

<sup>4</sup> Report of the International Law Commission covering the work of its 3d session, [1951] 2 Y.B. INT'L L. COMM'N 123, 129, UN Doc. A/1858 (1951).

statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."<sup>5</sup> A somewhat different position was put forth by the Harvard Research in International Law:

[A] "reservation" is a formal declaration by which a State, when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties. . . .<sup>6</sup>

It is reasonable to assume that although the Vienna Convention is not yet universally adhered to,<sup>7</sup> it represents the more consensual statement on the subject.

Two important things seem to stand out from the formulation of the Vienna Convention. First, it is unimportant what label is attached to a statement so long as it fulfills the requirements of the definition. Thus, a reservation might be called a declaration, an understanding, a statement, or a reservation. Second, ascertaining whether or not something is a reservation will hinge on whether it modifies the *legal effect* of the treaty. Drawing this distinction can be very difficult.

Some specialists have attempted to maintain a rigid distinction between reservations and statements that go by other names, *e.g.*, declarations or understandings. Kaye Holloway stated that "declarations and understandings, short of reservations, have been used to overcome legislative obstructions as well as to circumvent the necessity of obtaining unanimous consent."<sup>8</sup> As Lord McNair noted,<sup>9</sup> from an international legal point of view, these distinctions can be impossible to draw.

A few specific examples will illustrate the range of statements collected under the rubric of "reservation." At one end of the spectrum, one finds the following statement made by the Federal Republic of Germany: "The Federal Republic of Germany reserves the right upon ratifying the Vienna Convention on the Law of Treaties to state its view on the declarations made by other states upon signing or ratifying or acceding to that Convention and to make reservations regarding certain provisions of the said Convention."<sup>10</sup> Although the United Nations has placed this statement in a category called "reservations and declarations," a benign statement that does nothing more than assert the *right* to make reservations should

<sup>5</sup> UN Doc. A/CONF.39/27, Ar. 2(1)(d) (1969), *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

<sup>6</sup> Harvard Research in International Law, Draft Convention on the Law of Treaties, with Comment, 29 AJIL Supp. 653, 843 (1935).

<sup>7</sup> The Vienna Convention entered into force on Jan. 27, 1980.

<sup>8</sup> K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 486 (1967).

<sup>9</sup> A. D. MCNAIR, THE LAW OF TREATIES 158 (1961).

<sup>10</sup> MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS 533, UN Doc. ST/LEG/SER.D/12 (1979) [hereinafter cited as MULTILATERAL TREATIES].

not be classified as a reservation. The definition put forth in the Vienna Convention is silent on the matter of potential reservations. One would think the issue of reservations is already sufficiently complex without complicating matters with the idea of latent or anticipatory reservations.

The United Kingdom, when ratifying the 1958 Geneva Convention on the High Seas,<sup>11</sup> offered the following declaration:

In depositing their instrument of ratification, Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland declares that, save as may be stated in any further and separate notices that may hereafter be given, ratification of this Convention on behalf of the United Kingdom does not extend to the States in the Persian Gulf enjoying British protection. Multilateral conventions to which the United Kingdom becomes a party are not extended to these States until such time as an extension is requested by the Ruler of the State concerned.<sup>12</sup>

This statement was clearly an attempt by Britain not to obligate protectorates against their will. But it could be argued that since these "dependent states" had a legal link with the United Kingdom, the legal effect of the treaty was modified.

When Canada signed the 1958 Convention on the Continental Shelf,<sup>13</sup> concern was expressed about the application of a single article of that convention:

The Government of Canada wishes to make the following declaration with respect to article 1 of the Convention:

In the view of the Canadian Government the presence of an accidental feature such as a depression or a channel in a submerged area should not be regarded as constituting an interruption in the natural prolongation of the land territory of the coastal state into and under the sea.<sup>14</sup>

One would surmise that in most instances this position would cause no problems: *i.e.*, Canada's concern is that a small depression on the seafloor not be defined as the end of a state's continental shelf, which is to be expected from states with broad continental shelves. But there could be genuine disagreement about how large a depression it takes to interrupt the natural prolongation of the land territory. While this probably should not be construed as a major reservation, neither should it be relegated to a "no reservation" category.

The German Democratic Republic became party to the 1958 Geneva Convention on the High Seas only under the following terms:

*Reservation concerning article 9:*

The German Democratic Republic considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships.

<sup>11</sup> 450 UNTS 82, 13 UST 2312, TIAS No. 5200.

<sup>12</sup> MULTILATERAL TREATIES, *supra* note 10, at 560.

<sup>13</sup> 499 UNTS 311, 15 UST 471, TIAS No. 5578.

<sup>14</sup> MULTILATERAL TREATIES, *supra* note 10, at 567.

*Declarations concerning articles 15, 31, and 33:*

The German Democratic Republic considers that the definition of piracy given in article 15 of the Convention does not cover certain acts which under international law in force should be considered as acts of piracy and does not serve to safeguard the freedom of navigation on the high seas.

The German Democratic Republic considers that articles 31 and 33 of the Convention are inconsistent with the principle that all States pursuing their policies in accordance with the purposes and principles of the Charter of the United Nations shall have the right to become parties to conventions affecting the interests of all States.<sup>15</sup>

The East German statement makes clear that, although the first paragraph is called a reservation and the other two declarations, both categories are substantial and fall within the definition of reservation as put forth by the Vienna Convention. This example emphasizes the fact that the name given to a statement is not sufficient to decide whether it is a reservation.

The approach adopted in the balance of this paper is to tabulate as a reservation any statement by a state that could in any possible way be so construed. Of course, reservations offered at signature when *not* followed by a needed ratification are not counted. In those instances when a reservation is made at signature and *not* restated (reaffirmed) at ratification, it has been counted, again the goal being to obtain an exhaustive list of reservations. This exhaustive list will be used to develop a classification system for reservations and to describe the reservation activities of states.

### III. AN OVERVIEW OF STATE PRACTICE

Before looking at specific reservations and categories of reservations, it is instructive to view overall magnitudes and trends in reservations. This approach might be structured in several ways. It is possible to inquire about the characteristics of treaties coming into force at various periods of time, asking, among other things, how many reservations they tend to have. Another approach is to view individual states to see how prone they are to making reservations to their treaties. Both of these perspectives are important to a *tour d'horizon* of multilateral treaties.

Much of the literature on multilateral treaties seems to assume that reservations are now more necessary than in the past, owing in part to the increased number of states participating. In a few instances, these assumptions have been made explicit. McNair noted that states' tendencies to make reservations had increased significantly in the last quarter century (presumably the period from 1935 to 1960).<sup>16</sup> It is unclear whether McNair meant the number of reservations in absolute terms or relative to the number of treaties. T. O. Elias, in his study of the work of the Vienna Conference on the Law of Treaties, remarked: "In modern

<sup>15</sup> MULTILATERAL TREATIES, *supra* note 10, at 558.

<sup>16</sup> A. D. McNAIR, *supra* note 9, at 159.

TABLE 1  
CHARACTERISTICS OF MULTILATERAL TREATIES ACCORDING TO DATE OF ENTRY INTO FORCE

	Force Date of Treaty										Totals# Averages##
	1919-23	1924-28	1929-33	1934-38	1939-46	1947-51	1952-56	1957-61	1962-66	1967-71	
(1) Total number of treaties	53	120	124	108	50	105	145	141	148	170	1,164*
(2) Total number of reservations	18	1	18	45	10	75	127	115	159	123	691*
(3) Total number of commitments	597	1,379	1,679	1,440	817	2,216	2,393	1,960	2,560	2,397	17,438*
(4) No. Reservations No. Commitments	.03	*	.01	.03	.01	.03	.05	.06	.06	.05	.04**
(5) Average number of parties	10.9	11.4	13.4	13.3	16.3	21.1	16.5	13.9	17.3	14.1	14.8**
(6) Average number of reservations	.3	.01	.2	.4	.2	.7	.9	.8	1.1	.7	.6**
(7) No. Reservations No. States	.23	.01	.22	.54	.58	.81	1.30	1.03	1.16	.80	.67**

\* Less than .01.

practice, certain multilateral treaties such as the United Nations Charter are frequently concluded by a large number of States with widely divergent political and economic systems, and it is the use of reservations that enables the States to become parties to such treaties."<sup>17</sup> This view implies a very significant role for reservations. D. P. O'Connell stated flatly that reservations are much more common than in the past: "Since 1945, . . . the problem of securing even a minimum adherence to multilateral conventions has been magnified, and the tendency of States to annex *ex post facto* reservations to their ratifications or accessions has grown."<sup>18</sup>

Table 1 illustrates many characteristics of multilateral treaties<sup>19</sup> that entered into force between 1919 and 1971. It is a rather complex table and must be examined carefully. Row (1) shows the total number of multilateral treaties that entered into force during each time period. Remarkably, that number has increased relatively little in the 50 years covered. There has been no explosion of multilateral treaty-making. In fact, in proportion to the number of potential parties, *i.e.*, the number of states in the world, there are fewer treaties today than there were 50 years ago. Row (2) shows the total number of reservations to all treaties that entered into force during the intervals. There has been a substantial increase since World War II.

Row (3) is the total number of commitments to multilateral treaties on the part of all states in the world. Of course, if a state were party to 15 different treaties, it would be counted 15 times to arrive at this total figure. One sees that the total number of commitments has increased since World War II, but proportionately less than the increase in the number of independent states. Row (4) illustrates the number of reservations in proportion to the total number of treaty commitments, asking in essence what is the percentage of state commitments to multilateral treaties with reservations attached to them. The answer is that the range is quite small, from 0 percent to about 6 percent. There tended to be somewhat more reservations to treaties entering into force after World War II.

Rows (5) and (6) take the perspective of the average treaty for each time period; they demonstrate that the average treaty of the early 1920's had 10.9 parties, compared to 17.3 parties for the period from 1962 to 1966. Again, there has been some increase, but less than might be expected given the increase in the number of states. The pattern is somewhat clearer for the average number of reservations to multilateral treaties. Although there is some fluctuation within them, the interwar period averaged only .23 reservations per treaty, whereas the postwar period averaged .84—clearly a significant difference. Perhaps the last row, (7), is the most revealing from the point of view of state practice. It shows the

<sup>17</sup> T. O. ELIAS, *THE MODERN LAW OF TREATIES* 27 (1974).

<sup>18</sup> D. P. O'CONNELL, *INTERNATIONAL LAW* 231 (1970).

<sup>19</sup> A multilateral treaty is defined as having more than two states as party. Indications are that the LNTS and UNTS contain about 90% of the world's multilateral treaties for the period studied. Technical assistance agreements and treaties concluded under the auspices of the International Labor Organization have been omitted.

TABLE 2

LATERALITY AND THE NUMBER OF RESERVATIONS TO MULTILATERAL TREATIES

	Number of Reservations							Totals
	None	One	Two	Three	4-7	8 or More		
Laterality:								
Plurilateral	66 772 92 78	2 22 3 42	2 19 2 51	1 9 1 41	1 14 2 33	* 3 *	72	839 100 72
General	19 220 68 22	3 30 9 58	2 18 5 49	1 13 4 59	2 28 9 67	1 16 5 84	28	325 100 28
Totals	85 992 85 100	5 52 5 100	4 37 4 100	2 22 2 100	3 42 3 100	1 19 1 100	100	1,164 100 100

\* Less than 1%.

average number of reservations for an individual state to all treaties that entered into force during the period. The overall picture is that, on the average, a state has made only one reservation to a multilateral treaty every 10 years. There does seem to be a slight increase in the number of reservations per state, but it is gradual beginning in the 1930's.

Table 2 illustrates the number of reservations to two major categories of treaties, plurilateral and general multilateral. The distinction is that participation in a plurilateral treaty is limited to certain states because of subject matter or geography;<sup>20</sup> general multilateral treaties are open to any state wishing to abide by the terms. Since the format of these tables is somewhat unusual, some explanation is in order. The large numbers in the cells represent the actual number of treaties satisfying the conditions of the table. For example, there are 772 plurilateral treaties with no reservations. The smaller numbers are percentages: those to the right represent the percentage the large number is of the entire row. For example, the 772 plurilateral treaties constitute 92 percent of all plurilateral treaties. In analogous fashion, the small numbers below are column percentages, and the ones above and to the left are table percentages: *i.e.*, the 772 treaties are 66 percent of all treaties contained in the table and 78 percent of all treaties having no reservations. The most striking finding is that 85 percent of all multilateral treaties have absolutely no reservations; 92 percent of plurilateral treaties have no reservations. There are only 61 treaties with more than three reservations.

It must be admitted that the results of table 3 are open to some question: it is an attempt to treat a vital issue, to wit, are important treaties more likely than others to provoke reservations? Each treaty was put into one of three categories, "low," "medium," or "high" importance. Three points should be made about these categorizations. First, there is

<sup>20</sup> For a discussion of plurilateral treaties, see J. TRISKA & K. SLUSSER, *THE THEORY, LAW AND POLICY OF SOVIET TREATIES* 415 (1962).

TABLE 3  
NUMBER OF RESERVATIONS AND IMPORTANCE LEVEL OF MULTILATERAL TREATIES

	Number of Reservations to Treaties							Totals
	None	One	Two	Three	4-7	8 or More		
Importance Level of Treaties:								
Low	51 596 93 59	1 20 3 43	1 10 2 36	* 4 1 20	1 7 1 21	* 1 * 5	55 638 100 55	
Medium	32 376 80 37	2 23 5 50	1 16 3 57	1 14 3 70	2 24 5 70	2 19 4 95	40 472 100 40	
High	4 44 82 4	* 3 5 7	* 2 4 7	* 2 4 10	* 3 5 9	0 0 0 0	5 54 100 5	
Totals	87 1,016 87 100	4 46 4 100	2 28 2 100	2 20 2 100	3 34 3 100	2 20 2 100	100 1,164 100 100	

\* Less than 1%.

some subjectivity involved; no doubt, two individuals might disagree about the assignment of a particular treaty. But the aggregate picture should be fairly accurate. Second, these categories are assigned according to the subject matter of the treaties, not the number of parties to them. It could be argued that an assessment of the importance of treaties should consider both the content and the number of parties. Third, no attempt was made to distribute the treaties evenly among categories. The results reflect the judgment that most multilateral treaties are, in fact, relatively unimportant. The biggest surprise revealed by the table, apart from the fact that 55 percent of the treaties were classified as of "low" importance, is that treaties of "medium" importance tend to have somewhat more reservations attached to them than those in either the "high" or the "low" category. The probable explanation is that most of those in the "low" category are so trivial that few states feel the need to offer reservations, whereas those of "high" importance tend to be rare and have few parties. The latter deal with matters of such high policy that disagreements are likely to have been worked out in the negotiation process, or, in many instances, there would have been no treaty. Thus, it is in the middle category where one finds most reservations.

Table 4 views individual states and lists for each the total number of commitments and reservations. All states are *not* included. The table contains only those states with 60 or more commitments to treaties that entered into force between 1919 and 1971. It was felt that including states with very little treaty activity might distort the calculation of the relative frequency of reservations, which is a principal element of the table.

In absolute terms, the United Kingdom has expressed the most reserva-



TABLE 4

NUMBER OF STATE COMMITMENTS TO MULTILATERAL TREATIES 1919-1971

State*	Number of Reservations	Number of Unqualified Commitments	Total Number of Commitments	Col. (a) ÷ Col. (c)
	(a)	(b)	(c)	(d)
Afghanistan	1	59	60	.02
Albania	8	88	76	.11
Algeria	4	88	92	.04
Argentina	17	131	148	.11
Australia	10	253	263	.04
Austria	11	266	277	.04
Belgium	18	510	528	.03
Bolivia	0	74	74	.00
Brazil	5	160	165	.03
Bulgaria	23	153	176	.13
Cambodia	4	62	66	.03
Cameroon	0	61	61	.00
Canada	7	220	227	.03
Chile	5	148	153	.03
China	6	80	86	.07
Colombia	1	98	99	.01
Costa Rica	5	97	102	.05
Cuba	14	160	174	.08
Cyprus	1	85	86	.01
Czechoslovakia	21	239	260	.08
Denmark	23	430	453	.05
Dominican Republic	2	128	130	.02
Ecuador	3	88	91	.03
El Salvador	1	111	112	.01
Finland	8	291	299	.03
France	17	540	557	.03
Germany (pre-1945)	0	162	162	.00
Germany (Fed. Rep.)	14	231	245	.06
Ghana	1	92	93	.01
Greece	9	286	295	.03
Guatemala	8	121	129	.06
Haiti	1	123	124	.01
Honduras	3	100	103	.03
Hungary	22	201	223	.10
Iceland	2	146	148	.01
India	14	222	236	.06
Indonesia	2	55	57	.04
Iran	2	107	109	.02
Iraq	10	86	96	.10
Ireland	7	174	181	.04

TABLE 4—*Continued*

State*	Number of Reservations	Number of Unqualified Commitments	Total Number of Commitments	Col. (a) ÷ Col. (c)
	(a)	(b)	(c)	(d)
Israel	11	81	92	.12
Italy	12	120	132	.09
Ivory Coast	0	64	64	.00
Jamaica	2	71	73	.03
Japan	5	215	220	.02
Jordan	0	54	54	.00
Kenya	1	57	58	.02
Korea (Rep. of)	8	54	62	.13
Laos	0	60	60	.00
Lebanon	0	76	76	.00
Liberia	1	62	63	.02
Luxembourg	11	306	327	.03
Malagasy Republic	3	60	63	.05
Mali	0	54	54	.00
Malta	9	61	70	.13
Mexico	7	141	148	.05
Monaco	1	73	74	.01
Morocco	6	117	123	.05
Netherlands	15	472	487	.03
New Zealand	3	216	219	.01
Nicaragua	3	124	127	.01
Niger	1	75	76	.01
Nigeria	1	84	85	.01
Norway	13	386	402	.04
Pakistan	5	110	115	.04
Panama	1	105	106	.01
Paraguay	0	89	89	.00
Peru	5	91	96	.06
Philippines	5	83	88	.06
Poland	23	230	253	.09
Portugal	9	212	221	.04
Romania	31	230	261	.12
Senegal	1	59	60	.02
Sierra Leone	1	67	68	.01
South Africa	5	175	180	.03
Spain	11	234	245	.04
Sri Lanka	4	79	83	.05
Sweden	21	405	426	.05
Switzerland	13	289	302	.04
Syria	2	61	63	.03

TABLE 4—*Continued*

State*	Number of Reservations	Number of Unqualified Commitments	Total Number of Commitments	Col. (a) ÷ Col. (c)
	(a)	(b)	(c)	(d)
Tanzania	1	62	63	.02
Thailand	3	135	138	.02
Trinidad Tobago	4	71	75	.05
Tunisia	7	121	128	.05
Turkey	5	211	216	.02
Uganda	2	62	64	.03
USSR	26	159	185	.14
UAR/Egypt	12	185	197	.06
United Kingdom	32	561	593	.05
United States	12	276	288	.04
Venezuela	5	111	116	.04
Yugoslavia	11	259	270	.04

\* Includes only those states with 60 or more commitments.

tions, but this is because it is the most active multilateral treaty maker in the world. In a way, the most meaningful figure is the one shown in column (d), the proportion of commitments to which reservations have been made. Only the following states have attached reservations to 10 percent or more of their multilateral treaties: Albania, Bulgaria, Hungary, Iraq, Israel, the Republic of Korea, Malta, Romania, and the Soviet Union. Clearly, the Soviet Union and the East European states have the greatest propensity for making reservations, much of which is attributable to their refusal to accept dispute settlement provisions.<sup>21</sup>

#### IV. CATEGORIES OF RESERVATIONS

In order to understand more fully the scope and impact of reservations to multilateral treaties, it is desirable to have some idea of what types of reservations exist and how many reservations each type comprises. Most academic literature, focusing as it does on the legality of a small number of reservations to a very few treaties, *e.g.*, the Genocide Convention, may have created the impression that such reservations are typical.<sup>22</sup> There have been very few attempts to classify reservations, which probably further compounds the notion that all reservations are similar.

Two recent works suggested categories of reservations that can provide a basis for this discussion. Oscar Schachter and his colleagues, though they did not address themselves to the matter directly, suggested that

<sup>21</sup> Similar behavior has been noted in the bilateral sphere. See P. ROHN, *INSTITUTIONS IN TREATIES: A GLOBAL SURVEY OF MAGNITUDES AND TRENDS FROM 1945 TO 1965*, at 30-31 (1970).

<sup>22</sup> For a good example of this approach, see J. Ruda, *Reservations to Treaties*, 146 *RECUEIL DES COURS* 95, 111-78 (1975 III).

these three categories might be appropriate:

- (1) reservations regarding substantive treaty clauses;
- (2) reservations relating to nonrecognition; and
- (3) reservations relating to dispute settlement clauses.<sup>23</sup>

In a study of the reservation practice of the People's Republic of Poland, Renata Szafarz not only developed a classification system for reservations, but determined how many Polish reservations fell within each category.<sup>24</sup> She identified the following types:

- (1) reservations to dispute settlement provisions;
- (2) reservations to other final clauses;
- (3) reservations to the merits of treaties that single out a specific provision; and
- (4) reservations to the merits of the entire treaty.<sup>25</sup>

Szafarz found that the "most numerous reservations are those that exclude the judicial and arbitration clauses from the scope of obligations accepted by Poland," noting that these constitute three-quarters of Poland's reservations.<sup>26</sup>

Another problem in classifying reservations is that they often fall into more than one category. A typical example is the reservation of Bulgaria to the Single Convention on Narcotic Drugs,<sup>27</sup> signed in March 1961, which states in part:

The People's Republic of Bulgaria does not consider herself bound to implement the provisions of article 48, paragraph 2, concerning the obligatory jurisdiction of the International Court of Justice.

. . . . .

The People's Republic of Bulgaria considers it necessary to stress that the wording of article 40, paragraph 1; article 12, paragraphs 2 and 3; article 13, paragraph 2; article 14, paragraphs 1 and 2; and article 31, paragraph 1 "b" has a discriminatory character as it excludes the participation of a certain number of States.<sup>28</sup>

These are clearly very different kinds of reservations that cannot be subsumed in a single category. Throughout this section, reservations are divided into their constituent elements so that, for example, Bulgaria's concerns would be adequately reflected. Moreover, the categories listed by Schachter and Szafarz do not appear to accommodate all types of reservations. An exhaustive examination of reservations suggested additional categories. To establish a single category for substantive reserva-

<sup>23</sup> O. SCHACHTER, M. NAWAZ, & J. FRIED, *TOWARD WIDER ACCEPTANCE OF UN TREATIES* 154-56 (1971).

<sup>24</sup> Szafarz, *Reservations and Objections in the Treaty Practice of Poland*, 6 *POLISH Y.B. INT'L L.* 245, 249 (1974).

<sup>25</sup> *Id.* at 249-50.

<sup>26</sup> *Id.* at 249.

<sup>27</sup> 520 UNTS 151, 18 UST 1407, T.I.A.S. No. 6298.

<sup>28</sup> 649 UNTS 362.

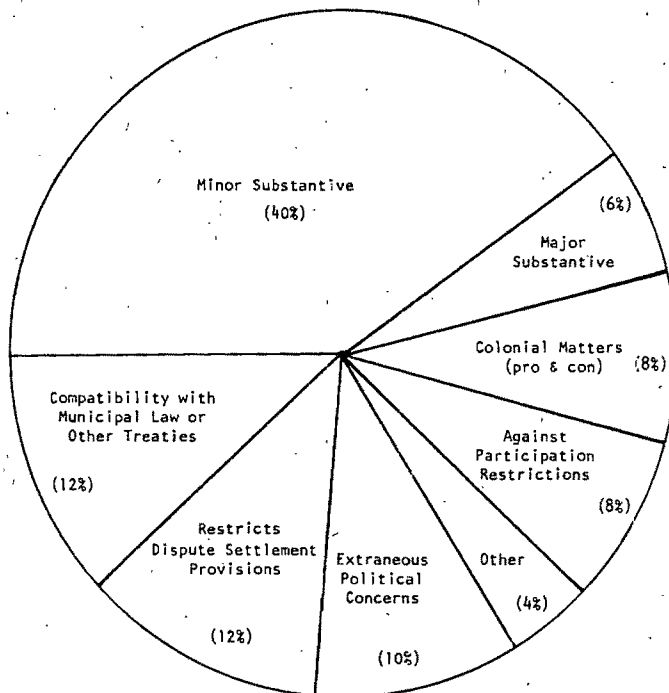


FIGURE 1

CATEGORIES OF RESERVATIONS

tions would be inadequate, since these can range from very minor objections to the wording of a single clause to major objections to much of the content of an entire treaty.

Figure 1 represents a set of categories derived inductively from reservations made to multilateral treaties in the *United Nations Treaty Series* that entered into force from 1947 to 1971.<sup>29</sup> The diagram is based on some 600 reservations, approximately one-quarter of which needed to be placed in more than one category. Figure 1 can be best understood if each category of reservation is explained and illustrated.

Approximately 40 percent of all reservations dealt with the substance of treaties, but in what was judged a minor way. They are usually objections to a single clause or to the wording of a clause and are not of central importance to the treaty. While there may be some disagreement about the importance of some of these reservations, most seemed to fit unambiguously into this category. There are many examples of these relatively minor reservations; three will suffice to give the flavor of this category. The Convention on the Political Rights of Women (signed March 31, 1953) stipulates almost total equality in the political arena between men and women.<sup>30</sup> Several states offered reservations excluding their mon-

<sup>29</sup> Technical assistance treaties and treaties negotiated under the auspices of the International Labor Organization have been excluded. While the tabulations are based on only 709 treaties that entered into force from 1946 to 1971, inclusive, reservations, ratifications, etc., to these treaties are current through UNTS volume 835.

<sup>30</sup> 193 UNTS 135, 27 UST 1909, TIAS No. 8289.

archies from the provisions of the treaty.<sup>31</sup> Such statements, which have no serious impact on the operation of this treaty, are classified as "minor substantive" reservations.

Other reservations in this category do modify the legal intent of the treaty to which they respond, but to a very minor degree. Typical is Sweden's reservation to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.<sup>32</sup> The crux of the Swedish reservation states that "by virtue of the third paragraph of article 5 of the Convention the Central Authority requires that any document to be served under the first paragraph of the same article must be written in or translated into Swedish."<sup>33</sup> Another example is the United Kingdom's response to the Agreement concerning Transfers to and from Postal Cheque Accounts<sup>34</sup> with this reservation:

A fiscal charge (two pennies stamp duty) will be levied on incoming Giro transfers in the United Kingdom. Since this does not in itself constitute a reservation to Article 5 of the Agreement, being outside the scope of the Agreement rather than contrary to it, it is not considered correct to include the information in the formal instrument of accession. . . .<sup>35</sup>

The latter statement is so minor that the United Kingdom did not consider it a reservation, although it is arguable that so classifying it meets the definition of the Vienna Convention on the Law of Treaties.<sup>36</sup> The point to be emphasized is that in most instances this group of reservations is of a demonstrably minor, technical nature that does not seriously jeopardize the intent of the treaties. The large size of this group (40 percent of all reservations) lends support to the argument that reservations do not seriously jeopardize the uniformity and consistency of multilateral treaties.

A sizable number of reservations (about 12 percent) indicate that treaty provisions must not conflict with municipal law or with other treaty rights and obligations. Of course, the severity of such reservations may vary considerably according to the nature of the other treaty provisions in effect and the nature of the applicable municipal law. An additional complication derives from the fact that states seldom specify the exact dimensions of this type of reservation. Many cases falling in this category express only a general demand that the treaty be in harmony with the municipal law and other treaty obligations. These three examples are typical. In response to the Convention on the Intergovernmental Maritime Consultative Organization,<sup>37</sup> Turkey stated that its ratification of the convention "will in no ways have any effect on the provisions of the Turkish laws concerning cabotage and monopoly."<sup>38</sup> The United States

<sup>31</sup> See, e.g., the reservation of the Netherlands, 790 UNTS 130.

<sup>32</sup> 658 UNTS 163, 20 UST 361, TIAS No. 6638.

<sup>33</sup> 700 UNTS 374.

<sup>34</sup> 621 UNTS 361.

<sup>35</sup> 694 UNTS 391.

<sup>36</sup> See text at note 5 *supra*.

<sup>37</sup> 289 UNTS 48, 9 UST 621, TIAS No. 4044.

<sup>38</sup> 320 UNTS 350.

indicated that it "will apply the [IMCO] Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."<sup>39</sup> Another example in this category is Spain's reservation to virtually all treaties dealing with ocean matters: "Spain's accession is not to be interpreted as recognizing any rights or situations in connexion with the waters of Gibraltar other than those referred to in Article 10 of the Treaty of Utrecht of 13 July 1713 between the Crowns of Spain and Great Britain."<sup>40</sup> In the three cases cited here and in the majority of reservations falling into this group, the effect on the treaty seems relatively minor, although the reserving states often have substantial latitude in applying the reservations.

Not surprisingly, a sizable group (12 percent) of reservations deals with the compulsory settlement of disputes stipulated under the terms of treaties. The argument about the desirability of dispute settlement provisions is similar to the argument about reservations themselves. On the one hand, it has been argued, for example, that the Third United Nations Conference on the Law of the Sea has struck so many difficult compromises that a final treaty must have strong dispute settlement provisions to protect the integrity of these compromises.<sup>41</sup> The counter-argument is that dispute settlement provisions themselves may inspire reservations and hence weaken the treaty.<sup>42</sup> Regardless of one's opinion on the issue, it is an empirical fact that a large number of reservations are aimed at dispute settlement provisions.

Many of these provisions are remarkably similar. Ghana's accession to the Protocol relating to the Status of Refugees<sup>43</sup> represents the more general type of dispute settlement reservation: "The Government of Ghana does not consider itself bound by article IV of the Protocol regarding the settlement of dispute[s]."<sup>44</sup> Depending both on the disposition of the state and the provisions of the treaty, objections to dispute settlement provisions are often much more specific, e.g., by reflecting a reluctance to use the International Court of Justice. In its reservation to the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>45</sup> Morocco stated that "in each individual case, the consent of all parties to such a dispute is necessary for referring the dispute to the International Court of Justice."<sup>46</sup> This type of reservation completely removes the compulsory element from the procedures.

It may be somewhat of a surprise that 10 percent of the reservations

<sup>39</sup> 751 UNTS 398.

<sup>40</sup> 767 UNTS 337.

<sup>41</sup> Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 516 (1975).

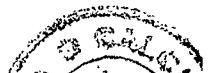
<sup>42</sup> Gamble, *The Law of the Sea Conference: Dispute Settlement in Perspective*, 9 VAND. J. TRANSNAT'L L. 323, 340-41 (1976).

<sup>43</sup> 606 UNTS 267, 19 UST 6223, TIAS No. 6577.

<sup>44</sup> 649 UNTS 372.

<sup>45</sup> 660 UNTS 195.

<sup>46</sup> 774 UNTS 374.



deals with political situations that are extraneous, or largely extraneous, to the subject matter of the treaties involved. The gamut of political concerns expressed in these reservations is wide; they range from recognition of Israel and the status of Berlin to the way in which a state's geography is represented on postal stamps. Among the most frequent reservations in this category are those concerning nonrecognition of the state of Israel, to which content of the treaty seems to bear absolutely no relation. The former United Arab Republic attached this reservation to the International Olive Oil Agreement:<sup>47</sup> "It is understood that the accession to this agreement does not mean in any way a recognition of Israel by the Government of the United Arab Republic. Furthermore, no treaty relations will arise between the United Arab Republic and Israel."<sup>48</sup> Israel usually responds to such reservations in this way:

The Government of Israel has noted the political character of the declaration made by the Government of the United Arab Republic on that occasion. In the view of the Government of Israel, this Convention is not the proper place for making such political pronouncements. Moreover, that declaration cannot in any way affect the obligations of the United Arab Republic already existing under general international law. The Government of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of the United Arab Republic an attitude of complete reciprocity.<sup>49</sup>

Numerous reservations and statements have been made in response to attempts by the Federal Republic of Germany to apply treaties to Berlin. Typical is Poland's statement on acceptance of the Agreement on the Importation of Educational, Scientific and Cultural Materials:<sup>50</sup> "[T]he Government of the Polish People's Republic rejects the aforementioned declaration of the Government of the Federal Republic of Germany since it is contrary to the international status of West Berlin which has never been nor is a part of the Federal Republic of Germany."<sup>51</sup>

This type of reservation is probably not very significant from an international legal point of view, *i.e.*, it has only a minimal effect on the execution of the terms of the agreement. Especially in the case of statements by Arab states, since (with the recent exception of Egypt) there are no relations between them and Israel, the operation of the treaties involved would not be affected. In the case of the status of West Berlin, such reservations may have a minor effect on the execution of terms of treaties, but only on the part of the socialist states concerned enough to formulate the reservations. In the aggregate, this 10 percent of reservations certainly does not have a significant deleterious effect on the efficient, consistent operation of treaties.

Approximately 8 percent of the reservations concerned restrictions, usually in the final clause of treaties, specifying which states are eligible to

<sup>47</sup> 495 UNTS 3.

<sup>48</sup> 636 UNTS 370.

<sup>49</sup> 695 UNTS 364-65.

<sup>50</sup> 131 UNTS 25, 17 UST 1835, TIAS No. 6129.

<sup>51</sup> 797 UNTS 392.



become parties. These reservations have even been made to treaties that do not take a restrictive position on participation. Article 8 of the 1958 Geneva Convention on the Continental Shelf<sup>52</sup> states: "This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention."<sup>53</sup> Nevertheless, the German Democratic Republic offered this qualification:

The German Democratic Republic considers that articles 8 and 10 of the Convention are inconsistent with the principle that all States pursuing their policies in accordance with the purposes and principles of the Charter of the United Nations shall have the right to become parties to conventions affecting the interests of all States.<sup>54</sup>

Of course, a reservation like this falls at the fringe of what is considered a reservation, but the inclusive approach adopted suggests that it meets the definition. Albania's reservation to the Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity<sup>55</sup> illustrates another version of reservations to provisions that limit participation: "[P]rovisions of articles V and VII are unacceptable because in preventing a number of States from becoming parties to the Convention, they are discriminatory in nature and thus violate the principle of sovereign equality of States and are incompatible with the spirit and purposes of the Convention."<sup>56</sup> Again, one would think this sort of reservation would have a nominal effect on the operation of the treaties involved.

A significant (8 percent) and fairly consistent number of reservations relate to colonies. These are of two distinct varieties: one objects to any colonial status for any territory, and the other attempts to extend or deny the application of treaty provisions to dependent territories. An example of the latter category is Holland's statement concerning the Agreement establishing the European Molecular Biology Conference:<sup>57</sup>

[W]ith respect to the Kingdom of the Netherlands, for the moment the Agreement shall apply only to the territory of the Kingdom situated in Europe and in the Netherlands Antilles; however, in view of the equality that exists from the standpoint of public law between the Netherlands, Surinam and the Netherlands Antilles, the Royal Government reserves its right to extend, at the request of the Government of Surinam, the application of the Agreement to that country, either when the Netherlands deposits its instrument of ratification or at a later date. . . .<sup>58</sup>

While this qualification is minor, it does ask for flexibility in the application of the treaty and could be construed as a reservation.

<sup>52</sup> 499 UNTS 311, *supra* note 13.

<sup>53</sup> *Id.*, Art. 8.

<sup>54</sup> MULTILATERAL TREATIES, *supra* note 10, at 568.

<sup>55</sup> 754 UNTS 73.

<sup>56</sup> 778 UNTS 384-85.

<sup>57</sup> 727 UNTS 309.

<sup>58</sup> 727 UNTS 338.

Because the period since World War II has seen an accelerating questioning of the precepts of colonialism, it is hardly surprising that a certain set of reservations simply does not accept any statement in any way connected with dependent territories. Many of these emanate from the Soviet Union and East European states. Among many such reservations is that of Czechoslovakia to the Fourth International Tin Agreement:<sup>59</sup>

It considers the provisions of articles 2 and 49 of the Agreement under which a Contracting Party may propose participation for any territory, for whose international relations the Contracting Party is responsible, to be unacceptable since they are in contradiction with the Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples, adopted by the Resolution 1514/XV on 14 December 1960.<sup>60</sup>

Clearly, this reservation does not constitute a serious bar to the operation of the treaty.

The category that may be of the most interest, "major substantive" reservations, is also the one containing the fewest reservations, only 6 percent of the total. It must be acknowledged that there can be disagreement as to what constitutes a "major" or "minor" substantive reservation. But since this study covers a great many treaties and reservations, the overall distribution of reservations is probably accurate in spite of possible differences of opinion about individual cases. The criterion applied to distinguish between "major" and "minor" was whether the reservation modified a crucial, pivotal portion of the treaty or, in a few cases, whether it modified so much of the treaty that the treaty was, in effect, gutted.

The difference between minor and major substantive reservations can be illustrated by the Convention on the Political Rights of Women.<sup>61</sup> Article III of that convention, which has inspired several reservations, provides: "Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination."<sup>62</sup> The Netherlands offered this reservation in response: "[S]uccession to the Crown in conformity with the relevant constitutional provisions shall be excluded from the application of article III of the Convention."<sup>63</sup> This was considered a "minor substantive" reservation since its effect would be *very* limited. Reservations to the convention that exempt women from service in the armed forces were also placed in the "minor substantive" group, although they were clearly closer to the "major substantive" category. In contrast, the reservation offered by Swaziland to the same convention was considered "major":

(a) Article III of the Convention shall have no application as regards remuneration for women in certain posts in the Civil Service of the Kingdom of Swaziland;

(b) The Convention shall have no application to matters which are

<sup>59</sup> 824 UNTS 229.

<sup>61</sup> 193 UNTS 135, *supra* note 30.

<sup>63</sup> 790 UNTS 130.

<sup>60</sup> 824 UNTS 457.

<sup>62</sup> *Id.*, Art. III.

regulated by Swaziland Law and Custom in accordance with Section 62 (2) of the Constitution of the Kingdom of Swaziland.<sup>64</sup>

This type of qualified acceptance presents at least the potential for modifying the fundamental intent of the convention.

Another example of a "major substantive" reservation can be seen in the response of Bulgaria to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.<sup>65</sup> In this instance, one finds that although the reservation seems to be narrowly focused, the effect on the intent of the treaty is substantial:

*Article 20:* The Government of the People's Republic of Bulgaria considers that government ships in foreign waters have immunity and that the measures set forth in this article may therefore apply to such ships only with the consent of the flag State.

*Article 23 (Sub-section D. Rules applicable to warships):* The Government of the People's Republic of Bulgaria considers that the coastal State has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters.<sup>66</sup>

These reservations eliminate the taking of any measures against government ships, even when measures are anticipated "only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State."<sup>67</sup> The reservation concerning warships is also significant because it both implies a different set of regulations for warships and suggests some sort of prior consent not envisioned in the convention.

This brief discussion of types of reservations to multilateral treaties suggests that reservations may not be too serious a problem; most are of a fairly minor nature. It is safe to assert that fully 70 percent will have no marked effect on the operation of the corresponding treaties. It is highly significant that only 6 percent of the reservations was classified as "major substantive"; after all, this 6 percent gets most of the attention in the literature. Probably those with the most ambiguous effect can be found in the categories called "Restricts Dispute Settlement Provisions" and "Compatibility with Municipal Law or Other Treaties." Since enormous latitude in application rests with the reserving state, many reservations in these categories have the potential to void large and unspecified segments of treaties or to eliminate the possibility of enforcement. But, on balance, the picture is an encouraging one and surely does not sustain the belief that reservations are eroding the foundations of multilateral treaty-making.

## V. SUMMARY AND CONCLUSIONS

It must be acknowledged that this paper has taken an unusual tack. The definition of a reservation is important; for the purposes here, any

<sup>64</sup> MULTILATERAL TREATIES, *supra* note 10, at 470.

<sup>65</sup> 516 UNTS 205, 15 UST 1606, TIAS No. 5639.

<sup>66</sup> MULTILATERAL TREATIES, *supra* note 10, at 551.

<sup>67</sup> 516 UNTS 205, Art. 20(2).

statement that could in any way be considered a reservation has been tabulated as such. Therefore, conclusions about the frequency of reservations are, if anything, overstated. Perhaps the mass of numbers can be put into perspective by comparing the pre-World War II and post-World War II periods. The hypothetical "average" multilateral treaty that entered into force in the prewar years had about .2 reservations: that is, there was about one reservation for every five multilateral treaties. For the postwar period, the average was about .85 reservations per treaty. This is a large increase, but probably not an explosion if one considers that the average number of parties also has increased. Of course, the increased size and diversity of the international system probably tends to increase the number of reservations. Overall, there are no reservations at all to 85 percent of multilateral treaties, and more than three to only 4 percent of such treaties. From the perspective of the state itself, the average since World War II is about one reservation per state every 5 years. Again, these are hardly epidemic proportions.

Certain states, principally those of Eastern Europe, have tended to make the highest proportion of reservations. But this conclusion must be put into perspective: most states have made reservations to only 3 to 5 percent of their multilateral treaties, and most of them are fairly minor. The attempt at categorizing reservations suggests that fully 70 percent cannot under any circumstances have a seriously negative impact on the treaty. Viewed another way, this statistic suggests that, on the average, a state will offer a *potentially* serious reservation to a multilateral treaty only about once every 16 years. From the vantage point of the average treaty, only about one multilateral treaty in three will have *any* serious reservations.

The approach used here has enabled us to view the entire range of multilateral treaties, instead of concentrating on a few particular treaties. In the process, no doubt, specificity has been lost. But certain insights have been gained. For example, Schachter's statement that "many of them [reservations] appear to have limited or marginal significance"<sup>68</sup> is substantiated by the finding that 70 percent of reservations can be so classified. When the International Law Commission assessed the net effect of reservations, it wrote:

Moreover, the failure of negotiating States to take the necessary steps to become parties to multilateral treaties appears a greater obstacle to the development of international law through the medium of treaties than the possibility that the integrity of such treaties may be unduly weakened by the liberal admission of reserving States as parties to them.<sup>69</sup>

At least at first blush, the evidence here suggests that the ILC was correct. But a point argued by the United Kingdom some years ago is germane:

<sup>68</sup> O. SCHACHTER, *supra* note 23, at 154.

<sup>69</sup> Reports of the International Law Commission, *supra* note 3, at 206.

namely, that it is not evident that the liberal use of reservations necessarily encourages participation.<sup>70</sup>

This contention is very difficult to test statistically because it is impossible to control for other factors, most importantly the content of the treaties in question. All that can be suggested at present is the following. It makes sense to conclude that a flexible policy on the admissibility of reservations will encourage some states to become party to a treaty they might otherwise find unacceptable. But there may well be a Hegelian nodal point beyond which flexibility gives way to no structure at all, after which participation will decline. It would be intriguing to test this proposition.

There are many other topics that might be illuminated by taking a broader, macroscopic approach to treaties. For example, legal questions are involved when a state issues a reservation at signature but fails to confirm the reservation at ratification.<sup>71</sup> When does this behavior occur most often? Do certain kinds of reservations tend to be dropped between signature and ratification? It is reasonable to think that the right to make reservations to treaties may hasten their ratification by states. Does the inclusion of specific clauses about reservations influence the number and kind that materialize?

Another interesting prospect for study is the practice of including several kinds of reservation in one statement. If one assumes that the preparation of a reservation requires a certain amount of bureaucratic energy, might it not be possible that once the reservations threshold is crossed, other marginal ones may be added? If this is the case, the so-called minor reservation may be more important than thought, and it might be desirable to investigate inserting clauses into treaties that eliminate the need for some of these "extraneous political" reservations. For example, insertion of a clause stating that ratifying the treaty in no way implies the recognition of any state by any other state might eliminate the need for some of these reservations. But the costs and benefits would have to be very carefully weighed.

The most fundamental, interesting, and perplexing problem remains the exact relationship between reservations and participation. All that has been established here is that reservations may aid and probably do not harm wider acceptance, but even this cannot be proven conclusively. The issue is more complicated. There are at least four major elements involved: the number of parties, the *right* to make reservations as specified in the treaty, the actual reservations, and the content of the treaty. It is not far-fetched to argue (which has not been done in the literature) that the number of ratifications really causes an increased number of reservations. It is possible that as the number of parties increases, the number of reservations also increases, and that this explanation is sufficient. As with most complex social phenomena, the causal relationships are difficult to determine and probably operate in both directions.

<sup>70</sup> O. SCHACHTER, *supra* note 23, at 147.

<sup>71</sup> K. HOLLOWAY, *supra* note 8, at 473-85.

Reservations to multilateral treaties are but one aspect of international law that can be more fully understood if explored from several perspectives. The *raison d'être* of this piece is that to understand reservations well one has to have some sensitivity to their overall magnitudes. Legal research that focuses too narrowly on a few specimens tempts the same fate as the blind men in the fable who try to describe an elephant. The complexity and diversity of multilateral treaties only increases the need for the combination of macro- and microscopic approaches.

# THE CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN: PHASE OF PROVISIONAL MEASURES

By Leo Gross \*

## I. INTRODUCTION

This case, instituted by the United States on November 29, 1979, by means of a unilateral Application under Article 40 of the Statute of the Court and Article 38 of the Rules of Court, relates to the takeover of the American Embassy in Tehran and the American Consulates in Tabriz and Shiraz and the detention as hostages of some 50 Americans by so-called militants. According to one doctrine of the justiciability of disputes, it would be difficult to imagine a more tension-laden and therefore non-justiciable dispute, considering that, as contended by the United States both in the Application and the Request of November 29, 1979, for the indication of provisional measures under Article 41 of the Court's Statute and Articles 73 and 74 of the Rules of Court, the Iranian Government was involved in the takeover and continues to be involved in the detention of the hostages. The circumstances, which in the view of the United States required the indication of provisional measures, were summarized by the Court in paragraph 34 of its Order of December 15, 1979,<sup>1</sup> as follows:

(i) On 4 November 1979, in the course of a demonstration outside the United States Embassy compound in Tehran, demonstrators attacked the Embassy premises; no Iranian security forces intervened or were sent to relieve the situation, despite repeated calls for help from the Embassy to the Iranian authorities. Ultimately the whole of the Embassy premises was invaded. The Embassy personnel, including consular and non-American staff, and visitors who were present in the Embassy at the time were seized. Shortly afterwards, according to the United States Government, its consulates in Tabriz and Shiraz, which had been attacked earlier in 1979, were also seized, without any action being taken to prevent it;

(ii) Since that time, the premises of the United States Embassy in Tehran, and of the consulates in Tabriz and Shiraz, have remained in the hands of the persons who seized them. These persons have ransacked the archives and documents both of the diplomatic mission and of its consular section. The Embassy personnel and other persons seized at the time of the attack have been held hostage with the exception of 13 persons released on 18 and 20 November 1979. Those holding the hostages have refused to release them, save on condition of the fulfilment by the United States of various demands regarded by it as

\* Of the Board of Editors.

<sup>1</sup> The Order of the Court, December 15, 1979, [1979] ICJ REP. 7, reprinted in 74 AJIL 266 (1980) [it will be cited hereinafter as Order]. The U.S. Application and Request for Interim Measures are reprinted in *id.* at pp. 258 and 264, respectively.

unacceptable. The hostages are stated to have frequently been bound, blindfolded, and subjected to severe discomfort, complete isolation and threats that they would be put on trial or even put to death. The United States Government affirms that it has reason to believe that some of them may have been transferred to other places of confinement;

(iii) The Government of the United States considers that not merely has the Iranian Government failed to prevent the events described above, but also that there is clear evidence of its complicity in, and approval of, those events;

(iv) The persons held hostage in the premises of the United States Embassy in Tehran include, according to the information furnished to the Court by the Agent of the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of "member of the diplomatic staff" within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of "members of the administrative and technical staff" within the meaning of that Convention; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Embassy;

(v) In addition to the persons held hostage in the premises of the Tehran Embassy, the United States Chargé d'Affaires in Iran and two other United States diplomatic agents are detained in the premises of the Iranian Ministry for Foreign Affairs, in circumstances which the Government of the United States has not been able to make entirely clear, but which apparently involve restriction of their freedom of movement, and a threat to their inviolability as diplomats.

The alleged nonjusticiable character of the dispute was underscored by Iran in its letter of December 9, 1979, to the Court. Iran urged the Court "not [to] take cognizance of the case," which "only represents a marginal and secondary aspect of an overall problem." Iran argued that the problem is "not one of the interpretation and application of the treaties upon which the American Application is based," and that any examination of the numerous repercussions of the Islamic revolution is "a matter essentially and directly within the national sovereignty of Iran."<sup>2</sup> How the Court dealt with these arguments will be discussed later; they are presented here to indicate Iran's view of the nonjusticiability of the dispute.

However, as the Iranian Government itself at least partially admitted in the above letter, the dispute can also be regarded as a classic example of a justiciable dispute involving the application and interpretation of articles of conventions in force between the parties, the violation of which is claimed by the United States in its Application.<sup>3</sup> Moreover, as the Court

<sup>2</sup> The text of the letter is in paragraph 8 of the Order; the passages quoted are in paragraphs 1, 2, and 3, and the concluding paragraph of the letter.

<sup>3</sup> See paragraph 1(a) of the Order. The treaties are: the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran. The Application also refers to Articles 2(3), 2(4), and 35 of the Charter.



pointed out in its Order, the rights for which the United States requested protection relate to fundamental principles and institutions of positive international law. The Court formulated them as follows in paragraphs 38 to 40 of its Order:

38. Whereas there is no more fundamental prerequisite for the conduct of relations between States, than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and whereas the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function;

39. Whereas the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means;

40. Whereas the unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States; and whereas therefore the privileges and immunities of consular officers and consular employees, and the inviolability of consular premises and archives, are similarly principles deep-rooted in international law.

In the view of the United States, the case was eminently justiciable. "We believe," said U.S. Agent Roberts B. Owen in closing his oral presentation on December 10, 1979,

that this case presents the Court with the most dramatic opportunity it has ever had to affirm the rule of law among nations and thus fulfill the world community's expectation that the Court will act vigorously in the interest of international law and international peace. The current situation in Tehran demands an immediate, forceful, and explicit declaration by the Court, calling upon Iran to conform to the basic rules of international intercourse and human rights. Only in that manner, I respectfully suggest, can the Court discharge its high responsibilities under the Charter of the United Nations.<sup>4</sup>

It would seem that the Court lived up to these expectations. It delivered the unanimous Order indicating provisional measures on December 15, 16 days after the filing of the Request on November 29. To be sure, as Mr. Owen recalled, the Court has acted with even greater dispatch in other cases.<sup>5</sup> However, in this case, both the U.S. team and the Court had

<sup>4</sup> ICJ Public Sitting, December 10, 1979, Verbatim Record (uncorrected) 44 (Doc. CR79/1, 1979) [hereinafter cited as Verbatim Record].

<sup>5</sup> Without identifying the cases, Mr. Owen said that in one case the period between the filing of the request and the indication of the measures was 13 days, in another, 9, and in a third, 6. *Id.* at 43.

to make a substantial effort to glean the relevant facts. Thus, the Court became a more active participant in these proceedings than in others. As early as December 4, the President of the Court addressed several questions to the Agent of the United States.<sup>6</sup> On that day he asked for information about the then pending discussion in the Security Council which resulted in the adoption of Resolution 457 (1979),<sup>7</sup> and at the opening of the public sitting, he asked Mr. Owen to comment on the significance that should be attached by the Court, "for the purpose of the present proceedings, to resolution 457 adopted by the Security Council on 4 December 1979."<sup>8</sup> At the conclusion of the public sitting, further and searching questions were formulated by Judge Mosler and the President.<sup>9</sup>

While Mr. Owen, as Agent, represented the United States, the factual information was supplied by David D. Newsom, Under-Secretary for Political Affairs in the Department of State. This appears from the certificate transmitted to the Court by Secretary of State Cyrus Vance on November 29, 1979, along with the application. It reads as follows:

I, David D. Newsom, certify and declare the following:

1. I am Under-Secretary for Political Affairs in the United States Department of State. I have been vested by the Secretary of State with overall responsibility within the Department for matters relating to the crisis in Iran.

2. In this capacity, I have closely monitored events since the attack on the United States Embassy in Tehran began. The facts stated in the Application of the United States to the Court are, to the best of my knowledge, true.<sup>10</sup>

The Request for Interim Measures of Protection of November 29, 1979, contains in paragraph 2 the statement: "The facts set forth therein have been verified in the appended statement of David D. Newsom. . . ." The existence of what appears to be a somewhat unusual division of labor, if not of responsibility, did not escape the attention of the President of the Court.<sup>11</sup>

Whatever the reasons may be, it appears from the Order of the Court that certain important facts, such as the diplomatic or consular status of the hostages—see paragraph 34 of the Order quoted above—became clear to all concerned only in the course of the proceedings.<sup>12</sup>

<sup>6</sup> *Id.* at 8-9.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id.* at 45-46.

<sup>10</sup> This certificate is reproduced in U.S. DEP'T OF STATE, PUB. NO. 9001, SELECTED DOCUMENTS No. 14, at 5 (Near East & South Asian Series 92, 1979).

<sup>11</sup> In the telegram addressed to the Agent, Mr. Owen, on December 4, 1979, there are these words in paragraph 2: "The President, while noting the certificate of Mr. David D. Newsom appended to the United States Application, asks the Agent of the United States. . . ." Verbatim Record, *supra* note 4, at 8.

<sup>12</sup> Thus, paragraph 2 of the Request for Interim Measures contains this general statement: "At least fifty United States citizens, virtually all of whom are diplomatic agents or administrative and technical staff of the Embassy, are being held hostages."

To sum up: the strongest evidence of the justiciability of the dispute may be seen in the fact that the Order was adopted unanimously and without any individual opinion.<sup>13</sup>

## II. CONDITIONS FOR THE INDICATION OF INTERIM MEASURES OF PROTECTION

These conditions are laid down in Article 41 of the Statute and Articles 73 through 78 of the Rules of Court. The Court has had occasion to express its views on this subject in several recent cases,<sup>14</sup> and it has been considered in several learned analyses of the jurisprudence of the Court.<sup>15</sup> However, it is not the purpose of this paper to contribute to this discussion but rather to present the issues in this most unusual case<sup>16</sup> and the manner in which they were handled by the Court.

Before taking up some of the issues connected with Article 41, it may be well to note that the Court made the usual pronouncement about the absence of Iran from the hearing: "the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures" (Order, para. 13). The Court cited no precedent, but the respondent was absent in all the recent cases mentioned above (in note 14). The Court also restated the *prima facie* test, saying: "Whereas on the request for provisional measures in the present case the Court ought to indicate such measures only if the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded" (Order, para. 15).

The Court did not advert to the view expounded in connection with some of the earlier cases that in the absence of the Respondent, Article 53 of the Statute comes into play and therefore more than a *prima facie* test should be applied.<sup>17</sup> As will be shown presently, the Court was satisfied

<sup>13</sup> In the *Aegean Sea Continental Shelf* case (Greece v. Turkey), the Court denied the Greek request for the indication of interim measures of protection by a vote of 12 to 1 (the judge *ad hoc* appointed by Greece), but there were 8 separate opinions. [1976] ICJ REP. 3, 14. See Gross, *The Dispute Between Greece and Turkey Concerning the Continental Shelf in the Aegean*, 71 AJIL 31 (1977).

<sup>14</sup> The most recent case is mentioned in the preceding note. The present Court was faced first with the issue in the *Anglo-Iranian Oil Co.* case (United Kingdom v. Iran), and more recently in the *Fisheries Jurisdiction* cases (United Kingdom v. Iceland, and German Federal Republic v. Iceland) and the *Nuclear Tests* cases (Australia v. France, and New Zealand v. France).

<sup>15</sup> Reference may be made to the following: Elkind, *French Nuclear Testing and Article 41—Another Blow to the Authority of the Court?*, 8 VAND. J. TRANSNAT'L L. 39 (1974); Merrilis, *Interim Measures of Protection and the Substantive Jurisdiction of the International Court*, 36 CUMB. L.J. 86 (1977); Mendelson, *Interim Measures of Protection in cases of Contested Jurisdiction*, 46 BRIT. Y.B. INT'L L. 259 (1972-73); Lellouche, *The Nuclear Tests Cases*, 16 HARV. J. INT'L L. 614 (1975); Obol, Note in 18 *id.*, at 649 (1977); Adede, *The Rule on Interlocutory Injunctions Under Domestic Law and the Interim Measures of Protection Under International Law: Some Critical Differences*, 4 SYRACUSE J. INT'L L. & COM. 277 (1977).

<sup>16</sup> There may be a parallel of sorts in the *Pakistani Prisoners of War* case which, however, was withdrawn before it came for adjudication.

<sup>17</sup> In case of a default judgment the Court, pursuant to Article 53(2), must "satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

that the clauses invoked by the Applicant furnished the necessary basis for jurisdiction (Order, paras. 17 and 18).

### *Jurisdiction*

The first condition for applying Article 41 is that the Court must satisfy itself that the *Application* discloses a basis for assuming jurisdiction on the merits. In this case the United States invoked the four conventions mentioned above, but primarily it relied on the identical Article I of the Optional Protocols on the Compulsory Settlement of Disputes attached to the Vienna Conventions on Diplomatic and Consular Relations, respectively. Article I of the protocols provides: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any Party to the dispute being a Party to the present Protocol."

Articles II and III provide alternative methods for settlement—arbitration or conciliation—but the right of unilateral arraignment in Article I is in no way modified by Articles II and III. The Court accordingly concluded that Article I provides "in the clearest manner for the compulsory jurisdiction" of the Court (Order, para. 17) and that, as stated in paragraph 18 of the Order,

it is manifest from the information before the Court<sup>18</sup> and from the terms of Article I of each of the two Protocols that the provisions of these Articles furnish a basis on which the jurisdiction of the Court might be founded with regard to the claims of the United States under the Vienna Conventions of 1961 and 1963.

Having thus established one leg of jurisdiction, it remained to show that the persons concerned, by their status, were covered by the two conventions. As has been seen from paragraph 34(iv) of the Order quoted above, the Court was satisfied that 28 of the hostages had the status, recognized by the Government of Iran, of "member of the diplomatic staff" and 20 persons, similarly recognized, of "members of the administrative and technical staff." Thus, 48 hostages were covered by the two conventions. There still remained the question of two private U.S. nationals. Could the United States make claims on their behalf under the Vienna Conventions or under the bilateral Treaty of Amity, Economic Relations, and Consular Rights? The dispute clause in that treaty, Article XXI(2), required attempts at adjustment by diplomacy prior to an appeal to the International Court of Justice. The Agent of the United States argued, however, that because Iran had rejected "the repeated efforts of the United States to deal with the dispute by diplomacy . . . it seems indisputable that under the Treaty of Amity, this case is properly before the Court."<sup>19</sup>

The Court did not pursue this line of reasoning. In fact, it found a more

<sup>18</sup> The Court may have referred here to paragraph 16 of the Order in which it found that Iran and the United States are parties to the two conventions and to their protocols without any reservation.

<sup>19</sup> See Verbatim Record, *supra* note 4, at 28.

elegant solution. In analyzing the case of these private individuals, the Court held that their seizure and detention also fell within the scope of the applicable Vienna Conventions relating to the inviolability of the premises of embassies and consulates, and more specifically within the scope of Article 5 of the Vienna Convention on Consular Relations, which provides for consuls to assist nationals of the sending state, and to protect and safeguard their interests. The Court accordingly concluded that Article I of the protocols "furnishes a basis on which the jurisdiction of the Court might be founded with regard to the claims of the United States in respect of the two private individuals in question" (Order, paras. 19 and 20).

The jurisdiction of the Court under Article I of the protocols to the two Vienna Conventions relates to disputes arising under the substantive provisions of the conventions themselves. The Application of the United States contains a list of articles alleged to have been infringed, but has it been established that there arose a dispute over which the Court could exercise jurisdiction? The best known definition of a dispute was given by the Permanent Court of International Justice in the *Mavrommatis* case: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."<sup>20</sup> It is, as Rosenne pointed out,

inherent in the conception of "dispute" . . . that some diplomatic negotiations had preceded the institution of the proceedings, in the course of which the points of fact or of law on which the parties were in disagreement had become identified. Indeed, without some diplomatic negotiations, there will frequently be difficulty in establishing the existence of the dispute.<sup>21</sup>

One may surmise from the questions addressed to the Agent of the United States on December 4,<sup>22</sup> and the request made on the same day for "copies of any official statements of the President of the United States, the Secretary of State or any of the other United States authorities relating to the matters alleged in the United States Application of November 29, 1979; and any statements by Iranian authorities evidencing those matters,"<sup>23</sup> that the Court was anxious to be enlightened on the existence and scope of the dispute. The information received from Mr. Newsom on December 9 was not wholly satisfactory, for at the end of the public sitting the Court

<sup>20</sup> The *Mavrommatis* Palestine Concessions, [1924] PCIJ, ser. A, No. 2, at 11.

<sup>21</sup> S. ROSENNE, 2 *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 513 ff. (1965).

<sup>22</sup> They were:

(a) What, if any, exchanges have taken place between the Governments of the United States and Iran regarding recourse to arbitration, conciliation or any other pacific means for the settlement of their present differences; and to furnish the Court with copies of any documents relating thereto;

(b) whether the government of either the United States or Iran has formally broken off diplomatic relations between the two governments since the matters which are the subject of their present differences arose; and, if so, to furnish the Court with copies of any documents thereto.

Verbatim Record, *supra* note 4, at 8.

<sup>23</sup> *Id.* at 9.

asked for further information.<sup>24</sup> It seems fairly obvious that the Court was interested in getting the sort of factual information on which a finding that a dispute exists can be made. However, it would seem that taking a realistic rather than a formalistic view of the matter, the Court must have satisfied itself about the existence of a dispute. This leaves open the question as to the critical date when the dispute arose. Perhaps the letter from the Iranian Government to the Court of December 9, 1979, may be regarded as the formal acknowledgment of the existence of the dispute. In this letter Iran asked the Court not to take cognizance of the case submitted by the United States on two grounds.<sup>25</sup>

As mentioned earlier in connection with the question of the justiciability of the dispute,<sup>26</sup> Iran drew the attention of the Court "to the deep-rootedness and the essential character of the Islamic revolution of Iran" and contended that "any examination of the numerous repercussions thereof is a matter essentially and directly within the national sovereignty of Iran." Whether this argument should have been regarded as being in the nature of a plea to the jurisdiction of the Court on the merits, and considered in that context, need not be examined here. The Court rejected it in no uncertain terms, saying (in paragraph 25 of the Order):

Whereas it is no doubt true that the Islamic revolution of Iran is a matter "essentially and directly within the national sovereignty of Iran"; whereas however a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction.

The Court also considered another Iranian objection, which will be discussed below in connection with Security Council Resolution 457 (1979), and, having found it without merit, concluded that neither objection could "be accepted as constituting any obstacle to the Court's taking cognizance of the case brought before it by the United States Application of 29 November 1979" (Order, para. 26). Stated in positive terms: the Court was satisfied that it had *prima facie* jurisdiction on the merits of the case.

#### *Some Other Aspects of Procedure for the Indication of Interim Measures*

The United States was aware that its Request for Interim Measures might run into two seemingly substantial difficulties. One of these related to the possible impact of Security Council Resolution 457, adopted unanimously on December 4, 1979,<sup>27</sup> and the other to the fact that in both its Application and its Request the United States asked for the release of

<sup>24</sup> *Id.* at 45. The Court asked for a copy of the message intended to be delivered by Ramsey Clark and of any documents or questions which Mr. Newsom stated had been communicated to the Iranian Chargé d'Affaires. In his oral statement Mr. Owen referred to the Ramsey Clark mission. *Id.* at 26.

<sup>25</sup> The letter will be found in paragraph 8 of the Order.

<sup>26</sup> Text at note 2 *supra*.

<sup>27</sup> Reprinted in 18 ILM 1644 (1979).

the hostages, which seemed to be contrary to the principle that a Request for Interim Measures should not anticipate the judgment on the merits.

It will be recalled that at the opening of the public sitting on December 10, the President of the Court said that he had given prior notice to the U.S. Agent of the Court's request that it be informed of his Government's view on the question: What significance should be attached by the Court, for the purpose of the present proceedings, to the Security Council resolution?<sup>28</sup> The question was obviously motivated by the role that a Security Council resolution had played in the *Aegean Sea Continental Shelf* dispute. In that case, apart from its request for provisional measures to ensure the preservation of its rights, Greece also had asked the Court to indicate provisional measures to prevent an aggravation of the dispute. The Court then reviewed the proceedings in the Security Council initiated by Greece on August 10, 1976, the day on which the Greek Application and Request for Interim Measures were filed in the Court, and found that in view of the adoption by the Security Council of the consensus Resolution 395 (1976) and the positive attitude of both Turkey and Greece to it, "it is not necessary for the Court to decide the question whether Article 41 of the Statute confers upon it the power to indicate interim measures of protection for the sole purpose of preventing the aggravation or extension of a dispute."<sup>29</sup> As the Court, for various reasons, had already determined that Article 41 of the Statute was inapplicable, the Court declined to accede to the Greek request.<sup>30</sup>

Resolution 457 was adopted on December 4, 1979, following an initiative by the Secretary-General under Article 99 of the Charter. After noting the "dangerous level of tension between Iran and the United States" and reaffirming the obligation "of all State Parties" to the Vienna Conventions to respect the sanctity of diplomatic personnel and premises, the Security Council in the resolution "[u]rgently calls on the Government of Iran to release immediately the personnel of the Embassy of the United States of America being held in Teheran, to provide them protection and to allow them to leave the country."

In view of the close relationship between this resolution and the U.S. request for the release of the hostages and the use made by the Court of the Security Council resolution in the *Aegean Continental Shelf* case, and in view of the above-mentioned request to the Agent of the United States, one would have been justified in expecting the Court to give this matter close consideration. Nothing of the sort happened. To be sure, the Agent of the United States distinguished the *Aegean* case from the present one on several grounds and stressed the judicial function of the Court "to decide in accordance with international law such disputes as are submitted to it" (Article 38(1) of the Court's Statute).<sup>31</sup> However, the Order contains only

<sup>28</sup> Verbatim Record, *supra* note 4, at 11.

<sup>29</sup> [1976] ICJ REP. 12-13. For comments on this case, see articles listed in notes 13 and 15.

<sup>30</sup> [1976] ICJ REP. 11 and 14, paras. 32 and 46.

<sup>31</sup> Verbatim Record, *supra* note 4, at 37-39. Mr. Owen quoted a statement by U.S.

one incidental reference to the Security Council resolution in the context of one of the Iranian objections to the Court's jurisdiction.

In its letter of December 9, Iran asked the Court not to take cognizance of the dispute on the ground that the hostages question formed only "a marginal and secondary aspect of an overall problem" relating to the activities of the United States over a period of 25 years. The Court stated that, "having regard to the importance of the legal principles involved," the seizure of the American Embassy and Consulates and the detention of internationally protected persons cannot be regarded as "secondary" and "marginal." The Court then went on to refer to the initiative of the Secretary-General, who had characterized the events as "a grave situation" posing "a serious threat to international peace and security"; the Court concluded "that the Security Council in resolution 457 (1979) expressed itself as deeply concerned at the dangerous level of tension between the two States, which could have grave consequences for international peace and security" (Order, para. 23). Thus disappeared what appeared to be an obstacle to the American case, serious enough to warrant the request from the President of the Court to the Agent of the United States. Whether this means that the ruling of the Court in the *Aegean Continental Shelf* case has been abandoned remains to be seen. In any event, its value as a precedent may never be the same.

The duplication of the appeal for the release of the hostages in the Application and the Request did not escape the attention of Iran. In its letter of December 9, it contended that this action by the United States implied "that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction."<sup>32</sup> In the *Chorzów* case, the Permanent Court of International Justice held that the German request "cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favor of a part of the claim formulated in the Application."<sup>33</sup> The Agent of the United States in his oral argument admitted the overlap in the Application and Request

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Ambassador Donald McHenry, which was discussed with all members of the Security Council. It reads as follows:

The United States wishes to place on the record that the adoption of this resolution by the Security Council clearly is not intended to displace peaceful efforts in other organs of the United Nations. Neither the United States nor any other Member intends that the adoption of this resolution shall have any prejudicial impact whatever on the request of the United States for the indication of provisional measures of protection by the International Court of Justice.

*Id.* at 39. As the Court made no comment on the statement, it is difficult to assess the significance it may have attached to it.

<sup>32</sup> See Order, para. 8(4).

<sup>33</sup> Order of November 21, 1927, [1927] PCIJ, ser. A, No. 12, 9-11, at 10. See in this connection the ICJ Order of June 22, 1973, in the *Nuclear Tests* cases, in which the Court called upon France to avoid nuclear tests causing the deposit of radioactive fallout on Australian territory. [1973] ICJ REP. 99, 106. And see also the dissenting opinions of Judges Forster and Gros, who recalled the *Chorzów* principle and based their dissent partly on that ground. *Id.* at 115 and 123, respectively.



in that "both pleadings ask in effect for an Order calling for an immediate release of the hostages and their safe departure from Iran." He explained that this overlap resulted "from an excess of caution on the part of the United States" and admitted that the request for the release of the hostages "should have appeared only in our pending request for an indication of provisional measures."<sup>34</sup>

The Court disposed of the Iranian objection in a single, short paragraph; the heart of it is in a sense a reinterpretation of the *Chorzów* dictum. The Court quoted the *Chorzów* ruling but distinguished it from the present case, saying that "the circumstances of that [*Chorzów*] case were entirely different from those of the present one, and the request there sought to obtain from the Court a *final* judgment on part of a claim for a sum of money."<sup>35</sup> The Court continued:

whereas, moreover, a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party; and whereas in the present case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claims but to preserve the substance of the rights which it claims *pendente lite*.<sup>36</sup>

The Court thus removed the last substantial obstacle facing the United States request and in doing so may well have made a significant contribution to a better understanding of a complex problem.

The Iranian Government in the above-cited letter also maintained that "since provisional measures are by definition intended to protect the interests of the parties, they cannot be unilateral, as they are in the request submitted by the American Government" (Order, para. 8(4)). The Court rejected this argument as Article 41 of the Statute speaks specifically of measures "which ought to be taken to preserve the respective rights of *either* party" (emphasis by Court, Order, para. 29). The Court referred to Article 73 of its Rules as recognition of the fact that "the whole concept of an indication of provisional measures . . . implies a request from one of the parties for measures to preserve its own rights against action by the other party calculated to prejudice those rights *pendente lite*," and declared that it follows from this consideration "that a request for provisional measures is by its nature unilateral." Finally, the Court referred to Article 75 of its Rules pursuant to which the Court may indicate provisional measures *proprio motu* which ought to be taken by any or all of the parties. The fact that Iran did not appear before the Court and made no request for provisional measures "does not, and cannot, mean that the Court is precluded from entertaining a request from a party merely by reason of the fact that measures which it requests are unilateral" (Order, para. 29). In short, a party in the position of Iran has no veto over the indication of provisional measures requested by the other party to the dispute.

<sup>34</sup> Verbatim Record, *supra* note 4, at 36.

<sup>35</sup> Order, para. 28 (emphasis supplied).

<sup>36</sup> *Ibid.*

## III. CONCLUDING OBSERVATIONS

In examining the Request for provisional measures, as formulated by the United States in its final submissions filed with the Registry on December 12, 1979, that is, after the oral hearing, the Court turned first to the "circumstances," that elusive term in Article 41(1). The Court has the power to indicate provisional measures "if it considers that circumstances so require." The Court understood the term in a factual sense and gave a summary of the circumstances, which is quoted at the beginning of this paper. It then examined another requirement of Article 41(1), namely, that the measures be designed "to preserve the respective rights of either party." This requirement caused some difficulty in the past as it may seem to refer implicitly to the *Chorzów* ruling. Were the rights to be preserved those rights that a party claimed as appertaining to it but that were the very subject of litigation? If so, would it not be a matter to be determined only in the judgment on the merits?

In this case, the United States in its Application claimed that Iran had violated numerous provisions in the conventions mentioned above, as well as obligations flowing from customary international law, and asked the Court to adjudge and declare that Iran by its action and inaction had indeed violated these legal obligations, that it should pay reparations to the United States for these violations, and that the persons who seized the premises and staff of the Embassy and Consulates should be prosecuted. It will be recalled that the United States had also, albeit unnecessarily, included in the Application a request for the release of the hostages. In its final submissions, the United States somewhat amended its earlier formulation in the Request of November 29, of the provisional measures it regarded as required to "preserve" its rights.<sup>37</sup> The Court did not deem

<sup>37</sup> In the final submissions filed with the Court on December 12, 1979, the United States asked the Court to indicate the following measures:

"First, that the Government of Iran immediately release all hostages of United States nationality and facilitate the prompt and safe departure from Iran of these persons and all other United States officials in dignified and humane circumstances.

Second, that the Government of Iran immediately clear the premises of the United States Embassy, Chancery and Consulate in Tehran of all persons whose presence is not authorized by the United States Chargé d'Affaires in Iran, and restore the premises to United States control.

Third, that the Government of Iran ensure that, to the extent that the United States should choose, and Iran should agree, to the continued presence of United States diplomatic and consular personnel in Iran, all persons attached to the United States Embassy and Consulates should be accorded, and protected in, full freedom of movement, as well as the privileges and immunities to which they are entitled, necessary to carry out their diplomatic and consular functions.

Fourth, that the Government of Iran not place on trial any person attached to the Embassy and Consulates of the United States and refrain from any action to implement any such trial; and that the Government of Iran not detain or permit the detention of any such person in connection with any proceedings, whether of an 'international commission' or otherwise, and that any such person not be required to participate in any such proceeding.

Fifth, that the Government of Iran ensure that no action is taken which might prejudice the rights of the United States in respect of carrying out of any decision which the Court may render on the merits, and, in particular, neither take, nor permit, action that would threaten the lives, safety, or well-being of the hostages" [quoted by Court, Order, para. 12].

it necessary to engage in what might have become a time-consuming and possibly controversial exercise of examining in detail how or to what extent the requested measures related to rights that the United States sought to have protected. Instead, the Court did two things: first, it made the most emphatic statement possible (quoted above, page 397) on the universal significance of the institutions and principles pertaining to the conduct of relations between states (Order, paras. 38-40). Obviously, these institutions and principles deserve protection.

In the second place, without saying so explicitly, the Court appears to have accepted the following statement submitted by the United States of the rights entitled to protection by the indication of provisional measures: "The right [of the United States] to maintain a working and effective embassy in Tehran, the right to have its diplomatic and consular personnel protected in their lives and persons from every form of interference and abuse, and the right to have its nationals protected and secure."<sup>38</sup>

As the Court pointed out, there is no obligation under general international law for states to maintain embassies and consulates, and both Vienna Conventions contain elaborate clauses for the termination of diplomatic and consular relations in times of peace and war (Order, para. 41). Iran, however, has not chosen to act in accordance with the law but has acted and continues to act in brutal violation of the law. The rights to which, in the Court's judgment, the United States is entitled, and which its Agent, Mr. Owen, put in a nutshell in almost moving language, are indeed rights that deserve protection in accordance with Article 41 of the Statute of the Court.

There remains one point to be considered, which figured prominently in the *Aegean Continental Shelf* case, namely, the question whether "the circumstances of the case disclose the risk of an irreparable prejudice to rights in issue in the proceedings."<sup>39</sup> In that case, the Court was unable to find in the alleged breach by Turkey "of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation."<sup>40</sup> On the contrary, the Court was of the opinion that the breach "might be capable of reparation by appropriate means."<sup>41</sup>

These statements made it inevitable that the United States would stress that the rights claimed in this case were threatened with irreparable injury. With the *Aegean Continental Shelf* case perhaps in mind, Mr. Owen declared with reference to the above-mentioned rights<sup>42</sup> that

with each passing hour those rights are being destroyed, and the injury, once incurred, is plainly and completely irreparable. The trauma of being held hostage day after day in conditions of danger cannot

<sup>38</sup> This is from Mr. Owen's oral statement, Verbatim Record, *supra* note 4, at 31.

<sup>39</sup> [1976] ICJ REP. 11, para. 32.

<sup>40</sup> *Id.*, para. 33.

<sup>41</sup> *Ibid.*

<sup>42</sup> Text at note 38 *supra*.

be erased, the weeks of interruption of diplomatic functions cannot be repaired. If the hostages are physically harmed, this Court's decision on the merits cannot possibly heal them. Given the nature of the rights involved, an ultimate award of monetary damages simply could not make good the injuries currently being sustained as this case awaits the Court's judgment.<sup>43</sup>

It was obviously necessary to stress in this phase of the case the irreparable character of the threatened injuries, inasmuch as the United States, in its Application, requested that the Court adjudge and declare, *inter alia*,

[t]hat the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court.

On its face, there seems to be a contradiction here, but a claim for reparation in the usual sense for a breach of an international obligation may well be distinguished from the threat of an irreparable prejudice, particularly to the detained individuals.

This, it seems to the present writer, is the approach adopted by the Court in this case. The Court accepted the view that the power to indicate provisional measures under Article 41 of the Statute "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings" (Order, para. 36). The Court then found that the "continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm" (Order, para. 42). It is significant that the Court required "a serious possibility" and not certainty, which in many cases would raise questions of proof.

In finally deciding upon the request, the Court said that, for unstated reasons, it "cannot fail to take note of the provisions of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973, to which both Iran and the United States are parties." This convention, it will be recalled, was included by the United States, along with the Vienna Conventions of 1961 and 1963, among the bases of jurisdiction of the Court. However, the Court found that it was not necessary to examine the question whether a basis for the exercise of its powers under Article 41 of the Statute might also

<sup>43</sup> Verbatim Record, *supra* note 3, at 31. In support of this position, Mr. Owen referred to the case concerning the *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium* decided by the Permanent Court of International Justice. In that case, which involved protection for nationals and property, and performance of consular functions, the Court granted measures on the ground that the injury expected to occur during the pendency of the case "could not be made good by the payment of an indemnity or by compensation or restitution in some other material form." [1927] PCIJ, ser. A, No. 8, at 6.

be found in the above convention or in the bilateral treaty between the United States and Iran (Order, para. 21).

Having satisfied itself that "in the light of the several considerations set out above, . . . the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute," and having made the usual disclaimer that "the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits" (Order, paras. 44 and 45), the Court unanimously indicated the following provisional measures:

A. (i) The Government of the Islamic Republic of Iran should immediately ensure that the premises of the United States Embassy, Chancery and Consulates be restored to the possession of the United States authorities under their exclusive control, and should ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law;

(ii) The Government of the Islamic Republic of Iran should ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law;

(iii) The Government of the Islamic Republic of Iran should, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran;

B. The Government of the United States of America and the Government of the Islamic Republic of Iran should not take any action and should ensure that no action is taken which may aggravate the tension between the two countries or render the existing dispute more difficult of solution.

It will be noted that these measures do not coincide entirely with the measures requested by the United States in its final submissions of December 12, 1979. The first and probably the most significant request for release of the detained personnel appears in A(ii) of the Court's Order; the second U.S. request appears in A(i), albeit in a more elaborate form; the third U.S. request may be covered in A(iii). The latter request was addressed to reports that some or all of the hostages might be subjected to trial in Iran. This possibility is not included specifically in any of the measures indicated by the Court. However, it may well come under A(iii), where the Court calls upon Iran to afford the United States personnel full protection under treaties and general international law, "including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran." The fifth U.S. request may well be subsumed under paragraph B of the measures indicated by the Court.

No doubt the Order of the Court in this case, even if it is not implemented by Iran, will come to be regarded as a landmark in the jurisprudence of the Court relating to Article 41 of the Statute. The Court's Order is not argumentative. It is left to students of this subject to find the points in which the Court clarified the principles governing the indication of provisional measures. There is nothing in the Order, for instance, on whether the power to indicate such measures is an "independent" or "inherent" or "incidental" power. On the other hand, in the present writer's provisional opinion, there is a good deal here to clarify the relation between jurisdiction on merits and jurisdiction under Article 41, on the relation between provisional measures and judgment on merits, on the meaning of "irreparable harm," and on the relevance of Security Council action.

Be that as it may, there is no doubt that this case represents a landmark in the relations between the United States and the Court. There has never been any doubt about the interest of the United States in promoting adjudication by the court.<sup>44</sup> However, the actual use of the Court by the United States is another matter. Over a period of years, from 1954 to 1958, the United States brought several cases before the Court against Hungary, Czechoslovakia, and the Soviet Union arising out of aerial incidents—knowing full well that there was no basis on which the Court could assume jurisdiction. In one case, the *Aerial Incident of 27 July 1955*, the United States cited Bulgaria before the Court on the basis of a Bulgarian declaration under Article 36 of the Statute of the Permanent Court of International Justice, which the present Court, in a companion case—*Israel v. Bulgaria*—found to have lapsed. However, the American Application was withdrawn when Bulgaria invoked the so-called Connally Amendment against the United States.<sup>45</sup> This then is the first time in 35 years that the United States has turned to the Court. Is there reason to hope that the United States will henceforth demonstrate its devotion to the cause of international adjudication by deeds as well as by words? Would this be a propitious time for the United States to submit a new declaration under Article 36(2) of the Statute of the Court from which the Connally Amendment would be conspicuous by its absence?

<sup>44</sup> See recent study by the DEPARTMENT OF STATE, PUB. NO. 8940, *THE SECRETARY'S REPORT TO THE PRESIDENT ON REFORM AND RESTRUCTURING OF THE U.N. SYSTEM* 16 and 18 (1978).

<sup>45</sup> See Gross, *Bulgaria Invokes the Connally Amendment*, 56 AJIL 357 (1962).

## EDITORIAL COMMENT

### THE IRAN HOSTAGE CRISIS: EASY ANSWERS AND HARD QUESTIONS

The U.S. Government has insisted since the Iran hostage crisis commenced on November 4, 1979, that international law supported its basic demand that Americans held captive be released. This insistence has been confirmed by a unanimous finding of the International Court of Justice, the highest organ for interpreting international law that exists in the world. For the United States, then, the only inadequacy of international law has involved the inability to enforce its mandate upon a defiant ruler.

Ayatollah Khomeini's refusal to honor the rules of international law relating to diplomatic immunity is among the most serious charges brought against his leadership. Even Hitler, it is alleged, never violated the diplomatic immunity of his enemies. In fact, one has to search the books of diplomatic history to find isolated precedents for the events of the last few weeks in Tehran, and in each instance the challenge to diplomatic decorum came from a source that can be credibly dismissed as "barbarian." Indeed, it is not a long step from condemning Khomeini as a lawbreaker to the more virulent bumper sticker demands to "nuke Iran" or "hang Khomeini."

And yet one must wonder about this supposed clarity of international law. After all, is it not a serious matter that an embassy is used to subvert the constitutional order of a country, as was done by the United States in staging the coup that brought the Shah back to power in 1953? Is it not also serious that embassy personnel evidently helped establish and train the SAVAK, the secret police that committed so many crimes against the people of Iran?<sup>1</sup> The response to these Iranian grievances is also clear: "Everybody knows that embassies are spy-nests." True, vague prohibitions against intervening in the internal affairs of sovereign states exist, but no one takes them seriously. And besides, diplomacy is inevitably interventionary. This is the game of politics played on a global scale, for better or worse.

The law on the subject also supports the American refusal to extradite the Shah. First of all, it is claimed that the Shah was a recipient of the American prerogative to give asylum, especially on this occasion when a supposed medical necessity existed.<sup>2</sup> Besides, on a more technical level,

<sup>1</sup> Perhaps the most reliable interpreter of Iranian political developments refers to the Shah as having come to power in 1953 "as a result of a CIA-backed and in large part CIA-directed coup. . . ." R. COTTAM, *NATIONALISM IN IRAN* 332 (2d rev. ed., 1979); for an insider account, see K. ROOSEVELT, *COUNTERCOUP: THE STRUGGLE FOR THE CONTROL OF IRAN* (1979).

<sup>2</sup> For a convincing dissent on the claim of medical necessity, see Bloom, *The Pahlavi Problem: A Superficial Diagnosis Brought the Shah into the United States*, 270 *SCIENCE* 282 (1980); see also the front-page journalistic account by Richard A. Knox to the same effect, *Boston Globe*, Nov. 24, 1979, at 1 and 4.

the absence of an extradition treaty between the United States and Iran would have made it virtually impossible to return the Shah to Iranian custody, even if Jimmy Carter had wanted to do so.<sup>3</sup> Finally, even if an extradition treaty had existed, it is doubtful that an American court would have found the Shah extraditable. The evidence against him is connected with his repressive rule, but extradition is not available against someone accused of "political crimes."

That is, international law as it exists supports the U.S. claim about the hostages, but it gives Iran almost no comfort. The very clarity of international law, given the underlying equities, raises questions about its one-sidedness. Why should the rules protecting diplomatic immunity be so much clearer than the rules protecting a weak country against intervention? Or why should "asylum" be available to a cruel tyrant associated with the massive commission of state crimes, including torture, arbitrary execution, and economic plunder? What kind of international law is it that protects foreign police and torture specialists by conferring upon them the status of "diplomat"?

In part, the drift of international law reflects the history of international relations since the birth of the modern state system in the middle of the 17th century. It is a law of, for, and by governments, and especially powerful governments. In that sense, all governments have a shared interest in upholding the absolute rights of their diplomatic representatives. Relations depend on communication, even in periods of stress, and hence the case for diplomatic immunity seems strong. The United Nations is, as an organization of governments, the world's strongest lobby for diplomatic immunity. On other aspects of the situation, interests are not so clearly shared. Intervention in an interdependent world is not altogether avoidable and it represents one of the instruments by which the strong control the weak. Nonintervention generally helps the weak, as the prohibition is only meaningful as directed against the relatively stronger party to a conflict. The weaker side, regardless of its intentions, normally lacks the option to intervene, although it could in a given instance theoretically ignore its handicaps of power. In fact, however, the history of interventionary diplomacy is overwhelmingly the story of how the strong have used their power in various ways against the weak, and the struggle for norms and regimes based on nonintervention is the contrary story of how weaker states have tried to inhibit intrusions on their territorial integrity and political independence.<sup>4</sup> To renounce intervention seems for a superpower

<sup>3</sup> According to U.S. law, extradition cannot be granted by the President apart from a treaty, unless authorized by legislation. Even if a special statute authorizing extradition of the Shah had been validly enacted, it would almost certainly have been struck down by the courts as an *ex post facto* law. For a brief summary of the legal situation pertaining to extradition in the absence of a treaty, see M. WHITEMAN, 6 *DIGEST OF INTERNATIONAL LAW* 732-37 (1968); compare *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, esp. 8-9 (1936).

<sup>4</sup> An excellent analysis of the dependence of international order upon upholding the norm of nonintervention as much as possible is to be found in R. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* (1974).



tantamount to renouncing the global extension of power politics. It can be done quite easily in words, but not consistently in deeds.

In this regard, it is true that the protection of diplomatic immunity suggests an invariable constraint, whereas the prohibition on intervention is fuzzy, vague, and necessarily conditional and contextual. The rationale for "humanitarian intervention," although itself controversial, suggests that even normative considerations can be ambiguous, as when, for instance, genocide or widespread abuse occurs in the target society. To make non-intervention into an absolute would be to endorse unlimited internal sovereignty, an endorsement quite inconsistent with the protection of human rights. At the same time, there are some core instances of intervention that seem clear, provided some limited assumptions are made. One of these, applicable to the Iranian case, is that in the absence of persistent and severe violations of human rights, the deliberate subversion of the constitutional process of a foreign state is an "illegal" intervention in its internal affairs, especially if a change of regime results.

Regarding the treatment of deposed wandering tyrants, existing governments grow nervous, as well they might. Many rulers are potential defendants in trials alleging state crimes. The idea of granting sanctuary to deposed leaders has some appeal as a matter of global policy; it creates the option of exile as an alternative to protracted civil strife and bloodshed. Even Idi Amin, Emperor Bokassa I, Pol Pot, and Anastasio Somoza Debayle have found foreign places of refuge; if returned home, they would each almost surely be executed.

What we find, then, is both a proimperial and a progovernmental bias built into modern international law. This double bias is a natural consequence of the fact that states dominate the global scene and some states dominate others. Whether such a framework is adequate or not is one of the deeper, unexamined issues posed by the Iranian crisis. Khomeini clearly rejects this bias: "What kind of law is this? It permits the U.S. Government to exploit and colonize peoples all over the world for decades. But it does not allow the extradition of an individual who has staged great massacres. Can you call it law?"<sup>5</sup>

Perhaps, however, Khomeini is mixing up here the law that should be with the law that could be. Given the way that international diplomacy operates, how is it reasonable to expect international law to be different from what it is?

Let us not sit too quickly in judgment of Ayatollah Khomeini for his evident refusal to shape Iranian policy by reference to the law on the books. American leaders have had their own doubts about whether international law should interfere with the formation of foreign policy in crisis contexts. One recalls, of course, in this connection, Dean Acheson's famous set of remarks on the Cuban missile crisis made at the 1963 annual meeting of the American Society of International Law:

the power, position, and prestige of the United States had been challenged by another state; and law simply does not deal with such

<sup>5</sup> Interview with Ayatollah Khomeini, *TIME*, Jan. 7, 1980, at 27.

questions of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life.<sup>6</sup>

In fact, in the several narrations of the U.S. decision process over the course of the Cuban missile crisis, as written by nonlawyers, the legal factor is either not mentioned, or only so slightly as to be of no consequence.<sup>7</sup>

To similar effect, one recalls that Leonard Meeker defended the United States Dominican intervention in 1965 by counseling against "fundamentalist views on the nature of international legal obligations" that would make it appear that a nondefensive use of force in a foreign country was a clear violation of the Charter prohibitions of Article 2(4).<sup>8</sup> Mr. Meeker, then Legal Adviser, addressed this "legal" defense of American policy to the Foreign Law Association in June 1965. My point here, as with my earlier reference to the Cuban missile crisis, is that American policymakers, and their legal experts, have been quite prepared to bend or ignore international law under the pressure of international circumstances. Why, then, be shocked when others do the same? Of course, the United States didn't violate *this* rule in the past, but why expect Iran to condition its exercise of sovereign rights by a literal imitation of our example? It is the more general example of subordinating legal inhibitions to claims of sovereign necessity that pertains here.

And yet there is another set of possibilities. Why should governments alone establish the rules that govern behavior on the planet? Why should not citizens organize to insist on a framework of law that corresponds to a framework of minimum morality? Part of this pressure can come through the reform of international law, making it less one-sided. The non-Western governments of the Third World have exerted some pressure along these lines with respect to international economic relations, ocean rights and duties, and the status of irregular forces (guerrillas, liberation armies) in time of war.

Perhaps out of the Iranian encounter will come increased possibilities for a more ambitious program of global reform. Perhaps we can look forward to a redrafting of the Vienna Conventions on Diplomatic and Consular Relations so as more nearly to balance the rights of the host country to political independence with the rights of the foreign country to diplomatic security. Already a commission of inquiry has been established under United Nations auspices to investigate the Iranian grievances. Its role and impact are at this time problematic. It is doubtful whether the commission, as established, will do more than investigate and report. What seems desirable is a permanent rather than an ad hoc mechanism, with a

<sup>6</sup> Acheson, *Remarks*, in ASIL, 57 PROCEEDINGS 13, 14 (1963).

<sup>7</sup> For a skeptical assessment of the relevance of international law to the Cuban missile crisis, see Gerberding, *International Law and the Cuban Missile Crisis*, in INTERNATIONAL LAW AND POLITICAL CRISIS 175-210 (Scheinman & Wilkinson eds., 1968). Compare the much more positive view in A. CHAYES, *THE CUBAN MISSILE CRISIS* (1974).

<sup>8</sup> Meeker, *The Dominican Situation in the Perspective of International Law*, 53 DEP'T STATE BULL. 60, 60 (1965).

continuing competence to investigate charges of crimes of state filed against tyrants whether deposed or not, and with the power to recommend remedies, as appropriate, including even the formation of special tribunals competent to pass judgment. But to affirm the necessity of such a step should not be confused with a positive attitude toward feasibility. As with such other "necessities" as the Nuremberg enterprise and nuclear disarmament, the need is overcome by the intractable dynamics of statism, which keep power and authority fragmented when it comes to the use of force either internationally or intranationally.

Assuming that the hostages are released unharmed and things calm down, it seems doubtful that much global reform along the lines proposed above will be undertaken. On the contrary. Efforts seem under way in the United States to restore the covert operations mission to the Central Intelligence Agency's repertoire. The only open question is the degree of accountability to Congress and the stringency of the requirement that the President give advance authorization. There is no serious prospect of conditioning CIA operations by imposing the constraints of domestic and international law. Even more clearly, the United States is moving to establish military forces and a doctrine for intervention in foreign countries. Indeed, the publicity surrounding the formation of the Rapid Deployment Force, designed especially for use in the Persian Gulf region, is very reminiscent of the 1960's enthusiasm for the Green Berets as the cutting edge of counterinsurgency doctrine, conceived of, especially in those early Kennedy years, as a way to defeat radical insurgencies in the Third World. This approach led to the Vietnam intervention, undertaken by Washington with only the most marginal attention to the constraining role of international law upon its sovereign discretion to use force as national policymakers saw fit. The one-sidedness of international law is but a reflection of the one-sidedness of international life in general.

Given this reality, have we not reached the stage where citizens through voluntary associations should organize to regulate the behavior of governments? At least, it would seem constructive to have a mechanism available for inquiring into the commission of state crime. Some past efforts in these directions exist. In Europe, the British philosopher Bertrand Russell established a "tribunal" to investigate charges of war crimes arising out of the American involvement in the Vietnam War.<sup>9</sup> More recently, a group of international legal and cultural figures has joined in an effort to proclaim a legal framework for human rights, the Algiers Declaration of the Rights of Peoples, issued on July 4, 1976.<sup>10</sup> Preliminary steps have been taken by an Italian entity, the Lelio Basso Foundation, to establish a tribunal that would investigate charges against governments and leaders flowing out of violations of the Algiers Declaration.

<sup>9</sup> The results of this investigation remain impressive as a moral and legal indictment of U.S. tactics in the Vietnam War. See *AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL* (Duffett ed., 1970).

<sup>10</sup> For the text of the declaration, see UN LAW/FUNDAMENTAL RIGHTS 219-23 (ed. Cassese, 1979).

In other settings, individuals and groups have gathered together to put forward normative demands. In 1978 the Delhi Declaration condemned nuclear weapons and proposed a treaty for their renunciation as weapons of war. Earlier, in 1975 a group of economists gathered in Mexico and issued the Cocoyac Declaration that called for a new global economic order that went well beyond the demands of governments for "a new international economic order."

How do initiatives such as these gain authoritativeness in international affairs? Suppose other groups issued less congenial declarations as to legal substance. How is it possible to choose among conflicting normative assertions? Would not chaos result if self-appointed lawmakers were endowed with legitimacy? These are real concerns that require extended discussion.<sup>11</sup> Suffice it to say here that government-generated law also depends often on soliciting respect from the actors in international life to achieve effectiveness. With populist initiatives, the path toward respect and observance is probably more difficult. Yet, it is not essentially different from the growth of effective law on the basis of conventional sources. The lawmaking claim of nongovernmental actors rests on the ultimate competence of individuals and groups to enact authoritative norms for behavior. Such norms do not enjoy an automatic validity and would not be valid at all in those arenas where validity is defined by reference to formal sources (for instance, the International Court of Justice). But in other arenas, including ones where international institutions and governments act, such populist norms can be invoked by participants, and if influential to some degree, then their role in shaping behavior is real and effective, and to that degree establishes part of the legal environment. Particularly with respect to crimes of state, there is an increasingly acknowledged institutional gap in the international legal order that is closed, if slightly, by private, nongovernmental normative initiatives that possess a certain law-creating impact.

Because law is clear on the books does not prove that it deserves approval or that it is adequate. The events in Iran show us that some clear rules of international law have been broken, but they also suggest that the content and impact of this law are arbitrary and one-sided. Given the historical shifts in the world, including the upsurge of power in the Third World, it is not clear why the old law should be kept as is. But it is also not assured by any means that governments will create a more balanced law surrounding the issues of embassy use and abuse, as well as whether someone accused of serious state crimes should be entitled to asylum rather than, say, to "a fair trial under impartial auspices." This may be the moment for individuals, churches, voluntary associations of various kinds to assert a human concern—that the future of international law is not *only* a matter for governments.

<sup>11</sup> My thoughts on these matters are developed further in *The Algiers Declaration of the Rights of Peoples and the Struggle for Human Rights*, in *id.* at 225–35, and *Keeping Nuremberg Alive*, in *HOMAGE TO LELIO BASSO* 811–20 (Amato et al., eds., 1979).

In time this concern, born of frustration and anxiety, could become a powerful basis on which to impose on sovereign states an effective framework of morally conditioned restraint. At least, it is worth pursuing this way out of surrendering unconditionally our birthright as moral beings to the monopolizing tendencies of the sovereign state.

RICHARD FALK

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN L. NASH \*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

### RIGHTS AND DUTIES OF STATES (U.S. *Digest*, Ch. 2, §1)

#### *Nonintervention in Internal Affairs*

In a memorandum dated December 29, 1979, to Acting Secretary of State Warren Christopher, the Legal Adviser of the Department, Roberts B. Owen, concluded that the military intervention in Afghanistan by the Soviet Union violated general international law and the United Nations Charter. Mr. Owen stated:

The Soviet Union has endeavored to justify its action in using Soviet armed forces to overturn the Afghan Government and install a new regime by reliance upon the 1978 Treaty of Friendship, Good-neighborliness, and Cooperation between the USSR and Afghanistan. The Treaty provides that the Parties shall "take by agreement appropriate measures to ensure the security, independence, and territorial integrity of the two countries" (Article 4). (It also provides for "respect for national sovereignty" and "non-interference in each other's internal affairs" (Article 1).)

President Carter has stated that "such gross interference in the internal affairs of Afghanistan is in blatant violation of accepted international rules of behavior. . . . Soviet efforts to justify this action on the basis of the United Nations Charter are a perversion of the United Nations . . . the Soviet action is a grave threat to peace. . . ."

It is plain the Soviet actions violate international law, including paramount principles of the United Nations Charter, for these reasons.

1. By the terms of Article 2, paragraph 4 of the UN Charter, the USSR is bound "to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." Among those Purposes are "respect for the principle of equal rights and self-determination of peoples" (Article 1, paragraph 2). The use of Soviet troops forcibly to depose one ruler and substitute another clearly is a use of force against the political independence of Afghanistan; and it just as clearly contravenes the principle of Afghanistan's equal international rights and the self-determination of the Afghan people.

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2. In elaboration of these fundamentals of the UN Charter and contemporary international law, the unanimously adopted General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (Resolution 2625 (XXV)) contains these pertinent passages:

Every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence.

....

No State . . . has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

. . . Also, no State shall organize . . . armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

3. No treaty between the USSR and Afghanistan can overcome these Charter obligations of the USSR. Article 103 of the Charter provides: "In the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

4. Nor is it clear that the treaty between the USSR and Afghanistan, concluded in 1978 between the revolutionary Taraki Government and the USSR, is valid. If it actually does lend itself to support of Soviet intervention of the type in question in Afghanistan, it would be void under contemporary principles of international law, since it would conflict with what the Vienna Convention on the Law of Treaties describes as a "peremptory norm of general international law" (Article 53), namely, that contained in Article 2, paragraph 4 of the Charter. While agreement on precisely what are the peremptory norms of international law is not broad, there is universal agreement that the exemplary illustration of a peremptory norm is Article 2, paragraph 4.

5. Moreover, the Soviet action conflicts with the terms of the Soviet-Afghan Treaty, since it is a violation of Afghanistan's national sovereignty and an interference in its internal affairs.

6. There is no plausible Soviet defense based on the contention that its intervention was designed to counter foreign intervention, e.g., Pakistani support of Afghani insurgents. Amin was fighting against rather than supported by the insurgents and any foreign supporters they may have, so it cannot seriously be argued that Soviet intervention to overturn Amin was in response to foreign intervention.

7. Nevertheless, the Soviet Union, on the eve of its overthrowing Amin, sent notes to the United Kingdom and other States seeking to justify its intervention not only with the terms of the Treaty but by reliance on the terms of Article 51 of the UN Charter. Such reliance would require that there had been an external armed attack on Afghanistan, which Afghanistan requested Soviet assistance to meet. The facts hardly support a rationale based on Article 51, both because

there is no clear evidence of an armed attack on Afghanistan to which the USSR responded nor is it plausible to suppose that Amin invited in the USSR to overthrow him.<sup>1</sup>

PROTECTION OF HUMAN RIGHTS  
(U.S. Digest, Ch. 3, §6)

*International Terrorism*

In a memorandum sent to the Department of State under date of October 29, Israel Singer, executive director of the North American branch of the World Jewish Congress, expressed concern that the UN Convention against the Taking of Hostages, then before the Sixth Committee for consideration, might allow an exemption or "loophole," from its applicability to national liberation movements, under certain wording in Article 12.

Anthony C. E. Quainton, Director of the Department's Office for Combatting Terrorism, replied to Mr. Singer under date of December 11, 1979, as follows:

The International Convention Against the Taking of Hostages (the "Hostages Convention") was adopted by consensus in the Sixth Committee of the U.N. General Assembly on December 7. The Convention will now be forwarded to the full General Assembly for an endorsing resolution which will open the Convention for signature.

... [T]he United States Government has worked diligently throughout the drafting process to produce a strong and effective convention based on the fundamental principle that *all* offenders involved in hostage-taking incidents must be prosecuted or extradited. We entirely agree with the view of the World Jewish Congress that the Hostages Convention should not provide an exemption from the aforementioned rule for members of national liberation movements or anyone else. In our opinion, Article 12(1) provides no such exemption and thus does not constitute a loophole in the coverage of the Convention. In essence, Article 12(1) ensures that all those who violate the Hostages Convention will be subject to prosecution or extradition under either the Convention itself or the Geneva Conventions of 1949/Geneva Protocols of 1977.

Without exception, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the "Civilians Convention") prohibits the taking of hostages during periods of armed conflict between two or more High Contracting Parties (even if the state of war is not recognized by one of them), in all cases of partial or total occupation of a State Party (even if the occupation meets with no armed resistance), and, with respect to hostage-taking, in all cases of armed conflict not of an international character occurring in the territory of a High Contracting Party. Hostage-taking is classified as a grave breach of the Civilians Convention, and the enforcement provisions common to all of the Geneva Conventions require States Parties to prosecute or extradite all persons alleged to have committed, or to have ordered to be committed, such grave breaches.

In 1977, two protocols to the 1949 Conventions were concluded which are applicable to the situations listed above. In addition,

<sup>1</sup> Dept. of State File No. P80 0016-0474.



Article 1(4) of Protocol I brings wars of national liberation within the concept of international armed conflict for the first time. In particular, Article 1(4) refers to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes." Therefore, States Parties to Protocol I will have an absolute obligation to prosecute or extradite individuals who directly or indirectly participate in the taking of hostages during international armed conflicts of the type covered by Article 1(4), in addition to their obligations under the Geneva Conventions during other types of armed conflict or occupation.

In summary, Article 12(1) of the Hostages Convention obligates States, without exception, to prosecute or extradite persons who commit offenses under the terms of the Convention. States Parties to the Convention must prosecute or extradite offenders pursuant to its provisions, unless the Geneva Conventions/Geneva Protocols are applicable to a particular situation *and* the States Parties concerned "are bound under those conventions to prosecute or hand over the hostage-taker." It should be noted that the word "conventions" in this latter phrase is spelled with a lower case "c" in the final version of the Convention (set forth in U.N. Document A/C.6/34/L.12), so that the phrase now refers to *both* the Geneva Conventions and the Geneva Protocols. Thus, if for any reason a State Party to the Hostages Convention is not bound to prosecute or extradite an offender under the Geneva Conventions/Geneva Protocols, the prosecute or extradite requirements of the Hostages Convention apply. Accordingly, Article 12(1) does not provide a loophole for members of national liberation movements or anyone else and does not supply a means by which any State Party to the Hostages Convention can escape the prosecute or extradite requirement.<sup>1</sup>

PEACEFUL USES OF OUTER SPACE  
(U.S. *Digest*, Ch. 8, §6)

*Moon Treaty*

Senator Frank Church, chairman of the Senate Committee on Foreign Relations, and Senator Jacob K. Javits, ranking minority member of the

<sup>1</sup> Dept. of State File Nos. P80 0019-2101 and 2098.

The four Geneva Conventions, all dated August 12, 1949, are: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention); the Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Second Convention); the Convention Relative to the Treatment of Prisoners of War (Third Convention); and the Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention). See, respectively: TIAS No. 3362, 6 UST 3114, 75 UNTS 31; TIAS No. 3363, 6 UST 3217, 75 UNTS 85; TIAS No. 3364, 6 UST 3316, 75 UNTS 135; and TIAS No. 3365, 6 UST 3516, 75 UNTS 287.

Two Protocols Additional to the Geneva Conventions were adopted at Geneva, June 8, 1977: Protocol I, Relating to the Protection of Victims of International Armed Conflicts, and Protocol II, Relating to the Protection of Victims of Non-International Armed Conflicts. The United States signed both protocols on December 12, 1977.

The UN General Assembly adopted the Convention against the Taking of Hostages, as recommended by the Sixth Committee, on December 17, 1979, by consensus. UN Doc. GA Res. 34/146, *reprinted in* 74 AJIL 277 (1980).

committee, addressed a joint letter to Secretary of State Cyrus R. Vance on October 30, 1979, in which they expressed concern that several aspects of the (United Nations) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty) could prove damaging to the national economic and security interests of the United States.

One source of concern was their view that the law of the sea negotiations had shown that the meaning attached to the concept, "common heritage of mankind," by many countries of the world was contrary to the economic interests of the United States and of other countries with free enterprise/free market economies. Another source of concern was their view that the treaty would result in a "de facto moratorium" on resource-related activities in outer space (through the commitment to negotiate a subsequent resource regime), which would not deter the Soviets from moving forward in resource development under the guise of scientific investigation because they would have "no fear of significant competition from the West, which must rely on its industry to provide commercial initiative."

Secretary Vance, in his replies to Senators Church and Javits on November 28, noted that on November 1, Ambassador Richard W. Petree had placed on record the U.S. interpretation of various treaty provisions, including those of concern to the Senators, during the debate on the resolution of the UN Special Political Committee commending the Moon Treaty and recommending that it be opened for signature. The United States had joined with 27 other countries, including the United Kingdom, the Federal Republic of Germany, France, Belgium, the Netherlands, Italy, Canada, Australia, and Japan, in sponsoring the resolution, which had been adopted by consensus on November 2. (The General Assembly approved the resolution on December 5, 1979.)

The Secretary clarified the legal significance of the U.S. actions to date in connection with the treaty, stating, in part:

Of course, our cosponsorship of the resolution and joining in consensus approval of the resolution does not entail legal obligations for the United States. Only ratification of the Treaty after the advice and consent of the Senate can impose binding obligations upon the United States. The Administration has not yet turned to questions relating to signature of the Treaty or its submission to the Senate. When we begin to consider such matters, we will give the most careful consideration to concerns which you and others have raised in regard to the Moon Treaty. I would, however, like to address myself to some of your points in a preliminary way.

In regard to the important matter of the exploitation of the natural resources of the moon and other celestial bodies, the Treaty contains no moratorium on exploitation and, in fact, has provisions designed to facilitate and encourage such exploitation. For example, Article XI(3) of the Moon Treaty makes clear that although the 1967 Outer Space Treaty provides that "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means," this "non-appropriation" principle applies to the natural re-

sources of celestial bodies only when such resources are "in place." Thus, Article XI(3) would permit ownership to be exercised by States or private entities over those natural resources which have been removed from their "place" on or below the surface of the moon or other celestial bodies. (Such removal is permitted by the article contained in the 1967 Outer Space Treaty which states, *inter alia*, that "Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States. . . .")

We also do not believe that the Treaty would benefit the Soviet Union to the disadvantage of the United States. While the Soviet Union first proposed a Moon Treaty, their draft text contained no detailed provisions concerning exploitation. It was, rather, characterized by the Soviets as a "navigation treaty." It was the United States which in 1972 first proposed detailed provisions concerning exploitation and the common heritage concept. (The 1967 Outer Space Treaty, which the United States has ratified with the Senate's advice and consent, already had provided that outer space was the "common province" of mankind and that "the exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development . . ." (Article I).) Until July of 1979, the Soviet Union maintained strong opposition to the common heritage concept, and it was essentially because of this opposition that the Treaty was not concluded several years ago. Likewise, the Soviets, as well as the United States, opposed the concept of a moratorium on exploitation of natural resources.<sup>1</sup>

The statement of Ambassador Richard W. Petree, U.S. Deputy Representative to the Security Council, enclosed with the Secretary's letters, summarized important U.S. space activities during the year and U.S. views on issues before the UN Outer Space Committee. In regard to the Moon Treaty, Ambassador Petree stated, in part:

[T]he draft Moon Treaty . . . is, in its own right, a meaningful advance in the codification of international law dealing with outer space, containing obligations which are of both immediate and long-term application in regard to such matters as the safeguarding of human life on celestial bodies, the promotion of scientific investigation and the exchange of information relative to and derived from activities on celestial bodies, and the enhancement of opportunities and conditions for evaluation, research and exploitation of the natural resources of celestial bodies. We think it useful to address some of the especially significant provisions contained in the draft Moon Agreement, this "fifth star" in the constellation of outer space treaties.

The common heritage concept, which was initially suggested by Argentina, but formally proposed by the United States in 1972, is set forth in Article XI, paragraph 1, which makes clear that its meaning for purposes of the Moon Treaty, is to be found within the Moon Treaty itself. Likewise, its meaning in the Moon Treaty is without prejudice to its use or meaning in any other treaty. Article XI also makes clear that the parties to the treaty undertake, as the exploita-

<sup>1</sup> Dept. of State File Nos. P79 0156-0154, P80 0016-0477, and P80 0016-0480.

tion of the natural resources of the celestial bodies other than the earth is about to become feasible, to enter into negotiations to establish a mutually acceptable international regime to govern the exploitation of those mineral and other substantive resources which may be found on the surface or subsurface of a celestial body. My Government will, when and if negotiations for such a regime are called for under Articles XI and XVIII, make a good faith effort to see that such negotiations are successfully concluded. Each of the participants in a regime conference will, of course, have to evaluate any treaty that emerges from the conference in the light of its own national interests. For the United States, this would require a conclusion that the treaty is balanced and reasonable and would then, as a constitutional matter, require submission to the Senate for its advice and consent, just as we have sought and obtained advice and consent to United States ratification of the four outer space treaties now in force.

The draft treaty, as part of the compromise by many delegations, places no moratorium upon the exploitation of the natural resources on celestial bodies by States or their nationals, but does provide that any exploitation of the natural resources of celestial bodies be carried out in a manner compatible with the purposes specified in paragraph 7 of Article XI and the provisions of paragraph 2 of Article VI. We view the purposes set forth in paragraph 7 as providing both a framework and an incentive for exploitation of the natural resources of celestial bodies. They constitute a framework because even exploitation which is undertaken by a State Party to the Treaty or its nationals outside of the context of any such regime, either because the exploitation occurs before a regime is negotiated or because a particular State may not participate in the international regime once it is established, will have to be compatible with those purposes set forth in Article XI, paragraph 7, of the Moon Treaty.

In a letter of November 13, 1979, Senator Richard Stone, also a member of the Senate Committee on Foreign Relations, urged Secretary Vance to reevaluate the U.S. position on the draft moon treaty, which he described as having "extremely dangerous potentialities" because it appeared to decrease "the ability of the United States to advance in yet unexplored fields" and to "greatly inhibit the actions and desires of U.S. corporations in space, negate the notion of free enterprise, and . . . place the United States in a position subservient to the Soviet Union."

J. Brian Atwood, Assistant Secretary of State for Congressional Relations, replied to Senator Stone on behalf of the Secretary in a letter of January 2, 1980, as follows:

The provisions of the Moon Treaty must be considered in the context established by the 1967 Treaty on Principles Governing the Activities of States on the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (the "Outer Space Treaty") to which approximately 75 countries, including the United States, are parties. This Treaty received the advice and consent of the Senate without reservations.

The Outer Space Treaty provides, *inter alia*, that:

—"The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the

interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind" (Article I);

—"Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality . . . and there shall be free access to all areas of celestial bodies" (Article I);

—"Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means" (Article II);

—"The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty" (Article VI);

—"In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall . . . conduct exploration of [the moon and other celestial bodies] so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extra-terrestrial matter and, where necessary, shall adopt appropriate measures for this purpose" (Article IX);

—"All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity" (Article XII).

The Moon Treaty places no limitations on the exploitation of celestial natural resources by any government or private entity beyond those already contained in the 1967 Outer Space Treaty except that the "activities with respect to the natural resources of the moon shall be carried out in a manner compatible with the purposes specified in paragraph 7" (See Article XI(8) and the environmental protections contained in Article VII). . . .

In regard to the international regime dealt with in Article XI(5) of the Moon Treaty, neither the "common heritage of mankind" concept as embodied in the Moon Treaty nor any other provision of the Treaty compels any specific form of international arrangement for the regulation of the exploitation of moon or other celestial body resources. Neither the Treaty nor the "common heritage" concept entails any specific obligation on States in regard to the establishment of such a regime except the commitment to engage in good faith negotiations to establish a mutually acceptable international regime to govern the exploitation of natural resources on celestial bodies when exploitation of such natural resources is about to become feasible.

The Law of the Sea experience with the common heritage concept, while relevant, would in no way be controlling regarding the negotiations of any such future agreement. Article XI(1) of the Moon

Treaty makes clear that the common heritage concept in the Moon Treaty finds its meaning totally within the text of the Moon Treaty itself. A future negotiation for the regime to govern moon or other celestial body resources could, however, benefit from the Law of the Sea experience, just as it could benefit from the experience of such multinational cooperative ventures in outer space as INTELSAT, which organization is evidence that the criteria set forth in Article XI(7) of the Moon Treaty can be met by institutional arrangements quite different from those contemplated in the Law of the Sea negotiations on sea-bed mining.

At any future negotiation to establish an international regime, there would, of course, be no obligation that agreement be reached at the conference or that the United States accept any results of the negotiations. The United States would be free at that time to assess any results against its own national interests and priorities. Any resulting treaty establishing an international regime specifically concerned with the exploitation of celestial natural resources would also have to be signed and presented to the Senate for its advice and consent before it would become binding on the United States. Refusal by a state to accept any such international regimen would not preclude that state or its nationals from exploiting the natural resources of the moon or other celestial bodies.

We do not believe that the Moon Treaty language would inhibit commercial investment by non-governmental entities in the exploitation of celestial natural resources or the operation of the free enterprise system in outer space generally. The article of the Moon Treaty most relevant, Article XI, makes clear that all States Parties to the Treaty have a significant interest in the possible future exploitation of the natural resources of the moon and other celestial bodies and that their views are to be given serious consideration at any future international conference which may attempt to establish an international regime specifically concerned with the exploitation of celestial natural resources. Given the legal context established by the 1967 Outer Space Treaty, such an interest can be neither denied nor ignored.

It is important to note that efforts by some developing countries to have the Treaty provide for a moratorium on the exploitation of the natural resources of celestial bodies except under the auspices of an international regime were rejected. The Treaty contains no moratorium on exploitation and, in fact, has provisions designed to clarify certain important ambiguities in the 1967 Outer Space Treaty and to otherwise facilitate and encourage the exploitation of celestial natural resources. For example, Article XI(3) of the Moon Treaty makes clear that although the 1967 Outer Space Treaty provides that "Outer Space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means," this "non-appropriation" principle applies to the natural resources of celestial bodies only when such resources are "in place."<sup>2</sup>

<sup>2</sup> Dept. of State File Nos. P79 0164-0562 and P80 0001-2091. For further explanation of the latter point, see Secretary Vance's letter of Nov. 28, 1979, *supra* at p. 423.

On December 5, 1979, the UN General Assembly adopted by consensus, without

FOREIGN ASSETS CONTROL  
(U.S. *Digest*, Ch. 10, §5)

*Situation in Iran*

Following an attack on the American Embassy at Tehran on November 4, 1979, by Iranian militants and their seizure of some 60 American members of the United States mission as hostages, Iranian authorities, including Ayatollah Ruhollah Khomeini, then de facto Chief of State, the Foreign Minister, the commander of the Revolutionary Guard, the public prosecutor, and the judiciary, announced their approval and support of these actions within a matter of 24 hours. Detention of the hostages continued, despite intensive efforts through diplomatic channels to obtain their release.

On November 12, 1979, the President issued Proclamation 4702, which embargoed importation into U.S. customs territory of any crude oil produced in Iran (except crude aboard vessels prior to November 13) or of any unfinished oil or finished products refined in U.S. possessions or free trade zones from such crude. Proclamation 4702 read:

The Secretary of the Treasury in a memorandum dated November 12, 1979, and the Secretary of Energy in consultation with the Secretaries of State and Defense, have informed me that recent developments in Iran have exacerbated the threat to the national security posed by imports of petroleum and petroleum products. Those developments underscore the threat to our national security which results from our reliance on Iran as a source of crude oil. The Secretaries have recommended that I take steps immediately to eliminate the dependence of the United States on Iran as a source of crude oil.

I agree with these recommendations and that the changes proposed are consistent with the purposes of Proclamation 3279, as amended.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States, including Section 232 of the Trade Expansion Act of 1962, as amended, (19 U.S.C. 1862) do hereby proclaim that:

Section 1. Section 1 of Proclamation 3279, as amended, is further amended by the addition of a new paragraph (e) to read as follows:

Sec. 1(e). Notwithstanding any other provision of this Proclamation, no crude oil produced in Iran (except crude oil loaded aboard maritime vessels prior to November 13, 1979) or unfinished oil or finished products refined in possessions or free trade zones of the

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debate, Resolution 34/68, which was identical in substance to the draft resolution contained in the report of the Special Political Committee, UN Doc. A/34/664 (Nov. 12, 1979). The operative portion of Resolution 34/68 commended the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the text of which was annexed), requested that the Secretary-General open it for signature and ratification at the earliest possible date, and expressed the hope of the General Assembly for the widest possible adherence to it. UN Doc. A/RES/34/68 (Dec. 14, 1979). The agreement is *reprinted* in 18 ILM 1434 (1979).

United States from such crude oil, may be entered into the customs territory of the United States.

Sec. 2. Section 11 of Proclamation No. 3279, as amended, is further amended in paragraph (1) to read as follows:

(1) The term "imports," when applied to crude oil other than that produced in Iran, includes both entry for consumption and withdrawal from warehouses for consumption, but excludes unfinished oil and finished products processed in the United States territories and foreign trade zones from crude oil produced in the United States.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of November, in the year of our Lord nineteen hundred and seventy-nine and of the Independence of the United States of America the two hundred and fourth.<sup>1</sup>

On November 14, in response to reports that the Government of Iran was about to withdraw its funds from the United States, the President issued Executive Order 12170, which declared a national emergency to deal with the threat to the national security caused by the situation in Iran and blocked all Iranian governmental property. Executive Order 12170 read:

Pursuant to the authority vested in me as President by the Constitution and laws of the United States including the International Emergency Economic Powers Act, 50 U.S.C.A. sec. 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. sec. 1601 *et seq.*, and 3 U.S.C. sec. 301,

I, JIMMY CARTER, President of the United States, find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.

I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

The Secretary of the Treasury is authorized to employ all powers granted to me by the International Emergency Economic Powers Act to carry out the provisions of this order.

This order is effective immediately and shall be transmitted to the Congress and published in the *Federal Register*.<sup>2</sup>

The President reported to the Congress on his action, as required by section 204(b) of the International Emergency Economic Powers Act (Public Law 95-223, 91 Stat. 1627, 50 U.S.C. §1703(b)), in a message that read as follows:

<sup>1</sup> 44 Fed. Reg. 65581 (1979).

<sup>2</sup> *Id.* at 65729.



*To the Congress of the United States:*

Pursuant to Section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C.A. §1703, I hereby report to the Congress that I have today exercised the authority granted by this Act to block certain property or interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran.

1. The circumstances necessitating the exercise of this authority are the recent events in Iran and the recent actions of the Government of Iran.

2. These events and actions put at grave risk the personal safety of United States citizens and the lawful claims of United States citizens and entities against the Government of Iran and constitute an extraordinary threat to the national security and foreign policy of the United States.

3. Consequently, I have ordered blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are or come within the possession of persons subject to the jurisdiction of the United States. I have authorized the Secretary of the Treasury to employ all powers granted to me by the International Emergency Economic Powers Act to carry out the blocking.

4. Blocking property and property interests of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran will enable the United States to assure that these resources will be available to satisfy lawful claims of citizens and entities of the United States against the Government of Iran.

5. This action is taken with respect to Iran for the reasons described in this report.<sup>3</sup>

The prohibitions or transactions in property in which Iran has an interest or with respect to securities registered or inscribed in the name of Iran are implemented by the Iranian Assets Control Regulations (31 C.F.R. 535).

ECONOMIC SANCTIONS  
(U.S. *Digest*, Ch. 10, §12)

*Zimbabwe-Rhodesia*

Public Law 96-60, the Department of State Authorization Act, Fiscal Years 1980 and 1981, approved August 15, 1979 (93 Stat. 395), contained the following provision regarding sanctions against Zimbabwe-Rhodesia:

SEC. 408.(a) The Congress finds that—

(1) It is in the interest of the United States to encourage the development of a multiracial democracy in Zimbabwe-Rhodesia based on both majority rule and minority rights:

<sup>3</sup> 15 WEEKLY COMP. OF PRES. DOC. 2118 (Nov. 19, 1979). Private U.S. and Iranian assets were not affected by the measures.

(2) the elections held in April 1979, in which Zimbabwe-Rhodesians approved through elections the transfer of power to a black majority government, constituted a significant step toward multiracial democracy in Zimbabwe-Rhodesia;

(3) the Government of Zimbabwe-Rhodesia has expressed its willingness to negotiate in good faith at an all-parties conference, held under international auspices, on all relevant issues;

(4) it is in the foreign policy interest of the United States to further continuing progress toward genuine majority rule in Zimbabwe-Rhodesia and to encourage a peaceful resolution of the conflict; and

(5) the Government of Great Britain, which retains responsibility for Zimbabwe-Rhodesia under international law, has not yet taken steps to recognize the legality of the new government.

(b) In view of these considerations, the President shall—

(1) continue United States efforts to promote a speedy end to the Rhodesian conflict; and

(2) terminate sanctions against Zimbabwe-Rhodesia by November 15, 1979, unless the President determines it would not be in our national interest to do so and so reports to the Congress.

If the President so reports to the Congress, then sanctions shall be terminated if the Congress, within 30 calendar days after receiving the report under paragraph (2), adopts a concurrent resolution stating in substance that it rejects the determination of the President. A concurrent resolution under the preceding sentence shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976 and in the House of Representatives in accordance with the procedures applicable to the consideration of resolutions of disapproval under section 36(b) of the Arms Export Control Act.<sup>1</sup>

On November 14, 1979, in a memorandum to the Secretary of State, President Carter determined that it was in the national interest of the United States to continue sanctions against Zimbabwe-Rhodesia and requested a report from the Secretary immediately upon the conclusion of the constitutional conference on Zimbabwe-Rhodesia then in progress in London (the Lancaster House conference), which would describe its outcome and make recommendations for action by the United States with respect to termination of sanctions.<sup>2</sup> Elsewhere, the President let it be known that "[w]e would . . . be prepared to lift sanctions when a British Governor assumes authority in Salisbury and a process leading to impartial elections has begun. Our policy will continue to be that no party should have a veto over fair settlement proposals."<sup>3</sup>

On the basis of proposals developed by the parties at the Lancaster House conference, the United Kingdom assumed legal and constitutional authority in Rhodesia with the arrival in Salisbury on December 12, 1979, of a British governor, Lord Soames, and a process leading to impartial elections within a British constitutional framework was set in train.

<sup>1</sup> 93 Stat. 405-406, 22 U.S.C. §287c note.

<sup>2</sup> 44 Fed. Reg. 67073 (1979).

<sup>3</sup> 15 WEEKLY COMP. OF PRES. DOC. 2119-2120 (Nov. 19, 1979).

On December 1, 1979, the President issued Executive Order 12183, "Revoking Rhodesian Sanctions," which read:

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c), and in order to terminate current limitations relating to trade and other transactions involving Zimbabwe-Rhodesia, it is hereby ordered as follows:

1-101. (a) Subject to the provisions of this order, the following are hereby revoked with respect to transactions occurring after the effective date of this order:

- (1) Executive Order 11322 of January 5, 1967 (32 F.R. 119);
- (2) Executive Order 11419 of July 29, 1968 (33 F.R. 10837); and
- (3) Executive Order 11978 of March 18, 1977 (42 F.R. 15403).

(b) To the extent consistent with this order, all determinations, authorizations, regulations, rulings, certificates, orders, directives, licenses, contracts, agreements, and other actions made, issued, taken, or entered into under the provisions of such Executive orders and not previously revoked, superseded, or otherwise made inapplicable, shall continue in full force and effect until amended, modified, or terminated by appropriate authority.

1-102. (a) The Secretaries of State, the Treasury, Commerce, and Transportation, and the heads of other government agencies, shall retain the authority and responsibility for the enforcement of Executive Orders 11322, 11419, and 11978 with respect to transactions occurring prior to the effective date of this order.

(b) The revocation, in Section 1-101 of this order, of such prior Executive orders shall not affect:

(1) any act done or omitted to be done or any suit or proceeding finished or started in civil or criminal cases prior to the revocation, but all such liabilities, penalties, and forfeitures under the Executive orders shall continue and may be enforced in the same manner as if the revocation had not been made; or

(2) any violation of any rules, regulations, orders, licenses, or other forms of administrative action under those revoked orders during the periods those orders were in effect.

1-103. (a) The Secretaries of State, the Treasury, Commerce, and Transportation, and the heads of other government agencies, shall take the appropriate measures to implement this order.

(b) In carrying out their respective functions and responsibilities under this order, the Secretaries of the Treasury, Commerce, and Transportation, and the heads of other government agencies, shall, as appropriate, consult with the Secretary of State. Each such Secretary and agency head and the Secretary of State shall also consult with other government agencies and private persons, as appropriate.<sup>4</sup>

Subsequently, in letters to Congressmen Clement J. Zablocki and Stephen J. Solarz (chairman of the House Committee on Foreign Affairs, and of its Subcommittee on African Affairs, respectively), dated December

<sup>4</sup> 44 Fed. Reg. 74787-74788 (1979).

31, 1979, and January 2, 1980, and to Senators Frank Church and George S. McGovern (chairman of the Senate Committee on Foreign Relations, and of its Subcommittee on African Affairs, respectively), dated January 2 and 3, 1980, Richard M. Moose, Assistant Secretary of State for African Affairs, wrote:

During the recent hearings in the House and Senate on Rhodesian sanctions, questions were raised concerning the relationship between action by the United States and action by the United Nations Security Council in the termination of sanctions.

President Carter terminated the application of sanctions by the United States against Rhodesia on December 16 because the objectives of the sanctions had been achieved. On December 21, the United Nations Security Council adopted Resolution 460 which calls upon all members of the United Nations to terminate the measures previously taken against Rhodesia under Chapter VII of the Charter. This action by the Security Council represents an authoritative confirmation that the objectives of the sanctions have been achieved and that there is no longer any basis for their continued application. It eliminates any doubt that the position of the United States in this matter is fully consistent with our international legal obligations.<sup>5</sup>

<sup>5</sup> Dept. of State File Nos. P80 0016-1422, 1426, 1424, and 1428.

On Dec. 12, 1979, the Parliament of Zimbabwe-Rhodesia had repealed the unilateral declaration of independence, enacted on Nov. 11, 1965, and had voted to dissolve the government led by Bishop Abel Muzorewa.

## JUDICIAL DECISIONS

ALONA E. EVANS

*Aliens—nonimmigrant status—expulsion for failure to maintain student status—Iranian nationals*

NARENJI v. CIVILETTI. No. 79-2460.  
U.S. Court of Appeals, D.C. Cir., Dec. 27, 1979.

On November 13, 1979, the Attorney General, acting on the order of the President, issued a regulation that required all Iranian nationals in the United States with student status who were above the secondary school level to report their current whereabouts and status to the Immigration and Naturalization Service (8 C.F.R. §214.5). Failure to report would subject the alien to deportation (8 U.S.C. §1251(a)(9)). Plaintiffs challenged the regulation on several grounds: the Attorney General did not have the authority to issue such an order; the regulation constituted classification of aliens on the basis of nationality in violation of the Equal Protection Clause of the Constitution; the effect on the national interest of the deterioration of U.S. relations with Iran, including the holding of Embassy personnel as hostages in the U.S. Embassy at Tehran, did not warrant the assertion of such controls. The district court found for plaintiffs. On appeal, the court of appeals reversed this decision with directions to dismiss the complaints and enter judgment for defendants.

There was no doubt, in the opinion of Circuit Judge Robb, that the Attorney General had the authority under the immigration laws to promulgate the regulation at issue in pursuance of his duty to carry out these laws (8 U.S.C. §1103(a)). He was specifically authorized to establish the conditions of admission and of deportation of aliens (8 U.S.C. §§1184(a), 1251(a)(9)). The immigration laws were broad enough to permit the Attorney General to make distinctions among nonimmigrant aliens on the basis of nationality. The court stated that such "classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis."<sup>1</sup> The "rational basis" here was the condition of relations between the United States and Iran. Circuit Judge Robb said:

To reach a contrary conclusion the District Court undertook to evaluate the policy reasons upon which the regulation is based. In doing this the court went beyond an acceptable judicial role. Certainly in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and

<sup>1</sup> No. 79-2460 (D.C. Cir. Dec. 27, 1979) at 4.

other officials. . . . This court is not in a position to say what effect the required reporting by several thousand Iranian students, who may be in this country illegally, will have on the attitude and conduct of the Iranian government. That is a judgment to be made by the President and it is not for us to overrule him, in the absence of acts that are clearly in excess of his authority.<sup>2</sup>

Circuit Judge MacKinnon, concurring, emphasized that issuance of the regulation was justified by foreign policy considerations.

*Extradition—definition of political offense*

IN THE MATTER OF THE EXTRADITION OF McMULLEN.\*

Magistrate No. 3-78-1099 MG.

U.S. District Court, C.D. Cal., May 11, 1979.

Great Britain requested the extradition of the accused on a charge of setting off explosives at the Claro Barracks, a British Army installation in Ripon, North Yorkshire, in 1974. The request was made pursuant to the Extradition Treaty with the United States of 1972 (28 UST 227, TIAS No. 8468) (Treaty). The accused, a deserter from the British Army and a member of the Provisional Wing of the Irish Republican Army (Provos), contended that the offense charged was a political offense for which he could not be extradited under the terms of the Treaty. It was argued on behalf of the requesting state that the accused's act was motivated by personal considerations. The extradition magistrate, denying extradition, held that the offense charged was a political act.

The extradition magistrate pointed out that beginning in 1970, Northern Ireland was in a state of public emergency or insurrection, which had been recognized as such by the British Government. During this period the Provos had engaged in terrorist and guerrilla activity there with a view to bringing about the "nationalization"<sup>1</sup> of Northern Ireland, *i.e.*, its union with the Republic of Ireland. The court observed that the existence of this politically disturbed situation was "one of the steps necessary in the application of the political exception defense."<sup>2</sup>

Following the rule of *Re Casticni* ([1891] 1 Q.B. 149), which the court took to be the standard in the United States for the definition of political offense,<sup>3</sup> the defense of the political offense would be available to the accused if he could show that the offense charged took place during a political uprising and that he was a member of a political group participating in that uprising. In the opinion of the extradition magistrate, the accused met both conditions, in that he had acted during an insurrection as a member of the insurrectionary group; consequently, his offense was

<sup>2</sup> *Id.*, 4-6, citing *Mathews v. Diaz*, 423 U.S. 67, 81-82 (1976), 71 AJIL 146 (1977), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

\* Text of decision provided by John F. Murphy, Esq.

<sup>1</sup> Magistrate No. 3-78-1099 MG (C.D. Cal. May 11, 1979) at 2.

<sup>2</sup> *Id.*, 4.

<sup>3</sup> Citing *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *judgment vacated and case remanded* for further proceedings under 18 U.S.C. §3184, 355 U.S. 393 (1958).

a political offense within the terms of the Treaty. The court found no merit in the Government's argument, on behalf of the requesting state, that the accused's acts were a "product of his own vengeance or personal motivation free of any political consideration."<sup>4</sup> The court said:

There is too much evidence to the contrary supportive of a finding that he acted as a member of PIRA [*i.e.*, Provos], his activities were directed by persons in authority in the PIRA, and that the bombing was a crime incidental to and formed as part of a political disturbance, uprising or insurrection and in furtherance thereof.<sup>5</sup>

In the opinion of the extradition magistrate, the Government was not able to carry the burden of proof that the offense was personal and not political in nature.

*Extradition—definition of political offense—attack against civilian population*

IN THE MATTER OF THE EXTRADITION OF EAIN.\*

Magistrate No. 79 M 175.

U.S. District Court, N.D. Ill., Dec. 18, 1979.

The Government of Israel requested the extradition of the accused pursuant to the Extradition Convention with the United States of 1963 (14 UST 1707, TIAS No. 5476, 484 UNTS 283) (Convention). The accused was charged with murder and causing bodily harm with aggravating intent, offenses that had been committed by placing an explosive device in a trash bin in a public market square; the resulting explosion caused two deaths and injuries to 36 other people. It appeared that the accused and a friend had gone to Tiberias on May 14, 1979, where, after they had walked about talking politics, the accused agreed to join Al Fatah, a branch of the Palestine Liberation Organization (PLO). At the request of his friend, who was subsequently the principal witness against accused, the accused agreed to plant an explosive device in a rubbish bin selected at random in the market area. A youth rally and religious festival were being held in Tiberias at this time. Following the explosion, the accused fled to the United States. It was argued on his behalf that the evidence submitted in support of the extradition request did not establish probable cause to believe that the accused had committed the offenses charged and that the offenses charged were political in character, hence non-extraditable. The extradition magistrate granted the extradition request, holding that there was probable cause to believe that the accused had committed the offenses charged and that these offenses were not political in character within the meaning of the law of extradition.

At the outset, the court was satisfied that the arrest of the accused in Chicago, pursuant to a warrant requested by Israel, conformed to the requirements of due process of law and that the evidence submitted by the requesting state met the requirements of the Convention and rele-

<sup>4</sup> Magistrate No. 3-78-1099 MG at 6.

<sup>5</sup> *Ibid.*

\* Text of decision provided by Dr. E. Eiselen.

vant federal and state law. The accused attacked the sufficiency of evidence of the statement made by the principal witness on the grounds, *inter alia*, that this statement was self-serving and had possibly been made under duress, that it was written in Hebrew and may not have been understood by him, and that he had recanted it twice. The court said:

Each of these contentions is directed to the evidentiary or qualitative sufficiency of the statements. The parameters of probable cause hearing are not to determine guilt or innocence; an extradition hearing is not a trial. The sworn statement of a co-defendant or accomplice must be considered together with all other facts adduced at the hearing.<sup>1</sup>

The court also pointed out that in an extradition proceeding "I may only receive evidence offered by the accused that explains or clarifies the demanding country's proof. The accused does not have the right to contradict the demanding country's proof or pose questions of credibility."<sup>2</sup> The court rejected other evidence, e.g., an alibi that the accused sought to submit, on the grounds that such evidence could only be considered at the trial stage, not at the probable cause hearing.

Magistrate Jurco found no merit in accused's contention that his extradition was actually being sought for trial for the offense of membership in a proscribed political organization, a nonextraditable offense, and that he would be tried in a military court. The evidence showed that the charges were those listed in the extradition request and that trial would be in a civil court.

Finally, the accused argued that his extradition was barred because the charges were political in character, hence nonextraditable (Convention, Art. VI(4)). The accused sought to support this contention by pointing out that there had been military and political conflict between Israel and the Arab states together with the Palestinian people for some three decades and that the PLO, an organization which had official observer status at the United Nations as the representative of the Palestinian Arabs, was dedicated to supplanting the state of Israel in Palestine. He argued that, given this frame of reference, the alleged offenses could be said to have had a political objective and that the burden of proof to show otherwise was on the requesting state. It was argued on behalf of the requesting state that the offenses charged were acts of terrorism which were directed against innocent civilians. Addressing the argument of the accused, Magistrate Jurco said:

That argument overlooks a significant issue—that it is [the] accused whose acts are subject to scrutiny; he must show the link between the crimes he allegedly committed and their relation to the political objective. Exemption of relative political crimes exists only where such crimes are directed against the political organization of the State. The achievement of that political objective has not been

<sup>1</sup> Magistrate No. 79 M 175 (N.D. Ill. Dec. 18, 1979) at 8-9.

<sup>2</sup> *Id.*, 9-10, citing *Collins v. Loisel*, 259 U.S. 309 (1922), and *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973), 68 AJIL 127 (1974).



linked to the means used and the target involved. The evidence shows a random selection of the locale; a locale where a Youth Rally and religious festival was [*sic*] being held in Tiberias, Israel. Defendant's argument seeks to lead to a conclusion that every Israeli present in Tiberias is in the military service of his country and therefore cannot be regarded as a civilian; that a violent act by a Palestinian-Arab against an Israeli comes within the political offense exception.

Accepting that defendant was a member of a P.L.O. organization and with motivation toward its political objective, there is nothing in the evidence which "tends" to show that this act was directed in opposition to the State of Israel and that the crime furthered the cause of his group objective. He has not shown the relation between these crimes, the method of their commission and the political objective. The random and indiscriminate placing of an explosive near a bus stop on a public street in any trash bin defuses any theory that the target was a military one or justified by any military necessity. It was an isolated act of violence. The commission of these alleged offenses is so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government of Israel.<sup>3</sup>

*Jurisdiction—high seas—search and seizure of foreign vessel—Convention on the High Seas of 1958—special arrangement with flag state to search its vessel*

UNITED STATES v. DOMINGUEZ. 604 F.2d 304.  
U.S. Court of Appeals, 4th Cir., Aug. 10, 1979.

Defendants were convicted for conspiracy to import marijuana into the United States in violation of 21 U.S.C. §§952(a), 960(a)(1), 963, 841(a)(1), and 846. Two of the defendants had arranged with the captain of a trawler of U.S. registry to smuggle marijuana into the United States. The captain reported this plan to the U.S. Customs Service and agreed to keep it informed about developments, with a view to obtaining a reward for the capture of the smugglers. Defendants' plans to contact the *Sea Crust*, a vessel of Bahamian registry, at a point 40 miles off the coast of North Carolina were unsuccessful. Later, a Coast Guard cutter and a Customs Service aircraft set out to find the *Sea Crust*. When the ship was observed at a point 40 miles off the coast of North Carolina, the Coast Guard hailed it, having previously received permission from the Government of the Bahamas to board and search it. When the *Sea Crust* replied that it was of British, not Bahamian, registry, the Coast Guard pointed out that "this change of nationality on the high seas rendered the *Sea Crust* a stateless vessel, and therefore it was subject to search under American law."<sup>1</sup> After firing warning shots across the bow, the Coast Guard was able to board the *Sea Crust* which, by this time, was some 200 miles off the coast. A search revealed six tons of marijuana on board. The Bahamian Government authorized seizure of the ship and arrest of

<sup>3</sup> Magistrate No. 79 M 175 at 19-21.

<sup>1</sup> 604 F.2d 304, 307 (footnotes by court omitted).

the crew. Defendants appealed their convictions on the grounds, *inter alia*, that the Coast Guard lacked jurisdiction to search and seize a foreign ship on the high seas and that in so doing the Coast Guard had violated the Convention on the High Seas of 1958 (13 UST 2312, TIAS No. 5200, 450 UNTS 82) (Convention). The court of appeals affirmed the judgment below.

Circuit Judge Butzner observed that although the United States and the Bahamas were parties to the Convention, it was not necessary to determine the legality of the seizure under the Convention in view of controlling U.S. legislation. He pointed out that according to 19 U.S.C. §§1581(h) and 1587(a), "a United States officer [may be authorized] to board a foreign vessel and enforce the laws of the United States in contravention of a treaty pursuant to 'special arrangement' with the foreign government where the ship claims registry."<sup>2</sup> The court also noted that according to 14 U.S.C. §89(a), the Coast Guard may board and search a vessel on the high seas, seize contraband, and arrest conspirators where it can be shown that some overt acts in pursuance of the conspiracy were committed in the United States. The court was satisfied that the Coast Guard had properly determined that the *Sea Crust's* actions had made it a stateless vessel.

One defendant, the captain of the *Sea Crust*, contended that the evidence should be suppressed because it had been obtained through a warrantless search in violation of the Fourth Amendment. Circuit Judge Butzner found that the authorities had ample evidence that the vessel was involved in a conspiracy to smuggle marijuana into the United States; consequently, there was probable cause for a search, and the possibility that the ship would flee before boarding provided the exigent circumstances that justified a warrantless search.

*Nationality—expatriation—voluntary relinquishment of nationality—evidentiary standards*

VANCE v. TERRAZAS. 48 U.S.L.W. 4069 (S. Ct., Jan. 15, 1980).  
U.S. Supreme Court, January 15, 1980.

Appellee had dual American and Mexican nationality by reason of having been born in the United States of a Mexican parent. In 1970, when he was 22 years of age and at school in Mexico, appellee executed an application for a certificate of Mexican nationality. In this certificate, he renounced his claims to any other nationalities and took an oath of allegiance to Mexico. Some months later, the Department of State issued to appellee a certificate of voluntary loss of American nationality (8 U.S.C. §1481(a)(2)), which was affirmed by the Board of Appellate Review in the Department. Appellee then filed an action in the district court requesting reversal of the administrative decision. The district court held that the preponderance of the evidence (8 U.S.C. §1481(c)) supported the conclusion that appellee had voluntarily relinquished his American na-

<sup>2</sup> *Id.*, 308.

tionality. On appeal, the court of appeals reversed this finding and remanded the case for further proceedings on the grounds that "preponderance of the evidence" as the standard of proof of voluntary relinquishment of nationality was not adequate after *Afroyim v. Rusk* (387 U.S. 253 (1967), 62 AJIL 189 (1968)) and that the proper constitutional standard should be "clear, convincing, and unequivocal evidence" of voluntary relinquishment (577 F.2d 7, 7th Cir. 1978, 73 AJIL 140 (1979)). On appeal to the Supreme Court, the judgment of the court of appeals was reversed and remanded.

At the outset, Mr. Justice White, writing for the majority, rejected appellants' arguments that the Government had only to prove that a person had voluntarily relinquished his nationality by one of several acts mentioned in the statute, such as taking an oath of allegiance to a foreign state, and that it did not have to prove intent on the part of the individual to expatriate himself. Appellants also contended that it would be difficult for the Government to prove intent apart from specific conduct on the part of the individual. The Court took the view that pursuant to *Afroyim*, "the record [must] support a finding that the expatriating act was accompanied by an intent to terminate United States citizenship."<sup>1</sup>

The problem was the determination of the standard of proof of intent to expatriate. Mr. Justice White disagreed with the appeals court's conclusions that the standard of proof of expatriation could not be determined by Congress and that this standard of proof must be clear and convincing evidence. Mr. Justice White pointed out that the Supreme Court had used the clear and convincing standard in *Nishikawa v. Dulles* (356 U.S. 129 (1958)) because no standard had been prescribed in law; subsequently, however, Congress had supplanted this standard with the preponderance standard (8 U.S.C. §1481(c)). It was also noted that *Afroyim* was not predicated upon section 1481(c). Mr. Justice White said:

We are unable to conclude that the specific evidentiary standard provided by Congress in §1481(c) is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. . . . This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa v. United States*, *supra*. But expatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, *Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas. . . . None of these cases involved a congressional judgment, such as that present here, that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship. Contrary to the Secretary's [of State, the appellant] position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we

<sup>1</sup> 48 U.S.L.W. 4069, 4072 (S. Ct. Jan. 15, 1980) (footnotes by Court omitted).

cannot hold that Congress has exceeded its powers by requiring proof of an international expatriating act by a preponderance of evidence.<sup>2</sup>

With regard to the voluntariness of an alleged act of expatriation, the Court said:

Section 1481(c) provides in relevant part that "any person who commits or performs, or who has committed or performed, any act of expatriation under this chapter or any other act shall be presumed to have done so voluntarily but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily." In enacting §1481(c), Congress did not dispute the holding of *Nishikawa* that the alleged expatriating act—there, service in a foreign army—must be performed voluntarily, but it did insist that the Government have the benefit of the usual presumption of voluntariness and that one claiming that his act was involuntary make out his claim of duress by a preponderance of the evidence.

It is important at this juncture to note the scope of the statutory presumption. Section 1481(c) provides that any of the statutory expatriating acts, if proved, is presumed to have been committed voluntarily. It does not also direct a presumption that the act has been performed with the intent to relinquish United States citizenship. That matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence. As so understood, we cannot invalidate the provision.<sup>3</sup>

The Court concluded:

In sum, we hold that in proving expatriation, an expatriating act and an intent to relinquish citizenship must be proved by a preponderance of the evidence. We also hold that when one of the statutory expatriating acts is proved, it is constitutional to presume it to have been a voluntary act until and unless proved otherwise by the actor. If he succeeds, there can be no expatriation. If he fails, the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship.<sup>4</sup>

Mr. Justice Marshall concurred in the conclusion that a person's intent to expatriate himself must be proved. He dissented from the majority's view that the standard for expatriation is preponderance of the evidence and asserted that the standard should be clear and convincing evidence.

Mr. Justice Stevens, concurring in part and dissenting in part, agreed with the majority's opinion that Congress could establish standards for determining whether a person intended to renounce his citizenship; however, he did not agree that Congress's standard was constitutionally acceptable, as he did not find any provision in the statute requiring an intent to expatriate. He also argued that the only standard of proof consistent with due process of law was clear and convincing evidence.

Mr. Justice Brennan, joined by Mr. Justice Stewart, dissenting, took

<sup>2</sup> *Id.*, 4073.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Id.*, 4074.

the view that a native-born citizen could only lose his nationality by formal renunciation pursuant to the relevant law<sup>5</sup> and that appellee had not followed that procedure. Mr. Justice Brennan also pointed out that as appellee had dual citizenship, his taking of an oath of allegiance to Mexico added nothing to his Mexican citizenship, and was not inconsistent with and had no effect on his American citizenship.

*Treaties—termination—power of President to terminate—whether consent of Senate or approval of Congress required—Mutual Defense Treaty of 1954 with Taiwan—standing of members of Congress to sue*

GOLDWATER V. CARTER. Civil Action No. 78-2412, U.S. District Court (D.D.C.), June 6, 1979, *amended*, October 17, 1979, *reversed*, No. 79-2246, U.S. Court of Appeals (D.C. Cir.), November 30, 1979, *vacated and remanded with directions to dismiss*, 48 U.S.L.W. 3402 (1979), U.S. Supreme Court, December 13, 1979.

Eight Senators, one former Senator, and 16 members of the House of Representatives brought an action for declaratory and injunctive relief, complaining that the termination of the Mutual Defense Treaty of 1954 with the Republic of China (Taiwan) (Art. X, 6 UST 433, TIAS No. 3178, 248 UNTS 213) (Treaty) by the President on his own authority was an unconstitutional act. Plaintiffs argued that a treaty can be terminated only with the consent of two-thirds of the Senate or by approval of a majority of both Houses of Congress. The President had given Taiwan 12 months' notice of termination of the Treaty (in accordance with Article X) as part of the change in United States policy toward the People's Republic of China, which culminated in the establishment of diplomatic relations as of January 1, 1979. Anticipating the establishment of diplomatic relations with the People's Republic of China, Congress had included the following clause in the International Security Assistance Act of 1978 (92 Stat. 746 (1978)): "It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."<sup>1</sup>

Defendants asserted that such consultation took place prior to the announcement of the termination of the Treaty. They moved to dismiss the action or, in the alternative, for summary judgment on the grounds that the action presented a political question which was not justiciable, that plaintiffs lacked standing to sue, and that under the Constitution, the President could terminate a treaty on his own authority. In this initial proceeding, the district court dismissed the action without prejudice.

In a memorandum-order, District Judge Gasch said: "the Court believes the power to terminate treaties is a power shared by the political branches of this government, namely, the President and the Congress."<sup>2</sup> As neither

<sup>5</sup> The individual would have to execute a formal statement before a diplomatic or consular officer of the United States in a foreign country (8 U.S.C. §1481(a)(6)).

<sup>1</sup> Civil Action No. 78-2412, cited from 125 CONG. REC. S7050, S7050 (daily ed. June 6, 1979), quoted by court (footnotes by court omitted).

<sup>2</sup> 125 CONG. REC., *supra* note 1, at S7051.

the Senate nor Congress as a whole had acted on the matter up to the time of this litigation, the threshold question was whether plaintiffs had standing to challenge the presidential order. The tests for the standing of legislators were stated in *Harrington v. Bush* (553 F.2d 190, 204 (D.C. Cir. 1977)), and could be summarized as follows:

Like all plaintiffs, a legislator must show that he has suffered an injury in fact; that the interests he asserts are within the zone protected by the statute or constitutional provision in question; that the injury resulted from the challenged illegal action of defendants; and that the injury be capable of being redressed by a decision in his favor.<sup>3</sup>

Following *Kennedy v. Sampson* (511 F.2d 430 (D.C. Cir. 1974)), "an injury in fact" could mean an act that impaired the legislator's powers as a congressman. Here, several plaintiffs argued that unilateral termination of the Treaty by the President "impaired the effectiveness of their prior votes approving the treaty,"<sup>4</sup> and the plaintiffs who were currently members of Congress contended that unilateral termination "impaired their legislative right to be consulted and to vote on treaty termination."<sup>5</sup>

In the opinion of District Judge Gasch, it was not appropriate to resort to litigation based upon a legislative right as long as Congress had within its power other ways to express its disapproval of allegedly unconstitutional executive action. The court observed that "[a] suit such as this by a group of individual legislators seeking to vindicate derivative constitutional rights bypasses the political arena which should be the primary and usual forum in which such views are expressed."<sup>6</sup> The court found that until Congress chose to act in the matter, no injury had been done to plaintiffs; hence they did not have standing to bring this suit.

Plaintiffs also contended that they had grounds for suit in that Congress had not been consulted about the proposed termination as required by section 26(b) of the International Security Assistance Act of 1978. The court held that this contention did not present a claim upon which relief could be granted (Fed. R. Civ. P. 12(b)(6)) because section 26(b) did not appear to be mandatory. Moreover, there was no standard available to the court whereby it could judge how much consultation would suffice.

On June 6, 1979, the day on which Judge Gasch's initial decision was handed down, the Senate voted to substitute the following resolution for a resolution that was before it: "That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."<sup>7</sup> This resolution, however, was not put to a final vote. Nevertheless, plaintiffs argued that the resolution met the conditions stated by the district court

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Civil Action No. 78-2412 (D.D.C. Oct. 17, 1979) at 9, quoted by court (footnotes by court omitted).

as necessary to establish their standing to sue and moved that the judgment of June 6, 1979, be altered or amended in the light of this senatorial action. Defendants moved to dismiss or, in the alternative, for a summary judgment. The district court found for plaintiffs, holding that they had standing and that the Mutual Defense Treaty could be terminated only with the consent of two-thirds of the Senate or of a majority of both Houses of Congress.

In a memorandum-order, District Judge Gasch first dealt with the question of plaintiffs' standing to sue. The court pointed out that the adoption of the resolution of June 6, 1979, while "not . . . decisive . . . [did] evidence at least some congressional determination to participate in the process whereby a mutual defense treaty is terminated, and clearly falls short of approving the President's termination effort."<sup>8</sup> District Judge Gasch concluded that plaintiffs had standing because they had "suffered and are suffering injury in fact to their legislative right to be consulted and to vote on the termination of the 1954 Mutual Defense Treaty."<sup>9</sup>

Defendants had argued that the issue before the court constituted a nonjusticiable political question and that, in any event, termination of a treaty is part of the constitutionally established power of the executive branch to conduct foreign affairs. The court took the position, however, that there was no express provision in the Constitution concerning the termination of treaties. The issue was "simply to determine whether the treaty termination was effectuated by constitutionally permissible means,"<sup>10</sup> not to inquire into the policy considerations involved in the decision to terminate; consequently, no political question was presented here. The court pointed out that since 1798 treaties had been terminated in a number of ways and that there was diverse opinion as to the validity of these several methods. The present situation, however, could be distinguished from previous instances of termination because "[n]one of these examples involves a mutual defense treaty, nor any treaty whose national and international significance approaches that of the 1954 Mutual Defense Treaty."<sup>11</sup> The court observed that senatorial or congressional approval had been given in some form in most of the previous instances of termination.

Defendants, taking the position that the President was "the sole organ of the federal government in the field of international relations,"<sup>12</sup> argued that the constitutional function of the Senate in the treaty-making process could only be construed as a limitation on the executive's use of that power and not as an independent source of power for the Senate. Defendants supported this argument by reference to *Myers v. United*

<sup>8</sup> *Id.*, 10.

<sup>9</sup> *Id.*, 12.

<sup>10</sup> *Id.*, 17.

<sup>11</sup> *Id.*, 19.

<sup>12</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), quoted by court.

*States* (272 U.S. 52 (1926)) concerning the independent authority of the President to remove executive personnel whose appointments had been confirmed by the Senate. In the opinion of District Judge Gasch, *Myers* was not relevant here as it concerned only the administrative function of the President to execute the laws. The court said:

By contrast, treaty termination impacts upon the substantial role of Congress in foreign affairs—especially in the context of a mutual defense pact involving the potential exercise of congressional war powers—and is a contradiction rather than a corollary of the Executive's enforcement obligation. The same separation of powers principles that dictate presidential independence and control within the executive establishment preclude the President from exerting an overriding influence in the sphere of constitutional powers that is shared with the legislative branch. A power to terminate treaties that are made "by and with the advice and consent of the Senate" [Constitution, Art. II, §2] simply does not fall within the limited scope of the *Myers* rationale.<sup>13</sup>

The court also rejected defendants' argument that the power of the President to recognize foreign governments supported termination of the Treaty as an essential element in the recognition of the People's Republic of China. Defendants' reliance upon *United States v. Pink* (315 U.S. 203 (1942)) and *United States v. Belmont* (301 U.S. 324 (1934)) did not support their argument, in the court's view, because these cases concerned the impact of an executive agreement upon property claims under state law, whereas in the instant case the issue was the function of Congress in the termination of treaties.

The court took the position that although the executive branch was dominant in the treaty-making process and that the policy decision to terminate and give notice of termination to the other party would be executive acts, there remained the fact that a treaty is the law of the land which the President must "faithfully execute." (Constitution, Art. VI, para. 2; Art. II, §3.) In the opinion of the court, defendants' argument that only self-executing treaties are the supreme law of the land under the Constitution had no merit. Furthermore, it could be shown that the Mutual Defense Treaty was self-executing in part (*see* Art. V).

The court concluded:

The important point is that treaty termination generally is a shared power, which cannot be exercised by the President acting alone. Neither the executive nor legislative branch has exclusive power to terminate treaties. At least under the circumstances of this case—involving a significant mutual defense treaty with a faithful ally, who has not violated the terms of the agreement, and the validity of which has not otherwise been destroyed—any decision of the United States to terminate that treaty must be made with the advice and consent of the Senate or the approval of both houses of Congress. That decision cannot be made by the President alone.<sup>14</sup>

Defendants appealed to the Court of Appeals for the District of Co-

<sup>13</sup> *Id.*, 21.

<sup>14</sup> *Id.*, 30.



lumbia Circuit (No. 79-2246 (1979)). They argued for reversal on the grounds that the district court lacked jurisdiction in the matter because appellees did not have standing to sue and because their complaint involved a political question. In a per curiam opinion, the court of appeals en banc reversed the decision of the district court; it held that the President had the power to terminate this treaty without senatorial or congressional consent and that there was no constitutional basis for the limits on the President's power enunciated in the district court's judgment.

Examining the issue of appellees' standing to sue, the court pointed out that the plaintiffs had alleged that the President's unilateral termination of the Mutual Defense Treaty of 1954 with Taiwan had deprived them of their right to vote on this matter. The plaintiffs had no effective remedy within the legislative process to block termination of the Treaty, for unless the President had submitted the issue of treaty termination to the Senate for its vote, no negative action by the Senate could have blocked termination if the President chose to act on the theory that he had the power to terminate the Treaty on his own authority. The court said:

Since the President has not afforded an opportunity for an up-or-down vote as the appellees request, we do not know whether the Senate would actually block the President's action if given the opportunity. Yet courts consistently vindicate the right to vote without first demanding that the votes when cast will achieve their intended end. A live controversy exists in appellees' claim of an opportunity to cast a binding vote. The President's action has deprived them of this opportunity completely, in the sense that they have no legislative power to exercise an equivalent voting opportunity. Therefore, appellee Senators have standing.<sup>15</sup>

The court was satisfied, however, that the President had the power to terminate the Treaty unilaterally. The court found no constitutional basis in Article II, section 2, or in Article VI, paragraph 2, for the argument that participation by the Senate in the making of treaties of necessity implied participation by the Senate in their termination. In the court's opinion, "[t]he District Court's absolutist extension of this limitation [*i.e.*, the Senate's advice and consent to the making of treaties] to the termination of treaties, irrespective of the particular circumstances involved, is not sound."<sup>16</sup> The court pointed out that the powers of Congress are specifically stated in the Constitution (Art. I), whereas the President's powers regarding foreign affairs (Art. II) are defined generally, the former having been delegated to the federal Government by the states; while the latter are founded in the sovereign status of the country. The court said:

Thus, in contrast to the lawmaking power, the constitutional initiative in the treaty-making field is in the President, not Congress. It would take an unprecedented feat of judicial construction to read

<sup>15</sup> No. 79-2246 (D.C. Cir. 1979) at 12 (footnotes by court omitted).

<sup>16</sup> *Id.*, 14.

into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties, similar to the specific one relating to initial approval. And it would unalterably affect the balance of power between the two Branches laid down in Articles I and II.<sup>17</sup>

It was noted by the court that Congress's power to implement treaties or to supersede them as domestic law could not be construed to mean that Congress also had the power to terminate them. Moreover, if a treaty could only be terminated the same way it was made, termination should require the consent of two-thirds of the Senate; then, one-third plus one of the Senate could lock the United States into all of its international obligations and deny the President the authority necessary to conduct U.S. foreign policy in a rational and effective manner. The court saw no merit in the contention that the Mutual Defense Treaty should be distinguished from other treaties as to the manner of its termination. In the opinion of the court, there was no basis for such a distinction. When the People's Republic of China was recognized, relations with the Republic of China ended, so there was no reason to continue the Treaty with the latter government. The court found of "central significance" that the Treaty contained a termination clause and that the Senate had consented to it.

Chief Judge Wright and Circuit Judge Tamm, concurring, argued that appellees had no standing to bring the suit. Circuit Judge MacKinnon concurred with the majority as to appellees' standing to sue but dissented from the majority with regard to the conclusion that the President could unilaterally terminate the Treaty. He took the position that termination of a treaty is an implied legislative power that can be exercised by Congress pursuant to the "Necessary and Proper" clause of Article I, section 8 of the Constitution.

On petition of certiorari, the Supreme Court, without hearing argument, on December 13, 1979, ordered that the judgment of the court of appeals be vacated and that the case be remanded to the district court with directions to dismiss the complaint (48 U.S.L.W. 3402 (1979)). There was no opinion of the Court.

Mr. Justice Powell, concurring, pointed out that "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority."<sup>18</sup> As no final action had been taken on the Senate's resolution of June 6, 1979, it would appear that there had been no confrontation of the President's exercise of power by the Senate or by Congress. He indicated, however, that if Congress or the Senate had acted and the case were ripe, the issue would be justiciable, and not a political question.

Mr. Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Stevens, concurring, considered that the complaint presented a nonjusticiable political question "because it involves the authority of

<sup>17</sup> *Id.*, 16.

<sup>18</sup> 48 U.S.L.W. 3402, 3402 (Sup. Ct. Dec. 13, 1979).

the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."<sup>19</sup>

Mr. Justice Blackmun, joined by Mr. Justice White, dissenting in part, took the view that the Court should hear oral argument in the case. Mr. Justice Brennan, dissenting, was of the opinion that the judgment of the court of appeals should be affirmed "insofar as it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments."<sup>20</sup> He objected to the view that the complaint presented a nonjusticiable political question. Mr. Justice Brennan said:

Properly understood, the political question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." *Baker v. Carr*, 369 U.S. 186, 211-213, 217 (1962). But the doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. . . . The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.<sup>21</sup>

#### UNITED KINGDOM CASE NOTE

##### *Extradition—double criminality—definition of political offense—speciality*

IN THE MATTER OF BUDLONG AND KEMBER.\* Nos. 199/79, 200/79.  
Queen's Bench Division, Nov. 30, 1979.

The United States requested the extradition of the accused, an American national and a British national, on ten charges of burglary, pursuant to the treaty with the United Kingdom of 1972 (28 UST 227, TIAS No. 8468) (Treaty). It appeared that the accused, who were senior members of the Church of Scientology and who resided in the United Kingdom, had instructed members of this organization in the United States to break into offices of the Internal Revenue Service and the Department of Justice in the District of Columbia for the purpose of making photocopies of documents pertaining to the organization. Finding that a *prima facie* case of burglary had been made against the accused, the metropolitan magistrate granted the extradition request. The accused then applied for writs of habeas corpus, complaining that the extradition order was illegal. The Queen's Bench Division denied their applications.

At the outset, the applicants argued that the magistrate did not have before him a document showing that the charge of burglary corresponded fully to the crime of burglary as defined in English law. It appeared that in English law burglary involved the act of trespass. The requisition

<sup>19</sup> *Id.*, 3403.

<sup>20</sup> *Id.*, 3404.

<sup>21</sup> *Ibid.*

\* Text of decision provided by William S. Kenney, Esq. The text is in the form of a stenographic report made by Walsh, Cherer and Co., Ltd.

sent by the Home Office to the magistrate simply referred to burglary. In the opinion of the court, the requisition was the only document that had to be submitted to the magistrate in order to initiate the extradition proceedings under the Treaty and the relevant law, and, in form, it need only refer to the offense in general terms.

Applicants then argued that because the definition of burglary in English law differed from that in the District of Columbia Code (22 D.C. Code §1801(b)), the requirement of double criminality that appears in the Treaty (Art. III) had not been met. Admittedly, the burglars had committed trespass in undertaking their act; applicants contended, however, that unless trespass was recognized as part of the offense of burglary, as in English law, if extradited, they would be tried for a different offense from that understood in England. Mr. Justice Griffiths pointed out that an examination of English and American judicial decisions and statutes indicated that for purposes of extradition the offense charged did not have to be identical in terms in each country's laws. Given the differences in language and legal systems, to require identical definitions of offenses would make extradition a very difficult process. The court said:

I therefore summarise by saying that double criminality in our law of extradition is satisfied if it is shown: (1) that the crime for which extradition is demanded would be recognised as substantially similar in both countries; (2) that there is a *prima facie* case that the conduct of the accused amounted to the commission of the crime according to English law.<sup>1</sup>

Applicants further contended that the offenses charged were actually political offenses for which extradition could not be granted under the Treaty. They argued that the burglaries had been committed in order to ascertain what detrimental information the U.S. Government had on file about the Church of Scientology and what persons in the Government were opposed to this organization. They submitted that the ultimate objective of the burglaries was to use this information in order to change the Government's hostile policy toward their organization. They maintained that this objective was political in nature; hence, the burglaries were political offenses. Although applicants' orders for the commission of the burglaries, which were submitted in evidence to the court, indicated that these acts were designed to obtain Government documents as well as the names of Government personnel opposed to the Church of Scientology, the court did not find that these orders supported applicants' alleged political objectives. Mr. Justice Griffiths said:

I am unable to accept that organising burglaries either for the purpose of identifying persons in Government offices hostile to the Scientologists, or for the purpose of gaining an advantage in litigation, or even for the wider purpose of refuting false allegations thus enabling a better image of the Church of Scientology to be projected to the public, comes anywhere near being an offence of a political character within the meaning of the Extradition Act.

<sup>1</sup> Nos. 199/79, 200/79, Q.B.D., Nov. 30, 1979, at 14.

The Applicants did not order these burglaries to take place in order to challenge the political control or Government of the United States; they did so to further the interests of the Church of Scientology and its members, and in particular the interest of Ron L. Hubbard, the founder of Scientology. In my view, it would be ridiculous to regard the Applicants as political refugees seeking asylum in this country, and I reject the submission that these were offences of a political character.<sup>2</sup>

A somewhat different approach was attempted by applicants in their argument that the extradition request had been designed so as to circumvent the rule that British courts will not enforce foreign public laws. They submitted that, if extradited, they would be tried not on the ostensible burglary charges but rather for theft of confidential Government documents in violation of the Freedom of Information Act, which was not an extraditable offense. It followed that in granting extradition the British court would, in effect, be enforcing the Freedom of Information Act. Mr. Justice Griffiths pointed out that the United States was committed to the principle of speciality in the Treaty. To admit applicants' argument would be to presume bad faith on the part of the United States, and this the court was not prepared to do.

Applicants also attempted to show that the extradition request was designed so as to bring them to trial, not for burglary, but for theft of confidential government documents, an offense of a political character in violation of section 3(1) of the Extradition Act of 1870. The court took the view that this part of section 3 was only intended to provide applicants with the opportunity to present evidence in support of their contention that the offense charged was, in fact, a political offense and not to enable them to explore other possible charges.

It was submitted on behalf of the applicant who was a British national that committing her for extradition amounted to restricting her freedom of movement within the European Economic Community, as guaranteed by Article 48 of the Treaty of Rome of 1957 (298 UNTS 11) and Council Directive 64/221/EEC of February 25, 1964. Such a restriction would only be warranted in terms of public policy (Treaty of Rome, Art. 48(3)). Applicant sought to show that extradition was the equivalent of deportation and that in *Regina v. Bouchereau* ([1977] 2 Comm. Mkt. L.R. 800) the European Court of Justice had held that deportation constituted a restriction on freedom of movement within the terms of Article 48. In the opinion of Mr. Justice Griffiths, if this theory were accepted, "it [would] . . . impose a formidable fetter upon extradition . . . [so that it could] only be ordered on grounds of public policy based exclusively on the personal conduct of the individual concerned."<sup>3</sup> There was a difference between deportation following conviction for a crime and extradition to stand trial for a crime. The court said:

I regard extradition as far more closely analogous to the implementation of domestic criminal law than to deportation. It is in no true

<sup>2</sup> *Id.*, 17.

<sup>3</sup> *Id.*, 20-21.

sense a banishment from our shores as is deportation; indeed section 3(2) of the Extradition Act specifically provides that there will be no extradition unless the foreign state undertakes to allow the accused to return to this country after he has been dealt with for the extradition crime. Extradition is no more than a step that assists in the implementation of the domestic criminal law of the foreign state.<sup>4</sup>

Applicant requested that the court refer the matter of justification of extradition on the grounds of public policy (Art. 48(3)) to the European Court of Justice. Mr. Justice Griffiths refused to do so, as there was no doubt about the matter in his opinion. He concluded that "it is common sense that dictates that Article 48 should be interpreted as manifestly not intended to apply to the exercise of the power of this country to extradite an accused person to the United States of America."<sup>5</sup>

<sup>4</sup> *Id.*, 21-22.

<sup>5</sup> *Id.*, 23.

## CURRENT DEVELOPMENTS

### UN CONFERENCE ON RESTRICTIVE BUSINESS PRACTICES

The United Nations Conference on Restrictive Business Practices held its first session in Geneva from November 19 to December 7, 1979, with a mandate to negotiate a code of conduct on such practices. It produced two surprises: the possibility of an early agreement (a resumed session is scheduled for April 1980) and the emergence of the Soviet Union as a significant factor in the negotiations.

The conference had the benefit of a text produced by the Ad Hoc Intergovernmental Group of Experts,<sup>1</sup> which had met over a period of 4 years under a mandate from UNCTAD IV in Nairobi. The experts' text left relatively few (albeit potentially difficult) issues for resolution. As drafted, the code—entitled the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”—would include (1) guidelines addressed to enterprises concerning anticompetitive agreements and abuses of dominant positions that restrain international trade; (2) recommendations to governments for effective control of restrictive business practices and fair treatment of enterprises under national legislation; (3) provision for bilateral consultations between governments to resolve issues arising out of alleged restrictive business practices; and (4) the establishment of follow-up machinery in UNCTAD to continue work designed to improve developing countries' ability to deal with restrictive business practices, in particular by drafting a model law and organizing technical assistance.

The developing countries originally proposed in the Group of Experts meetings a broad code that would require developed countries to prevent their transnational corporations from carrying out a wide range of business practices that allegedly restrict the trade and development of developing countries. Machinery would be set up in UNCTAD to monitor implementation of the code, settle disputes arising out of restrictive business practices affecting developing countries, and coordinate technical assistance to developing countries in their efforts to control restrictive business practices.

The developed countries have maintained that the code should be directed at restraints on competition in international trade by all enterprises (regardless of nationality, and whether or not transnational in character) and should be limited to practices generally or frequently proscribed by their national laws governing economic competition. They based their approach on the competition provisions of the 1976 OECD Guidelines for Multinational Enterprises and suggested a similar set of nonbinding recommendations from participating governments, with a modest follow-up procedure that did not involve the settlement of specific disputes at a multi-

<sup>1</sup> UNCTAD Doc. TD/RBP/CONF/1 (June 26, 1979).

lateral level. This approach was consistent with the developed countries' position in the other so-called codes of conduct.

The Soviet-Eastern Europe negotiating bloc generally supported the developing countries and maintained from the beginning that state enterprises should not be subject to the code.

At the experts' level, it was agreed that the principles and rules would apply to purely national as well as transnational enterprises and that it would be directed at restraints on competition (or of "access to markets"), "particularly" when they affected the trade and development of developing countries. The principal issues confronting the conference were: (1) whether enterprises of developing countries would essentially be exempted from the principles and rules; (2) how the principles and rules would apply to relations between affiliated enterprises; (3) whether the principles and rules would be legally binding on governments or enterprises; (4) the nature of follow-up machinery and the role of UNCTAD in dispute settlement; and (5) whether the code would apply to state enterprises.

After about 3 weeks of intensive discussions on the first four of these issues (the Soviet bloc alone had not agreed to the inclusion of state enterprises, and it did not raise the issue during the first 2 weeks of the conference), agreement was reached on two fundamental points: as had been agreed previously at the Conference on a Code of Conduct for the Transfer of Technology, the principles and rules would not, at least initially, be binding, and any multilateral institutional machinery to be set up would not become involved, as a tribunal or otherwise, in specific disputes. Such disputes would be dealt with by the affected countries in consultations, with no prior commitment to binding arbitration or conciliation.<sup>2</sup> In the middle of the third week of the conference, the president, José Sanchis-Muñoz of Argentina, offered compromise solutions to most of the remaining outstanding issues.<sup>3</sup> On the two seemingly most difficult substantive issues, he proposed (1) that the principles and rules apply to enterprises of all countries, but that governments, in controlling restrictive business practices, take into account "the development, financial and trade needs of developing countries"; and (2) that relations between enterprises under common control be subject to the principles on abuses of dominant positions but not to the provisions on restrictive agreements. Under his proposal, the principles and rules would apply to state enterprises.

The president's text appeared to many delegations to provide a possible basis for final agreement, and an attempt was made to extend the conference for 2 days to make this possible. However, the Soviet bloc was not satisfied with the provisions on a number of issues, including state enterprises, and a consensus agreement to continue the negotiation failed to materialize.

Thus, after years of negotiation, as the developed and developing countries may be on the verge of agreeing on what would be the first code of conduct for international commercial behavior, a new element of un-

<sup>2</sup> UNCTAD Docs. TD/RBP/CONF/NG/CRP.4 (Dec. 5, 1979) and TD/RBP/CONF/NG/CRP.5/Rev.1 (Dec. 6, 1979).

<sup>3</sup> UNCTAD Doc. TD/RBP/CONF/CG/CRP.3 (Dec. 6, 1979).



certainty has been introduced by a group of countries that has heretofore played a minor role in the exercise. The resumed session of the conference should show just how large a factor they intend to become.

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#### U.S. SENATE HEARINGS ON HUMAN RIGHTS TREATIES

From November 14 to 19, 1979, the Foreign Relations Committee of the United States Senate held hearings to consider ratification of four multilateral human rights treaties: the Convention on the Elimination of Racial Discrimination,<sup>1</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>2</sup> and the International Covenant on Civil and Political Rights,<sup>3</sup> all adopted by the United Nations; and the American Convention on Human Rights,<sup>4</sup> adopted by the Organization of American States.

Taken together, these treaties define a series of fundamental rights of the individual. The Racial Discrimination Convention, the Civil and Political Covenant, and the American Convention charge states parties with the immediate protection of rights similar to those contained in the U.S. Bill of Rights. The Economic and Social Covenant obligates states parties to take steps to achieve progressively the full realization of the rights recognized in the Covenant. Each treaty contains provisions for its enforcement, the most important of which require states parties to report on implementation measures taken to a committee of independent experts.<sup>5</sup>

On the first day of hearings, statements from the Departments of State and Justice emphasized the treaties' potential to serve as a foundation for evolving international legal standards of human rights protection. The administration spokesmen stressed the fact that the rights established by the four treaties are by and large already respected under the laws and policy of the United States. Subsequent days saw a wide range of witnesses from concerned organizations and academic circles; the majority of those testify-

<sup>1</sup> 660 UNTS 195 [hereinafter cited as Racial Discrimination Convention]. This treaty was signed on behalf of the United States on September 28, 1966, and entered into force on January 4, 1969. There are at present 106 parties to it.

<sup>2</sup> Reprinted in S. EXEC. DOCS. C, D, E, and F, 95th Cong., 2d Sess. 13 (1978) [hereinafter cited as Economic and Social Covenant]. This Covenant was signed on behalf of the United States on October 5, 1977, and entered into force on January 3, 1976. There are at present 62 parties to it.

<sup>3</sup> *Id.* at 28 [hereinafter cited as Civil and Political Covenant]. This Covenant was also signed by the United States on October 5, 1977. It entered into force on March 23, 1976, and has 60 parties.

<sup>4</sup> *Id.* at 41 [hereinafter cited as American Convention]. The United States signed this Convention on June 1, 1977; it entered into force July 18, 1978, and now has 15 parties.

<sup>5</sup> The Committee on the Elimination of Racial Discrimination, established under Articles 8 through 15 of the Racial Discrimination Convention, has been receiving and examining reports since 1970; the Committee on Human Rights, established under Articles 28 through 45 of the Civil and Political Covenant, has been receiving and examining reports since 1977. Both have been found to be thorough and searching in their examination of reports and criticism of states' human rights practices.

ing voiced their support for ratification of the treaties. It was generally felt that the effort to afford international protection to fundamental rights and freedoms of the individual would be crippled without U.S. participation in these treaties.

Witnesses opposing the treaties expressed concern that U.S. obligations under them would infringe upon areas of peculiarly domestic concern that have traditionally been left to state governments to regulate. The Secretary of State, in his letter of submittal of December 17, 1977,<sup>6</sup> recommended certain reservations, declarations, and understandings in an effort to minimize the perceived conflict between U.S. domestic law and the international obligations imposed by the treaties.<sup>7</sup> Many of those testifying in favor of the treaties vigorously opposed the recommended reservations. In their view, the fears articulated by treaty opponents were unfounded, which made reservations responding to those fears unnecessary; they found the reservations also to be undesirable, since, it was maintained, they appeared to dilute U.S. commitment to international human rights law.

Not directly considered at these hearings was the Genocide Convention, although members of the committee and many witnesses spoke to deplore Senate inaction with regard to it. There is little hope that further action on the four treaties will be taken by the Foreign Relations Committee until the Senate votes its advice and consent to ratification of the Genocide Convention. That does not promise to be soon. However, the November hearings on the four human rights treaties have yielded a thorough and informative record that can provide a solid basis for further consideration of the treaties in the future.<sup>8</sup>

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#### JOINT BAR ASSOCIATION PROPOSAL FOR CANADIAN-U.S. DISPUTE SETTLEMENT

In 1975 and 1976, officers of the Canadian Bar Association were approached by representatives of the American Bar Association for the purpose of working together on a proposal that would constitute a joint initiative toward creating a legal structure for peace in the world.<sup>1</sup> The representatives of the American and Canadian Bar Associations agreed that the most practical course of action would be a demonstration research project on the matter of dispute settlement between the two countries, to be car-

<sup>6</sup> Reprinted in S. EXEC. DOCS. C, D, E, and F, note 2 *supra*, at v.

<sup>7</sup> Included in those reservations, declarations, and understandings was a declaration that the treaties were to be non-self-executing; a federal-state reservation, to the effect that the United States obligates itself to implement only those provisions of the treaties over which the federal Government exercises jurisdiction as to subject matter; an understanding that everyone has the right to own private property; etc. *Id.* at vi-xv.

<sup>8</sup> *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. (1979).

<sup>1</sup> The proposal for the project originated at a meeting of the leadership of the Section of International Law of the ABA, which was held in October 1974. After consultations, it was agreed that it should be undertaken by the section in conjunction with one or more bar associations of other friendly countries.

ried out by a joint working group composed of members of the two associations.<sup>2</sup>

After over 2 years' work, in the spring of 1979, the Joint Working Group was able to present to both bar associations a 100-page report presenting and recommending two draft treaties, one providing for the compulsory settlement of certain legal disputes between the two Governments, and the other creating a regime of equal access and remedy in judicial and other proceedings relating to transfrontier pollution.

The proposed treaties were reviewed and approved by the Section of International Law of the ABA and its counterpart in Canada; in August 1979, they were endorsed by the House of Delegates of the ABA at the association's annual meeting in Dallas, Texas, and by the Canadian Bar Association at its annual meeting in Calgary, Alberta.<sup>3</sup>

The Joint Working Group, in conjunction with the leadership of the two bar associations, is now taking steps with the respective executive and legislative branches of the two Governments to promote the adoption of the proposed treaties. A summary of their basic provisions and some of the reasoning behind those provisions follows.

The thrust of the draft treaty on transfrontier pollution is that persons in both countries should have equal access to judicial and administrative procedures for the prevention of and compensation for pollution damage. It should not matter on which side of the border the polluter is located, where the affected person lives, or in which jurisdiction the judicial or administrative protection is sought. What is being proposed here is not a new legal system but the adjustment of the two countries' existing municipal systems to accommodate equally residents of both in pollution matters.<sup>4</sup>

The second treaty provides that a system of third-party settlement of legal disputes between the two countries should be established and maintained for use as and when required. The main provisions of this treaty are:

Compulsory jurisdiction is limited to questions of interpretation, application, or operation of the various treaties in force between the two countries.

All disputes not subject to such compulsory jurisdiction may be submitted

<sup>2</sup> Henry T. King, Jr., Gerald Aksen, Professor Don Wallace, and Arthur T. Downey have represented the Section of International Law, with Professor Louis B. Sohn acting as U.S. rapporteur. For the Canadian Bar Association, T. Bradbrooke Smith, Q.C., W. C. Graham, Q.C., and Professor J. G. Castel have been the designated representatives, with Professor George Alexandrowicz acting as Canadian rapporteur. Messrs. King and Smith acted as cochairmen of the Joint Working Group.

<sup>3</sup> Copies of the Report and Recommendations of the Joint Working Group and of the resolutions and related reports of the 2 bar associations are incorporated in a document published by the Section of International Law, which can be obtained from ABA headquarters. Copies are also available at the offices of the Canadian Bar Association in Ottawa.

<sup>4</sup> Since a number of the disputes that have arisen in the past between Canada and the United States have originated in pollution damage claims by private parties, it was felt that this proposal would fill an existing gap. Implicit also in the thinking of the Joint Working Group was the feeling that this type of dispute might create more extensive problems in the future.

to third-party settlement only through an ad hoc agreement by both countries, and there are set forth eight categories of disputes especially appropriate for such special agreements.

Procedures are set forth for the constitution of a three-member arbitral tribunal or for submission of a dispute to a special chamber of the International Court of Justice.

The proposed system establishes legal procedures to complement existing procedures even though the preponderant majority of cases is resolved by bilateral negotiations. The availability of a third-party decision to the process is crucial. There are questions on which the two states may reasonably disagree and on which a genuine reconciliation of legally supportable conflicting positions cannot be had through negotiations since each side continues to maintain the legal validity of its claim. At other times, difficult and unsettling negotiations may lead to a solution, but a genuine accommodation may be lacking and a fundamental disagreement only patched over.

Third-party settlement can assure that in appropriate cases issues are kept self-contained and are dealt with on their own merits without "linkage" to other bilateral issues. In complex relations it may frequently be unwise to "trade off" the interests of different groups and regions. Consequently, the proposed treaty suggests that, where a dispute is a legal one or has legal aspects, obligatory arbitration or adjudication may be the most efficient and equitable means of settlement. Where a dispute is wholly legal, the prospect of compulsory arbitration encourages negotiators to find a resolution. Where a dispute is partially legal, arbitration of the legal questions can reduce its dimensions and provide a framework which will simplify resolution of the remaining issues.

Compulsory jurisdiction is especially appropriate for Canada and the United States because their mutual treaties are many and varied. The net result of a series of decisions over a period of time will properly reflect the equality and fairness inherent in genuine third-party proceedings. The automatic availability of third-party settlement should reduce tension and diminish frustration by assuring that a genuine and impartial solution can be had if negotiations will not produce one.

HENRY T. KING, JR.

*Cochairman, Joint Committee on the  
Settlement of International Disputes*

## BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

*How Nations Behave. Law and Foreign Policy* (2d ed.). By Louis Henkin. Published for the Council on Foreign Relations. New York: Columbia University Press, 1979. Pp. xv, 400. Index. \$25, cloth; \$7, paper.

The second edition of this classic introduction to the role of law in international relations contains enough new material to qualify as virtually a new book. Professor Henkin has included chapters on new modes of diplomacy and lawmaking, the decade of sea law negotiations, the legal aspects of the Vietnam War, and the emergence of the Third World as an important initiator of new law and institutions.

The exemplary clarity and fairness with which these issues are handled, by an author not unknown to entertain strong personal views, is illustrated by his treatment of the Vietnam War's legal penumbra. That tragic episode reveals "the importance of facts and their characterization in legal determinations." Henkin produces three elegant fact-models: *A*, *B*, and *C*. *A* characterizes the struggle as "Civil War in independent South Vietnam, with intervention by U.S. and North Vietnam"; *B* is "Civil War in Vietnam between North and South Vietnam, with U.S. intervention"; and *C* is "North Vietnamese aggression against independent South Vietnam, with U.S. assistance to victim." The U.S. Government, of course, proceeded on fact-model *C*, but Henkin notes that an international tribunal might have characterized the episode as a civil war along the lines of fact-model *B*. Depending on the fact-model chosen, U.S. intervention—particularly the bombing of the North and of Laos and Cambodia—could be characterized either as illegal intervention and aggression, or as a lawful exercise in collective self-defense in response to an attack on a sovereign state and the North's use of neighboring neutrals as supply routes and bases.

This emphasis on the facts perforce makes legal relativists of most of us. It also impels us in the direction of impartial fact-finding as a prerequisite for an effective international legal order. Yet, Henkin coolly points out, for that very reason it is unlikely to come about. The very absence of such machinery—in the field of human rights, in particular—conveniently permits states that are chronic violators to be among the first to embrace the human rights Covenants. So long as there is no reliable way to ascertain and characterize the facts, adherence to law is a cost-free way to cadge Brownie points.

No easy optimism is to be found, either, in Henkin's analysis of the Third World's agenda for making new international law, particularly in economic matters. Here, again, the approach is eminently fair and the emphasis is on the fact-matrix, the need for the developing world to

demonstrate that desired concessions will produce the predicated reforms. One small cavil here: the role of the USSR and China, the author says, is to "compete in enthusiasm to support the rhetoric and even the specific demands of the Third World" in order to jolly those states into the belief that they have a friend in the Kremlin. However, in significant instances—fair commodity pricing, for example—the Soviets have already been targeted by the Third World as part of the problem and have revealed themselves as highly reluctant to contribute to the solution. In that set of negotiations we ought to rethink our own position, if only because we and the Soviets tend to drag our feet along the same side of the street.

With grace, economy of style, and great equanimity of judgment, Henkin has given us a fresh yet seasoned look at the current state of our art.

THOMAS M. FRANCK  
*Board of Editors*

*Droit International Pénal Conventionnel, Volume II.* By Stefan Glaser. Brussels: Émile Bruylant, 1978. Pp. 494. Index. F.3.400.

Like the previous volume, published in 1970,<sup>1</sup> volume II of Stefan Glaser's magnum opus on conventional international criminal law is in two parts. Part 1 describes and analyzes recent developments, while part 2 provides the texts and other documentary information on a series of relevant international instruments.

As the concepts the author expounded in 1970 also underlie the present volume, it may be useful to recall what Glaser understands by "international criminal law." This is, in his conception, the body of internationally recognized legal rules designed to protect the international legal or social order by repressing acts detrimental to this order. An "international offence" is thus an act that is in contravention of international law and detrimental to the community values protected by that law, to such a degree that the act must be the object of a penal sanction (vol. I, pp. 16, 49). In volume I, the author lists general community values such as the preservation of peace, the protection of humanity, and protection against racial discrimination and obscene publications; other, more specific and tangible values are the protection of cultural property, submarine cables, the safety of traffic, and currency. Glaser discusses not only the evolution of the notion of individual criminal responsibility for acts detrimental to these values, but the developments relating to the values themselves and the substantive rules of international law protecting them.

In the second volume the author continues this ambitious undertaking, concentrating on those subjects whose development since 1970, in his judgment, warrants such special treatment. The first, descriptive part contains chapters on the following: the maintenance of peace, the concept of aggression; international terrorism, capture or diversion of aircraft; crimes of war and crimes against humanity; the Geneva Conventions of 1949; the law of war and prohibited weapons; human rights; the nonapplicability

<sup>1</sup> Reviewed in 66 AJIL 442 (1972).

of statutory limitations to war crimes and crimes against humanity, and the problem of extradition; the fight against drugs; the fight against obscene publications; and international criminal jurisdiction.

This is an impressive list of topics. It is also a very heterogeneous one, and this not merely at first sight; while Glaser apparently holds that all this can properly be brought under the umbrella of international criminal law, the present reviewer ventures to suggest that the various subjects differ so widely, precisely where their possible relevance to criminal law is concerned, as to make this approach highly hazardous.

Some of the items on the list are clearly part and parcel of the body of international criminal law, even under the most conservative of estimates. This is the case, *e.g.*, with international terrorism, the capture or diversion of aircraft, and anything to do with war crimes: the law relating to these subjects typically deals with such questions as attribution of criminal jurisdiction, extradition and other forms of international cooperation in criminal matters, political crime, superior orders, and the like.

For some other subjects on Glaser's list the relevance of criminal law, if not wholly lacking, is marginal at best. An example of the first category is provided by the very first chapter on the maintenance of peace, in which the author discusses such matters as the Uniting for Peace Resolution (1950), the problems involved in peacekeeping operations and the attempts to solve these problems, general disarmament, and even the Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1975). Where is the connection between all this and international criminal law?

Another example can be found in chapter VII, which for the greater part is devoted to developments with respect to nuclear, bacteriological, and chemical weapons. These developments cannot very well be subsumed under the "law of war" (as the first half of the chapter's title reads). Rather, they belong under disarmament law. Does Glaser wish his readers to believe that this branch of international law (dealing with matters such as the nonproliferation of nuclear weapons, the partial test ban, and the prohibition on the production, stockpiling, etc., of bacteriological weapons) has assumed characteristics bringing it within the range of international criminal law? Unfortunately, the author is silent on the question. The present reviewer, for his part, is not aware of any developments that would warrant this suggestion.

In some other chapters Glaser deals with subjects that do have a certain link with international criminal law, although not a particularly strong one. Curiously, the manner in which he treats these subjects tends to diminish the relevance of the criminal law aspect even further. This is notably the case with chapters II and VI.

In chapter II Glaser discusses the developments leading up to the adoption by the United Nations General Assembly, on December 14, 1974, of Resolution 3314 (XXIX) on the definition of aggression, and he deals with various elements of this resolution. However, the one element that would have been particularly relevant to his subject, *i.e.*, paragraph 2 of Article 5 ("A war of aggression is a crime against international peace.

Aggression gives rise to international responsibility"), he glosses over so summarily as to amount to virtual neglect. Without so much as referring to the debate on the extent of individual criminal liability for aggression (only for a "war of aggression" or for all acts of aggression?), he asserts that "aggression has been *recognized as an international crime*" which, consequently, gives rise to international responsibility. "This evidently means that those who . . . have decided to start a *war of aggression* are individually responsible" (pp. 28, 29, italics added). These quotations not only fail to elucidate the ambiguous text of Article 5, paragraph 2; they confuse the matter even further.

In chapter VI, Glaser discusses the drafting history of the two protocols of 1977 additional to the four Geneva Conventions of 1949. Like those conventions, the protocol applicable in international armed conflicts (Protocol I) contains certain provisions of international criminal law; thus, there is a long list of additional grave breaches (Article 85) which Glaser duly records. He also mentions a provision on superior orders (p. 113); this provision, however, although contemplated for a time, was rejected in the end. On the other hand, Glaser makes no mention at all of another important provision that did in fact find a place in the protocol, viz., Article 86 on failure to act and the responsibility of superiors. It is not merely this lack of accuracy that surprises the present reviewer; his main objection is that these matters of direct relevance to Glaser's main theme have been dealt with, as it were, in passing, more or less hidden in a lengthy and somewhat erratic description of the four sessions of the diplomatic conference that led up to the adoption of the protocols. The result is that the author plays down rather than highlights these matters, as he might have been expected to do.

In sum, Glaser deals with a broad spectrum of subjects. Some of these clearly belong to the field of international criminal law, while others are tenuously linked to it at best—even according to his own definition. It is a matter of regret that Glaser did not exert greater self-restraint in selecting his topics. As it is, the detailed description of developments in the law with respect to each and every one of the subjects on the list makes somewhat confused reading and is not always conducive to enhancing the reader's understanding of international criminal law. Despite these defects, however, the book, and especially its documentary part, may be considered a useful tool to all those who take an interest in the development of international criminal law.

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*Boundaries and Frontiers.* By J. R. V. Prescott. London: Croom Helm; Totowa, N.J.: Rowman and Littlefield, 1978. Pp. 210. Index. \$20.

This splendid, if concise, study by a geographer-social scientist of boundaries and frontiers ("frontier" is used in the sense of an ethnic, cultural,



strategic, political, and economic zone along a line termed a "boundary") is rich in detail and full of insights that the international lawyer would do well to recall in devising boundary agreements and settlements of boundary disputes. It is introduced by an illuminating discussion of the theoretical contributions and research of experts in the field from Ratzel (1897) through Lord Curzon, Holdich, Fawcett, Lapradelle, Ançel, Boggs, Jones, Hodgson, Lamb, Widstrand, and Touval. The social, economic, and strategic factors leading to the gradual narrowing of the frontier zones and the replacement of frontiers of separation by those of contact are then set in evidence. The evolution of boundaries by delimitation, demarcation, and relocation as products of these factors is illustrated in numerous problems such as the contradictions in the clause "the most elevated crests of said Cordillera that may divide the waters," which produced the dispute between Argentina and Chile (p. 71), the conflict between Austria and Italy over the Tyrol, and the century-long boundary adjustments between the United States and Mexico. Among the numerous boundary disputes examined is that over the Amur and Ussuri Rivers between the Soviet Union and China, and those concerning the utilization of boundary waters. Chapters follow on maritime and intranational boundaries.

The study is constantly enlivened by a refreshing cynicism as to the motives dictating the formation and evolution of boundaries and the settlement of boundary disputes. "Territorial disputes which are based solely on legal arguments that the territory ought to belong to the claimant state are comparatively rare. . . . Indeed the largest number of territorial disputes lack any significant legal component" (p. 103). Writing of maritime boundaries, he observes: "There are no major rules which have not been breached in both the spirit and the letter" (p. 147). The significance of "natural" barriers is punctured by the reminder that passes at 15,000 feet mean nothing to a Tibetan or Bolivian who suffers physical discomfort at lower levels (p. 106).

Self-determination is realistically diminished as being invariably subject to political expediency. "For example, the Organisation of African Unity called for the self-determination of Rhodesian citizens, but it condoned the partition of Spanish Sahara between Morocco and Mauritania without any consultation with the local population." Prescott adds quite erroneously, however, that "[t]he people of Eritrea were not consulted before they were handed over to Ethiopia in 1952" (p. 110).<sup>1</sup> "The transfer of power to indigenous governments during the process of decolonisation has caused a number of territorial disputes to flare." He then goes on in the context of Iran's seizure of three islands in the Strait of Hormuz, Afghanistan's claims to Pushtunistan, and the annexation of Spanish Sahara by Morocco and Mauritania to observe: "Decolonisation is sometimes the

<sup>1</sup> A commission of investigation of the four great powers was sent there in 1947 and a United Nations Commission of five member states was likewise dispatched to Eritrea in 1950. Both engaged in an elaborate series of consultations with the population throughout the territory. The decision by the UN General Assembly was reached only after consideration of the reports of those commissions.

signal for neighbouring states to take advantage of the withdrawal of colonial armies" (p. 97).

The study is not, however, without its flaws. It is notoriously weak on nomadism, and it makes no mention of the Treaty of Lalla Marna of 1845 which excluded a boundary along a major portion of the territorial limits between Algeria and Morocco, of the unusual frontier arrangements between Egypt and the Sudan occasioned by nomadism, or of Lattimore's fascinating studies of nomadism and frontier problems in Outer and Inner Mongolia. It fails to remind the reader of the renunciation by the USSR of the tsarist boundary treaties with China which the Soviet Union now conveniently forgets. The Argentina-Chile *Beagle Channel* arbitration (1977)<sup>2</sup> and—in the context of intranational boundaries—*U.S. v. Maine et al.* (1975)<sup>3</sup> have been ignored.

JOHN H. SPENCER

*La Succession d'Organisations Internationales en Afrique.* By Raymond Ranjeva. Paris: Editions A. Pedone, 1978. Pp. xiv, 418. Index.

While state succession need not invariably involve substitution of sovereignty over territory, certainly the states of Africa have insisted more than most on a scrupulous respect for both sovereignty and territory. On the other hand, succession in respect of international organizations does not involve the concept of sovereignty and only rarely that of territory. If, then, succession remains a questionable concept<sup>1</sup> as applied to international organizations, it would seem to be largely inapplicable to African regional organizations. An inquiry demonstrating acceptance of such a concept in Africa would therefore constitute an original, if not almost startling, contribution. Conversely, a study of nearly four hundred pages proving rejection by African states of succession as applied to African regional organizations, scarcely appears to merit the accolade of "*infiniment précieux*" bestowed upon it in an extended and laudatory preface by Professor Emerita Suzanne Bastid of the University of Paris and the Institut de France. As with state succession, the African states have insisted upon the "clean slate" ("*solution de continuité juridique*") and the "opting-out" formulas in respect of international organizations (pp. 221, 391). With but one dubious exception,<sup>2</sup> every solution has depended on the consent of each member state of each regional African organization involved (pp. 252, 391), although the author claims to detect some empirical practice of "continuity of activity" (pp. 391–92). The result has been a proliferation of opportunistic, political, and contradictory settle-

<sup>2</sup> 17 ILM 632 ff. (1978).

<sup>3</sup> 14 ILM 513 ff. (1975).

<sup>1</sup> Compare D. P. O'CONNELL, INTERNATIONAL LAW 458–60 (1965); L. OPPENHEIM, 1 INTERNATIONAL LAW 168–69 (8th ed. Lauterpacht, 1955); Fitzmaurice, *International Organisations and Tribunals*, 29 BRIT. Y.B. INT'L L. 8–9 (1952); H. Chiu, *Succession in International Organizations*, INT'L COMP. L. Q. 8 ff. (1965).

<sup>2</sup> The takeover by the Afro-Malagasy Common Organization (OCAM) of the headquarters building originally belonging to the Afro-Malagasy Economic Cooperative Organization (OAMCE), p. 348.

ments (pp. 145, 296, 338, 353, 355, 359, 390, and 391), some actually adopted, others merely proposed and left to perish from indifference (pp. 300, 373, and 379).

In consequence, the author repeatedly finds himself involved in discussion of points that lead nowhere and of distinctions that, in the end, prove to be without differences. For example, following elaborate discussion, he is led to admit that in respect of succession as applied to African regional organizations, political interests have voided of juridical content the otherwise significant distinction between real and movable property (pp. 380, 387). One must question the author's assertion that there has been no problem in recognizing succession of international organizations in the case of the takeover of the properties of the East African Common Services Organization (EACSO) by the East African Community. The latter organization was the creation of three independent states (Kenya, Tanzania, and Uganda), whereas the former was a structure created unilaterally by the British Government.

The emphasis is on "succession" as applied to the Afro-Malagasy Union (UAM), the Afro-Malagasy Organization of Economic Cooperation (OAMCE), the Afro-Malagasy Union of Economic Cooperation (UAMCE), and the Afro-Malagasy Common Organization (OCAM). Contributions from French authors are extensively cited and quoted, including unpublished lectures (*répétitions écrites*), to the almost total exclusion of works in English. Little use has been made of the jurisprudence of the International Court of Justice in the *South West Africa*, the *Anglo-Iranian*, and the *Aerial Incident* cases, and the theoretical underpinnings of the problem are completely ignored. Nor can one share Professor Bastid's enthusiasm for the "meticulous treatment of materials and discussion" and "the care in assembling documentation" (pp. x, xi). A generous indifference to accuracy infuses both the text and quotations from official documents (pp. 32, 71, 77, 173, 195, 337, 375, and 389).

JOHN H. SPENCER

*An International Rule of Law.* By Eberhard P. Deutsch. Charlottesville: University Press of Virginia, 1977. Pp. xxix, 389. Appendixes. Index. \$20.

Proposing a major revision of the Statute of the International Court of Justice, the late and respected Eberhard P. Deutsch argues in this volume that the "absolutely indispensable . . . factor to bring about acceptance of compulsory jurisdiction of an international tribunal over disputes among sovereign nations is assured independence of an international judiciary." In addition, Deutsch asserts that such jurisdiction will be accepted only if, in addition, there is "effective prohibition of invasion of domestic jurisdiction."

Proceeding from these premises, the author presents and explains his comprehensive draft for a new ICJ Statute that would include the following new elements:

- universal compulsory jurisdiction with no reservations permitted by ratifying states, coupled with a requirement that, if a state asserts

that a matter is solely within its domestic jurisdiction, the concurrence of 10 of the 15 judges would be necessary for the ICJ to have jurisdiction, and, in cases of doubt, the judges would resolve the matter in favor of the claim of domestic jurisdiction;

- election of judges for life, followed by their "internationalization," i.e., renunciation of their nationality and assumption by them of citizenship in the United Nations;

- a minimum age of 50 for judges at the time of their election, a maximum age at election of 65, and a compulsory retirement age of 75;

- elimination of the provision for appointment of *ad hoc* judges by a party to a contentious proceeding whose nationality is not represented on the Bench;

- permission for public international organizations to appear as parties before the ICJ; and

- inclusion among the applicable principles of international law for adjudication of contentious proceedings those provisions of international conventions establishing rules generally recognized among nations even if, as required by Article 38(1)(a) of the current ICJ Statute, such rules are not expressly recognized by the contesting states.

To place his proposal in context and support its contents, Deutsch examines in detail the negotiations and other developments that led to the formulation of the Statutes of the Permanent Court of International Justice and the International Court of Justice. This meticulous account of the past, however, does not strengthen the argument for the author's proposal. For example, four chapters on the issue of domestic jurisdiction are followed by only a single paragraph explaining how requirements for a ten-judge ruling on domestic jurisdiction challenges and a presumption in favor of finding domestic jurisdiction would suffice to overcome the reluctance of states to accept compulsory jurisdiction. The volume also ignores the more modest efforts that others have undertaken to promote increased use of the ICJ without revision of its Statute.<sup>1</sup> In short, Deutsch's volume is more likely to stimulate thinking by its bold approach and its exhaustive account of the history of the PCIJ and ICJ Statutes than it is to gain ready adherents to its detailed proposals.

PETER D. TROOBOFF

*Of the District of Columbia and New York Bars*

*Revolution of Being. A Latin American View of the Future.* By Gustavo Lagos and Horacio H. Godoy. New York: The Free Press, 1977. Pp. xxvii, 226. Index. \$14.95.

<sup>1</sup> See, e.g., S. Res. 74-78, 93d Cong., 2d Sess., 120 CONG. REC. 15264-66 (1974), as reported in S. REP. NO. 93-842, 93d Cong., 2d Sess. (1974); THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE, esp. chs. 12-17 concerning *The Use, Actual and Potential, of the International Court of Justice* (L. Gross ed., 1976). See also, Baxter, *Two Cheers for International Adjudication*, 65 A.B.A.J. 1185 (1979) (reviewing the flexibility of the ICJ to hear cases under its current Statute and noting the ICJ's recent "meticulous examination and revision of its rules, in order to make them as responsive to the needs of states as the Statute of the Court will allow").

This book is another in the series of "relevant" utopian essays sponsored by the World Order Models Project (WOMP). Like their associates in this enterprise, Lagos and Godoy have operated under the requirement that

each author . . . attempt a diagnosis of the contemporary world order system, make prognostic statements based on that diagnosis, state his *preferred future* world order and advance coherent and viable *strategies of transformation* that could bring the future into being. A stringent time frame, the 1990's, served to discipline and focus thought and proposals.

The time frame, one might uncharitably add, also lends an air of desperate frivolity to an inquiry required by editorial fiat to proceed from the assumption that WOMP goals cannot be achieved without a radical change in the world order and human consciousness. The authors themselves concede that the postulated changes probably cannot occur within the imposed time frame. Hence, at the very outset they are placed in the unenviable situation of imagining an unimaginable transition scenario.

An additional commission apparently borne by the authors is the presentation of a peculiarly Latin American perspective. Lagos and Godoy are certifiably Latin American. And they do emphasize conditions of poverty and social injustice in that part of the world. But I, at least, find nothing distinctively Latin American about their diagnosis, prognosis, or utopia. An analyst from any part of the world who shared their values—"humanist" or, I suppose, democratic socialist—might as easily have written this book. Whether there exists in fact a distinctively Latin American or Indian or African or, for that matter, North American perspective is an interesting question that somehow does not seem to interest the authors or the Grand Master of WOMP, Dr. Mendlovitz.

Be that as it may, what can be said of this essay in utopian modeling? Very little, I am afraid, and that little can be further reduced to the following: impeccably decent values, leaden prose, hackneyed and superficial diagnosis, a banal utopia, and uncooked speculations about the great transition. Let the book speak for itself:

The Peruvian military regime is regarded as an interesting phenomenon in Latin America, since it has proved that the armed forces are not necessarily an instrument of the more conservative elements of society. On the contrary, in Peru they have shown that under given circumstances they can carry out the changes required to attain economic development and social justice, and independent policies in relation to the U.S. or any other world power.

My marginal notes read:

"[R]egarded" by whom? What phenomenon is not "interesting" to someone? Can a country compelled by the harshest financial stringencies to negotiate its domestic economic policies with North American private banks be deemed to have attained "independent policies"? Given the authors' lack of prescience about events occurring less than half a decade after their observations (which appear to have concluded in 1974), how credible are their two-decade projections?

Banality is sometimes veiled by language that drifts like a vagrant gas-bag across the page, as in the following two examples selected at random:

The essence of the new individual and of the new society will be their permanent capacity for self-renewal and self-construction. The new individual will be one who will be reborn with every fresh discovery of new values and new dimensions of life. In the new individual there will be people of the old sort who will have to die gradually so that through revolutionary cultural change an individual with a new outlook on life may come into being. . . .

The model of the international system will be constructed around a set of basic values to which the interactions of the system will be oriented. These central values will be as follows:

1. Maximization of peace understood as a synthesis-value made up of integrant values.
2. Maximization of the integrant values that indicate the scope of the synthesis value in its various dimensions.

Normally, authors must bear the primary responsibility for their failures. But, having encountered other essays in this series written by able people, I wonder whether in all these cases the fault lies not in the authors but rather in their mandate. Lagos and Godoy almost imply as much when, in the book's most useful and accurate paragraph, they write:

The methodology for the construction of preferred-world models embodying the relevant utopian characteristics is as yet inchoate, at so rudimentary and embryonic a stage that the researcher proposing to do a scientifically acceptable job will be virtually on his own. Although WOMP has made some incursions into this unexplored terrain, the intellectual instruments it has identified amid the welter of questions and problems are, in our opinion, insufficient.

TOM J. FARER  
Board of Editors

*Nuclear Proliferation: Motivations, Capabilities, and Strategies for Control.*

By Ted Greenwood, Harold A. Feiveson, and Theodore B. Taylor.  
1980s Project/Council on Foreign Relations. New York: McGraw-Hill Book Company, 1977. Pp. ix, 210. \$4.95.

This volume is one of the products of the 1980s Project of the Council on Foreign Relations; as such, it constitutes one of a considerable number of independent but, in part, interrelated studies. Though largely the work of the three named authors, the questions addressed were formulated by the project staff under the guidance of a coordinating group, and the draft was vetted by working groups of specialists and generalists selected by the Council. Thus, there are traces of group flavor about the product, which do not, however, affect its quality. Indeed, the volume consists of two separate studies somewhat tenuously held together by an introduction (which in part serves as a conclusion) by David C. Gompert of the project staff.

Greenwood addresses himself to *Discouraging Proliferation in the Next*

*Decade and Beyond.* After examining the security and political objectives that nuclear weapons might meet or affect, he explores at some length various means for reducing incentives to acquire them and for increasing disincentives to do so; he then considers how the international nuclear industry could best be managed to achieve those ends. After briefly examining and dismissing the chances of proliferation by nonstate entities, which he (in contrast to his co-authors) does not consider likely to want nuclear weapons, he outlines an admittedly modest "general strategy of nonproliferation." This strategy recognizes that proliferation is an irresistible and irreversible process, but trusts that if it does not proceed too rapidly or disorderly, the world community will be able to adjust without catastrophe to the gradual addition of nuclear powers. Thus, none of the measures recommended is advanced as a panacea but merely as a homoeopathic step, which, taken under the right circumstances and in combination with other appropriate measures, should inhibit proliferation. This sober message is not an optimistic one, particularly when it is recognized that the careful treatment prescribed cannot be unilaterally administered by a single-minded benevolent authority, but depends on a growing number of differently motivated states of varying stability, themselves not immune to the nuclear urge. Unfortunately, the basic realism of the analysis cannot be faulted.

Feiveson and Taylor, in a briefer study, consider the technical aspects of safeguards and other control measures. They conclude that even if the best efforts are employed, proliferation to both states and other entities cannot be prevented in a plutonium economy. Instead of this economy, they propose a radically different strategy for nuclear power production, based on a thorium-uranium 233 cycle. Though they confidently suggest that such a cycle would function and be less likely to lead to proliferation, it should be noted that the technical assumptions are almost entirely theoretical—not yet tested on any substantial scale—and may thus be just as erroneous as early 1950's promises about the uranium-plutonium cycle.

PAUL SZASZ  
*United Nations*

*The Persian Gulf and the Strait of Hormuz.* By R. K. Ramazani. No. 3, International Straits of the World Series, edited by Gerard J. Mangone. Alphen aan den Rijn: Sijthoff & Noordhoff, 1979. Pp. xi, 180. Appendixes. Index. Dfl.70; \$35.

The dependence of the Western countries, Japan, and many nations of the Third World on oil from the Persian Gulf region is well known. What is perhaps less appreciated is the fact that all but a small fraction of the Gulf's oil production is carried to its destinations by ships passing through the Strait of Hormuz, a passage over 100 miles long but less than 21 miles wide at its narrowest point. From this fact, reinforced by other considerations, the author (a distinguished Middle Eastern scholar at the University of Virginia) draws the central thesis of his study: that the strait is par excellence "the global chokepoint" at which vital worldwide political,

economic, and strategic interests are compressed in small compass under potentially explosive pressures.

The monograph correctly emphasizes—and elucidates—the complexity of the political scene in the Gulf: the variety of interests at stake, the comingling of local and intraregional tensions with those of wider scope, the social and economic pressures generated by vast oil revenues, and the ever-looming presence of the Soviet Union to the north. Every problem is entangled with every other, making even partial answers difficult and total solutions impossible. Writing before the departure of the Shah, the author sees for Iran a greater stabilizing role in the region than would be justified today; but certainly the dangers he describes are now more evident than ever.

The focus of the book is more on strategy, politics, and economics than on law. However, it does contain some interesting accounts of territorial disputes in the Gulf and the texts (in English) of a dozen Gulf boundary and other agreements. The question of a right of transit passage through the Strait of Hormuz is examined, and the author concludes that up to the time of writing the positions of the two coastal states, Iran and Oman, were not favorable to such a right. This example well illustrates the legal difficulties over transit of straits that may be anticipated in future if a right of transit passage is not generally recognized.

RICHARD YOUNG  
*Board of Editors*

*Bargaining in International Conflicts.* By Charles Lockhart. New York: Columbia University Press, 1979. Pp. viii, 205. Index. \$12.50.

Drawing on research begun a decade ago, this book tries, with some success, to bridge the gap between abstract theory and the kind of practical advice that would be of use to a statesman caught up in an international crisis.

A brief opening chapter reviews some game-theory models that have been applied to international conflict. A second chapter considers the relevance of experimental psychological research to the analysis of bargaining in severe international conflicts. The theoretical models are seen as offering frameworks for analysis, the experimental work as providing clues to what may be important.

In the main body of the book, Lockhart suggests patterns of conduct that occur in acute international conflicts. In doing so, he relies primarily on close analysis of perhaps a dozen or so international bargaining situations that occurred during the past 75 years, such as the Cuban missile crisis. He suggests that acute bargaining situations that fall between war and peace can be seen as falling into four stages: an intolerable violation, an act of resistance, a confrontation, and an accommodation. Within each of these stages of a conflict episode he looks at what is taking place in terms of (1) patterns of interpretation as to what is going on; (2) the plurality of those involved in making a decision; (3) the search for a



strategy; (4) the creative inventing of useful options; and (5) strategic dilemmas that are faced. This chronological analysis is presented with extensive examples. Insights about common failings of statesmen appear throughout the book: *e.g.*, "the chances of a statesman's initially perceiving the situation with which he is actually confronted are slim." And: "It is rare for an . . . image of the adversary to change much during the confrontation phase." Modest conclusions—some descriptive, some prescriptive—are drawn.

Lockhart is fully aware of what he is doing: he is looking for patterns of conduct in how statesmen behave which can be used by other statesmen in deciding how to behave. While it is useful to anticipate what others may do, it is also dangerous to generate advice without a broader search for purpose and for better ways to accomplish those purposes. By studying crises of recent decades we learn to play gunboat diplomacy more skillfully; we will not learn better games to play, or how to change the game.

I did not find the words "law" or "international law" in the book.

ROGER FISHER  
*Harvard University*

*Human Dignity: The Internationalization of Human Rights.* Edited by Alice H. Henkin. New York: Aspen Institute for Humanistic Studies; Dobbs Ferry: Oceana Publications, Inc.; Alphen aan den Rijn: Sijthoff & Noordhoff, 1979. Pp. xii, 203. Appendix. \$12.50.

This book of essays is a product of an Aspen Institute Workshop held at the time of the 30th anniversary of the adoption in 1948 of the Universal Declaration of Human Rights by the General Assembly of the United Nations. The essays focus upon a consideration of how the member states of the United Nations bear their obligations under the Charter "to promote universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race, sex, language, or religion." Noting the increasing acceptance of the late-Renaissance idea that "human rights are 'inalienable,' and are to be recognized, not conferred, by society," a group of distinguished contributors discusses the post-World War II phenomenon of progress toward the internationalization of human rights and probes the attendant problems of defining, ranking, and implementing those rights.

A majority of the contributors expressed the view that at the heart or core of international human rights are those rights dealing with freedom from governmental violations of the security or integrity of the person. An explication of this core concept was furnished by Robert B. McKay:

Even the domestic jurisdiction clause of Article 2 of the United Nations Charter does not immunize nations guilty of consistent patterns of gross violations of human rights, such as genocide, mass killings, torture and severe cases of racial discrimination. There is then, a core of human rights which have been recognized—or at least not denied—by all nations.

To this core Thomas Buergenthal and Abraham Sirkin added freedom from mass arrest and prolonged imprisonment without trial.

The essayists trace how these "core" rights, together with the rights to freedom of expression, religion, movement, and suffrage—rights that have been championed by the Western democracies—are defined in the first 21 articles of the Universal Declaration, elaborated in European and American regional conventions, incorporated by reference in the Helsinki accords of 1975, and codified in the International Covenant on Civil and Political Rights and in the Genocide and Racial Discrimination Conventions. They also point out how the rights to employment, education, adequate income, and social security—rights favored by the Second (or Marxist) and Third (or developing) Worlds—are spelled out in the latter part of the Universal Declaration and further developed in the International Covenant on Economic, Social and Cultural Rights.

The volume contains descriptions and evaluations of the rudimentary modes of implementing international human rights standards at the world level, of the more promising regional institutions for that purpose, and of what can be done at the initiative of the individual state and of nongovernmental organizations such as Amnesty International. The contributors caution that attempted case-by-case enforcement or encouragement of human rights through bilateral diplomacy must have the right combination of patience and urgency, pragmatism and idealism, and flexibility and coherence necessary for negotiating with the powerful and the weak, the rich and the poor, the democratic and the authoritarian, and the friendly and the unfriendly—all without destabilizing offending states or harming their victims and without jeopardizing arms controls, energy supplies, or détente.

GEORGE D. HAIMBAUGH, JR.  
*University of South Carolina*  
*School of Law*

*Human Rights: International Documents.* By James Avery Joyce. Volumes I, II, and III. Alphen aan den Rijn: Sijthoff & Noordhoff; Dobbs Ferry: Oceana Publications, Inc., 1978. Pp. xi, 1717. Index. \$40 per vol.

With the proliferation of intergovernmental and nongovernmental human rights organizations, there is great need for a compilation of major documentation in the human rights field, particularly for those without ready access to the publications of international organizations. This three-volume compilation attempts to fill that need. Unfortunately, it does not succeed; instead, it provides a sampling of documents and commentary that are often more puzzling than useful.

The first volume, entitled *The Main Instruments*, reproduces a 1973 compilation by the United Nations of its major human rights declarations and conventions. There follows a commentary by the United Nations on its work in the human rights field and a special commentary on the status of the UN Covenants on human rights. Then a chapter on "some special

categories", reproduces two UN studies on the role of youth in the promotion of human rights, followed by some reports dating to 1975 on the efforts to draft a declaration on religious intolerance. This section is curious not only because of the selection of these topics for consideration but also because the entire second volume is devoted to selected issues.

The bulk of the second volume consists of reports of the Secretary-General to the General Assembly rather than resolutions or other primary working documents of the United Nations. Even in the chapter on specific case studies, South Africa, Chile, and Israel, the author omits any decisions of the United Nations taken in regard to the human rights situations in these three countries.

The most serious difficulties are with the third volume, devoted to other intergovernmental and to nongovernmental organizations. There are no treaties here of the ILO or UNESCO; the Inter-American and the European Conventions on Human Rights are omitted, as are the rules of procedure of the European Commission and the Court and the Statute of the Inter-American Commission. Instead, chapters on those organizations contain a one-page summary of the work of each regional organization, excerpted from Ganji's 1973 UN report on "The Realizations of Economic, Social and Cultural Rights," and a 1977 publication of the European Commission entitled *Stock-taking on the European Convention on Human Rights*. The latter would be much more useful if the convention and protocols were also contained in the volume. The only major instrument that appears outside volume I, chapter I, is the Helsinki Final Act, which is reproduced in volume III.

For the section on nongovernmental organizations, one publication of each organization appears to have been selected at random for inclusion; for example, the *Review* of the International Commission of Jurists of 1977; the inaugural session of the Dakar Conference on Namibia for the International Institute of Human Rights; and excerpts from the 1977 report of the Interparliamentary Union. Only in the case of Amnesty International is there an explanation of what the organization is and how it functions.

Also missing are documents of the United Nations relating to individual communications, such as ECOSOC Resolution 1503, certainly of interest to anyone concerned with human rights. No mention is made of these procedures apart from a brief discussion in the UN commentary in volume I. Finally, the bibliography selects a small fraction—fewer than 30 titles—of the available books on human rights. These shortcomings detract from the set's value as an introductory work, while the absence of primary documentations such as treaties and UN resolutions makes it difficult to recommend to those with more background in the field.

DINAH SHELTON  
*University of Santa Clara*

*Compendium of Case Law Relating to the European Communities, 1976.*  
By H. J. Eversen, H. Sperl, and J. A. Usher. Amsterdam, New York,

Oxford: North-Holland Publishing Co., 1978. Pp. xiv, 503. Cumulative Index 1973-1976. Dfl.130.

This volume is the fourth in the series of compendia of the case law relating to the European Communities published in English by the authors, who are officers of the Court of Justice of the European Communities. The English edition was prompted by the accession in 1972 of the United Kingdom, Ireland, and Denmark to the treaties establishing the European Communities. Predecessor volumes covering the period from 1953 to 1972 were published in French and German as part of the *Kölner Schriften zum Europarecht*. That series, which is sponsored by a different publishing house, includes a parallel volume for the same period.<sup>1</sup> The new English volume follows the pattern of the prior issues.<sup>2</sup> It contains 497 extracts culled from 76 judgments of the Court of Justice that decided questions of Community law<sup>3</sup> during 1976, and from relevant judgments of national courts of seven of the nine Community nations that dealt with issues germane to Community law and were published in various collections and periodicals during the period covered. A separate part of the work relates to conventions concluded between member states under Article 220 of the EEC Treaty, especially the Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments of 1968, recently extended in amended form to the new Community nations.<sup>4</sup> This segment includes extracts from seven judgments involving the applicability and interpretation of the convention in cases decided under the protocol of June 3, 1971, which demonstrates the growing rule in that area.

The output of the Court of Justice during the period covered involved some cases that transcend the interests of specialists in Community law. Readers of this *Journal* might find it notable that in the case of *Cornelis Kramer and others*<sup>5</sup> the Court rendered a basic judgment on the distribution of the external relations powers between the Community and the member states. The Court held "that in its external relations the Community enjoys the capacity to enter into international commitments over the whole field of objectives defined in Part One of the Treaty" and that therefore "the Community has authority to enter into international commitments for the conservation of the resources of the sea."<sup>6</sup> In reaffirming

<sup>1</sup> H. EVERSEN & H. SPERL, *RÉPERTOIRE DE LA JURISPRUDENCE RELATIVE AUX TRAITÉS INSTITUANT LES COMMUNAUTÉS EUROPÉENNES*. Deuxième série 1976. (1978).

<sup>2</sup> The volumes for 1973 and 1975 were reviewed in this *Journal*, 70 AJIL 883 (1976) and 72 AJIL 963 (1978).

<sup>3</sup> Community law covers matters pertaining to the application and interpretation of the three treaties establishing the European Communities, association agreements with other countries, especially the ACP-EEC Convention of Lomé, the secondary Community law consisting of acts of the Council and the Commission, the Common Customs Tariff and related instruments, the regulations covering the status of Community officials and employees, and the Statute of the Court of Justice.

<sup>4</sup> Reprinted in 18 ILM 8 (1979).

<sup>5</sup> [1976] ECR 1279, joined cases 3, 4, and 6/76.

<sup>6</sup> *Id.* at 1308 and 1309. Pursuant to that authority the United States and the Community concluded an agreement on Fisheries off the United States Coasts, Feb. 15,

the Community authority to make international commitments binding the member states in all areas of exercised internal Community powers, the Court has greatly strengthened the role of the Community in world affairs, which has been noted by the European Parliament,<sup>7</sup> as well as by commentators.<sup>8</sup> Other vintage judgments of general significance are cases on the protection of basic economic rights under the EEC Treaty, although the Community's role in that area is limited indeed. Thus, in *Defrenne v. Sabena*<sup>9</sup> the Court held that Article 119 of the Treaty of Rome mandating equal pay for men and women became directly applicable as of January 1, 1962, for the original member states and as of January 1, 1973, for the new entrants. Unfortunately, the plaintiff's victory in her suits was only partial: she failed in her efforts to establish mandatory equality in compulsory retirement age or other conditions of work.<sup>10</sup>

The compendium demonstrates the mounting numbers of intricate questions on Community law coming to the courts. It is a carefully arranged and excellent guide to the judicial decisions relating to the individual articles of the treaties and to the cases involving the validity and construction of the changing body of secondary Community law.

STEFAN A. RIESENFELD  
Board of Editors

*Fontes Juris Gentium. Series A, Sectio II. Tomus 5 and Tomus 6.* Decisions of German Courts relating to Public International Law 1961–1965 and 1966–1970. Edited by Hermann Mosler and Rudolf Bernhardt. Berlin, Heidelberg, New York: Springer-Verlag, 1978 and 1979. Vol. 5: pp. xxii, 1048; Vol. 6: pp. xxi, 580. Indexes.

During the later years of the Weimar Republic, when the renaissance of German scholarship reached its peak, the Institute for Foreign Public and International Law of the Kaiser Wilhelm Gesellschaft embarked upon an ambitious project: the compilation and publication, in a trilingual edition, of the sources of international law. The *Fontes Juris Gentium* were to consist of two separate series, one (Series A) comprising decisions of international tribunals (Sectio I) and of German courts (Sectio II) adjudicating issues of international law, and the other (Series B) reproducing diplomatic correspondence of the European nations. The first three volumes of the work, all belonging to Series A, appeared in 1931.<sup>1</sup> In 1932 the first

1977, which entered into force on June 9, 1977, 28 UST 3787. See Riesenfeld, *Building the Common Market—and Beyond*, 19 VA. J. INT'L L. 42 (1978).

<sup>7</sup> European Parliament, Report on the position of the European Communities in Public International Law, Doc. 567/77, at 23.

<sup>8</sup> See, e.g., Riesenfeld, *Remarks on the foreign relations powers of the European Communities*, 72 ASIL PROC. 186 (1978).

<sup>9</sup> [1976] ECR 455, [1976] 2 COMM. MKT. L.R. 98.

<sup>10</sup> [1971] ECR 445, [1974] 1 COMM. MKT. L.R. 494, and [1978] ECR 1365, [1978] 3 COMM. MKT. L.R. 312.

<sup>1</sup> They consisted of digests of the decisions of the PCIJ for the years 1922–1930 (Series A, Sectio I, Tomus 1), of the awards of the Permanent Court of Arbitration

volume of Series B appeared,<sup>2</sup> followed, until the outbreak of World War II, by a further volume of Series A,<sup>3</sup> and four additional volumes of Series B.<sup>4</sup> Publication of the collection was hailed by Manley O. Hudson as "one of the big events in international law during the past decade."<sup>5</sup> After World War II the Institute, now maintained by the rechristened Max Planck Gesellschaft, decided to resume publication of Series A, Sections I<sup>6</sup> and II, broadening in 1970 the scope of the latter so as to include decisions on questions of international law by German national courts other than the highest courts. The preceding three post-World War II volumes covered the period from 1929 to 1960.<sup>7</sup>

The two new volumes under review span the decade from 1961 to 1970. They are the first to include published decisions of lower courts, including the separate administrative, tax, labor, and social security courts. As before, the volumes consist of topically arranged headnotes of the relevant judgments, followed by lengthier abstracts from the digested judgments themselves. The gist of the headnotes is summarized in French and English, sometimes in translations not readily understandable to the foreign reader. The excerpts from the judgments are solely in German. The limitations that this technique places on the utility of the *Fontes* for foreign readers have been noted before.<sup>8</sup> The great merit of this series and section of the *Fontes* for non-German scholars consists mainly in the fact that its volumes collect otherwise dispersed, not easily identified, and not readily accessible judgments relating to international law and thus tremendously simplify the task of research.

The 383 judgments contained in the two volumes furnish a vivid insight into (1) the vast array of questions of international law, whether created by custom or treaty, that come before German domestic courts in the course of their regular business; (2) the interaction between domestic and international law under the German constitutional system; and (3) the role of the Federal Constitutional Court.

Under the Bonn Constitution the general rules of customary international law are automatically incorporated into the federal law, prevail over

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rendered between 1902 and 1928 (Series A, Sectio I, Tomus 2), and of judgments of the Supreme Court of the German Empire published between 1879 and 1929 (Series A, Sectio II, Tomus 1).

<sup>2</sup> This volume covers the diplomatic correspondence of the European states between 1856 and 1871.

<sup>3</sup> Volume 4 covers the decisions of the FCIJ rendered between 1931 and 1934.

<sup>4</sup> Diplomatic correspondence of the European states between 1872 and 1878.

<sup>5</sup> See his reviews of the various volumes of the series in 25 AJIL 795 (1931); 26 AJIL 427 (1932); 28 AJIL 395 (1934).

<sup>6</sup> Three volumes of Series A I were published in 1961, 1963, and 1978, digesting the judgments and advisory opinions of the PCIJ rendered during 1934-1940 and of the ICJ rendered between 1947 and 1975. These volumes are of lesser interest to the English-speaking reader because of the availability of excellent digests in English.

<sup>7</sup> Vols. A II 2 (1929-1945), A II 3 (1945-1949), and A II 4 (1949-1960) were published respectively in 1960, 1956, and 1970. Reviewed in 50 AJIL 978 (1956), 55 AJIL 510 (1961), and 66 AJIL 912 (1972).

<sup>8</sup> See review, 66 AJIL 912 (1972).

statutes in conflict with them, and are capable of directly creating rights and duties for the inhabitants of the territory of the Federal Republic.<sup>9</sup> The Federal Constitutional Court is vested with the final authority to determine, upon certification to it of that question by a national court in a litigation in which the answer is relevant to its decision, whether a rule of international law is part of the federal law and whether it creates rights and duties for individuals.<sup>10</sup>

The case law of the Federal Constitutional Court, as manifested by a number of judgments reproduced in the volumes under review, has established several propositions. Under Article 25, only *general* rules of customary international law are incorporated and prevail over national statutes.<sup>11</sup> It is not necessary that such general rules be specifically recognized by the Federal Republic.<sup>12</sup> Incorporation is a continuous process that reflects changing content and scope.<sup>13</sup> Moreover, Article 25 of the Bonn Constitution, as well as the procedures under Article 100(2) of the Bonn Constitution and section 83 of the Law on the Federal Constitutional Court, also apply to general rules of international law that must be observed by the Federal Republic and its governmental agencies, even though they do not create rights and duties for individuals.<sup>14</sup> By certifying that the validity of a statute or other governmental act is in question under Article 25, a court may bring the existence of a general rule of customary international law before the Federal Constitutional Court, but a direct challenge to the validity of a statute or governmental act on that ground, by way of a direct constitutional complaint (pursuant to a procedure instituted by sections 90 *et seq.* of the Federal Constitutional Court Act) is not permitted.<sup>15</sup> An exception to that rule permits a direct constitutional complaint if a statute is claimed to be invalid under Article 25

<sup>9</sup> Bonn Constitution Article 25 provides: "The general rules of international law form part of the federal law. They prevail over statutes and create directly rights and duties for the inhabitants of the federal territory."

<sup>10</sup> Bonn Constitution Article 100(2) provides: "If in a litigation doubt arises whether a rule of international law is part of the federal law and whether it creates directly rights and duties for individuals (Art. 25), the court must submit the question for decision to the Federal Constitutional Court."

Article 100(2) of the Constitution is implemented by section 83 of the Law on the Federal Constitutional Court of March 12, 1951, as revised on February 3, 1971, and further amended in 1974, 1976, and 1979.

<sup>11</sup> 15 BVerfGE 25 (1962), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 81; 16 BVerfGE 27 (1963), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 112; 16 BVerfGE 276 (1963), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 127; 18 BVerfGE 441 (1965), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 217.

<sup>12</sup> 15 BVerfGE 25 (1962), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 81; 16 BVerfGE 27 (1963), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 112.

<sup>13</sup> 15 BVerfGE 25 (1962), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 81; 16 BVerfGE 27 (1963), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 112; 18 BVerfGE 441 (1965), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 217.

<sup>14</sup> 15 BVerfGE 25 (1962), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 81; 16 BVerfGE 27 (1963), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 112.

<sup>15</sup> 18 BVerfGE 441 (1965), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 217; 23 BVerfGE 289 (1968), 6 FONTES JURIS GENTIUM, Ser. A II, Case No. 63.

and the lack of a statutory basis for the governmental act violates a constitutional guaranty.<sup>16</sup>

Treaties as such are not subject to constitutional challenge.<sup>17</sup> However, the statute that gives assent to a treaty (a requirement under Article 59 of the Bonn Constitution<sup>18</sup>) is subject to review by the Federal Constitutional Court on the ground (and only on the ground) that the treaty violates a constitutional mandate.<sup>19</sup> The Court may be invoked either by way of a certified question from a court in which a litigation necessitating its resolution is pending<sup>20</sup> or by way of a constitutional complaint.<sup>21</sup> Only statutes giving assent to self-executing treaties may be subject to constitutional review under Article 100 of the Bonn Constitution because only such treaties may create rights and duties for individuals. A treaty is self-executing if "according to its terms, purpose and content" it is capable of creating legal norms binding on citizens, as is a domestic statute.<sup>22</sup> A statute that gives assent to a treaty that derogates from a rule of customary international law is not subject to challenge, unless the treaty violates a rule of *jus cogens*.<sup>23</sup> Likewise, except in the case of a treaty establishing a supranational entity pursuant to Article 24 of the Bonn Constitution, a federal statute cannot be invalidated on the ground that it is inconsistent with a prior treaty. Apparently, the rule *pacta sunt servanda*, although a general rule of international law within the meaning of Article 25, has not been generally recognized as compelling a different result.<sup>24</sup>

The aforementioned rules gleaned from the judgments digested and reproduced in the two volumes serve to illustrate the importance and richness of the materials collected.

STEFAN A. RIESENFELD  
Board of Editors

*Annuaire de l'Institut de Droit International, Vol. 57, Tomes I and II, Session d'Oslo 1977. Travaux préparatoires.* Basel: S. Karger, 1978. Tome I: pp. ix, 386. Sw.F.180; DM 216; \$108; Tome II: pp. lx, 413. Sw.F.355; DM 426; \$212.

The Institut's 1977 *Annuaire* (Oslo) contains reports, draft resolutions,

<sup>16</sup> 23 BVerfGE 289 (1968), 6 FONTES JURIS GENTIUM, Ser. A II, Case No. 63.

<sup>17</sup> 29 BVerfGE 348 (1970), 6 FONTES JURIS GENTIUM, Ser. A II, Case No. 127.

<sup>18</sup> Article 59 requires assent or participation by the parliamentary bodies in the form of a statute to treaties that govern political relations of the Federal Republic or relate to matters within federal legislative powers.

<sup>19</sup> 18 BVerfGE 441 (1965), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 217.

<sup>20</sup> Bonn Constitution Art. 100(1).

<sup>21</sup> 15 BVerfGE 337 (1962), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 108; 16 BVerfGE 220 (1963), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 120 (application for injunction against promulgation of a ratification law and the exchange of instruments of ratification).

<sup>22</sup> 29 BVerfGE 348 (1970), 6 FONTES JURIS GENTIUM, Ser. A II, Case No. 127.

<sup>23</sup> 18 BVerfGE 441 (1965), 5 FONTES JURIS GENTIUM, Ser. A II, Case No. 217.

<sup>24</sup> See Finance Court Hamburg (1969); [1970] EFG 196, 6 FONTES JURIS GENTIUM, Ser. A II, Case No. 102; *contra*, B Pat G (1967), [1968] GRUR Int. 135, 6 FONTES JURIS GENTIUM, Ser. A II, Case No. 50.



discussions, and commentaries on three topics of great importance. These are: (1) contracts entered into between international organizations and private individuals (Professor Nicolas Valticos, rapporteur); (2) contracts between states and foreign private individuals (Professor Georges van Hecke, rapporteur); (3) multinational enterprises (Professor Berthold Goldman, rapporteur); and (4) the receivability of public law claims in foreign fora. The volumes under review thus bring to the world of international legal scholarship and practice areas with rapidly moving frontiers. The importance of these areas should not be underestimated merely because they seem, at least so it appears to this reviewer, to be regarded as rather recondite in general American law teaching, if not in scholarship and publication. This unfortunate result is possibly due to the more limited scope of American law school offerings in conflict of laws (when compared with the continental European disciplines of private international law) and to the limited student interest in courses in international business transactions and international organizations.

Valticos's Provisional and Definitive Reports to the Fourth Committee of the Institut, and the comments and observations of the members of that committee, provide significant insights into the increasingly important issues concerning contracts between international organizations and private individuals and enterprises.

At the outset, however, certain fundamental considerations discussed by the Fourth Committee should be briefly indicated before passing to some of the proposals and perspectives that were offered. These premises include the following facts and values. (1) International organizations do not enjoy sovereign immunity and such exemptions that they do enjoy are provided in general conventions and in agreements with host states. The privileges and immunities so assured are predicated upon the recognition of the need for the organizations' independent performance of their functions and accomplishment of their purposes. (2) These organizations have not evolved detailed bodies of contract law regulating their agreements with private individuals and enterprises. (3) The monetary values expressed in their agreements are in terms of currencies controlled, not by the contracting organizations, but by states (frequently, but not necessarily, the organizations' host states). (4) In order to carry out their global or regional tasks, international organizations ought not to be subjected to the vagaries, changes, and accidents of state law.

Be that as it may, international organizations do not exist in the abstract as disembodied creatures carrying out transcendental tasks without the compulsions and restrictions of physical necessity. They are, by virtue of their existence, bound by the world of quotidian demands: the claims of their employees, the requirements of being housed in buildings, their needs for supplies and money, and a host of other requirements to which all human organizations must bow in order to function at any, let alone all, levels of commitment and purpose. All these mundane necessities must be contracted for. And such contracts must be negotiated with individuals and private enterprises. At this level of the international organi-

zation's performance of its tasks, national law takes on a new significance for the international order.

Despite these problems of the existence, identity, and integrity of the international organizations, it should be stressed that the traditional distinction with respect to contracts with states, namely, between obligations *jure imperii* and those of *jure gestionis*, has no place in the evolution of a body of law governing contracts with international organizations. Such organizations, unlike states, do not possess sovereignty and, hence, the analogy from sovereign immunity has no direct or immediate bearing.

But clearly a distinction should be made between agreements entered into for the purpose of mundane housekeeping requirements and those that are directed to the central and worldwide goals of the organization. Accordingly, when an organization enters into contractual accommodations with private individuals or enterprises, the question of selecting which of a number of possible sources of the governing laws becomes imperative. Such possible governing laws include international law, the general principles of law, the internal law of the organization itself, national law, or a combination of all or any of these. Again, the contract itself may either expressly, or by its nature and purposes, indicate the applicable law.

In contracts relating to the organization's physical needs the rapporteur considered the most appropriate governing law to be that of a state—this having the advantages of precision, completeness, stability, and predictability. By contrast, for contracts relating to the responsibilities of the organization (here one may contrast, for example, a contract for cafeteria supplies with one for technical cooperation) international law may provide the chosen governing rules. When national law is chosen, the rapporteur recommended that the parties also effectively resolve the intertemporal ("*droit gelé*") issue by expressly specifying that the governing state law should be that in force at the time of the completion of the contract.

What if the contract is silent as to the choice of law? In actual practice international organizations prefer to omit such a clause in their agreements, especially when private contractors do not accept the selection of either international law or the general principles of law. The effect of such silence may lead, in the event of a dispute, to diplomatic intervention by the host state and arbitration by an appropriate body, with the choice-of-law problem arising in that context.

In their observations the distinguished members of the Fourth Committee expressed divergent viewpoints—Professor Suzanne Bastid favored looking to the type of contract to indicate the applicable law, while Pierre Gannagé, Georges van Hecke, and Frederick A. Mann adhered to the principle of the *lex fori*. Yvon Loussouarn argued for the arbitrators' freedom to mold their own conflict-of-law rules of decision, and Paul Reuter favored the *lex fori* for a national arbitral body, but argued that the general principles of law should govern decisions by an international tribunal.

The Institut favored, from among a number of possible models, a per-

manently established international arbitral body as the medium of dispute settlement most appropriate for establishing and developing an applicable jurisprudence to regulate the contractual relationships of international organizations. This arbitral body would be independent of the host state and capable of resisting claims of national jurisdiction. The International Chamber of Commerce's arbitration capabilities seemed favored in this regard, but so also were ad hoc arbitration bodies.

The second major area of the Institut's investigation was the work of the Twenty-first Committee: contracts between a state and a foreign private person or enterprise. As always, the reports, observations, draft resolutions, and discussions by the Institut's members well merit study for their creativity, insight, and utility, especially in light of the current scholarly, legislative, and diplomatic interest in this subject and its congeners, sovereign immunity and act of state.

The third major topic, to which space for this review only permits the briefest salute, consists of the Institut's fine work on multinational enterprises. The rapporteur indicated the core problem as the tension between a centralized, transnational economic activity and the juridical plurality of its branches in the individual sovereign states that, collectively, constitute the contemporary world political order. Here again, the jurisdictional, choice-of-law, and regulatory dilemmas, already indicated in this review in the discrete context of contracts by international organizations, came to the fore.

The sense of the Institut's membership seemed to indicate that the law applicable to the constitution, structure, and functions of the multinational enterprise was that indicated by the forum's conflict-of-laws rules. The Institut added, however, that these rules should be progressively harmonized so that the law of the country where a corporate activity is carried on should be looked to first, and secondary reference should be made to the law of the place where the direct and immediate effects of the activity are produced.

Professor Willis Reese, however, seemed to favor the view that a distinction might well be drawn between the law governing the enterprise's internal affairs (including its relations with its overseas subsidiaries) and that regulating its relations with third persons. While the former might well be governed by the law of the state of incorporation (the "parent's" law), relations with the latter should be governed by the *lex fori*. In determining the link between the activity and the governing state's law, Reese argued that the Institut should formulate no more than a general, relative principle in terms of the "most significant relationship."

In volume 57's second part (*Travaux préparatoires (continued) and Deliberations and Plenary Sessions of the Institut*, bound separately as *Tome II*) the Institut continued its discussion of some of the topics already noted in the review of *Tome I*. In addition to these was the Twentieth Committee's Report by its rapporteur, Professor Pierre Lalive. The topic was the receivability, in the forum's courts, of public law claims advanced by foreign public authorities or organs based on their public

law. This Report provides a stimulating and original *Rapport définitive* of the subject.

Following the Institut's rejection, at its Wiesbaden meeting, of the traditional a priori rule of the conflicts of laws prescribing that foreign public law (including tax law) could not be applied to vindicate the claims of foreign public authorities, or that claims grounded on such law could not be received by the forum courts, Lalive developed an interesting and important thesis arguing, *de lege ferenda*, for the recognition and reception of such claims. He pointed to the evolution of the legal doctrines that provide for making foreign public bodies defendants in commercial and property disputes, and argued that equality before the law strongly supports their being plaintiffs. When the public purposes and scales of government activities today are considered, the distinction between public and private becomes blurred, if not meaningless. This was well illustrated in an example in Professor Otto Kahn-Freund's Observations which expressed strong agreement with Lalive's report. He wrote:

Under the British Employment Protection Act, 1975, sections 63 ff., in the event of insolvency of the employer, certain claims for wages and other payments are satisfied by the relevant government department out of a certain fund. In so far as this has been done, "any rights and remedies of the employee in respect of that debt . . . shall . . . become rights and remedies of the Secretary of State", i.e. of the public authority as such (0.67 (1)(a)). This is a *cessio legis* of a private claim, a subrogation such as is well known in other systems of law. By becoming "rights and remedies of the Secretary of State" do these wages etc. claims change their character so as to become unenforceable outside the United Kingdom? Does not this example show that the undoubtedly existing principle is, in modern conditions, difficult, perhaps increasingly difficult to apply?

Furthermore, as intergovernmental cooperation increases it becomes more and more desirable to restrict, or even eliminate, by means of negotiating bilateral and even multilateral treaties, this increasingly anachronistic principle, which currently denies to states the right of raising claims based on their public law (including their tax law) in the courts of foreign states.

A modest trend in this direction has already begun within the federal polity of the United States of America where a state public authority may sue in the courts of a sister state as a plaintiff to recover, under the Full Faith and Credit Clause (Constitution Art. IV, sec. I), a tax claim that has been reduced to a judgment (*Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935)). In *City of New York v. Shapiro* (129 F.Supp. 149 (D. Mass. 1945)), the federal district court held that the city comptroller could recover unpaid business and use taxes, plus penalties and interest, he had assessed against the defendant on the ground, as the court saw it, that there is no "reason of policy for distinguishing between a State's duty to give effect to a sister State's court judgment for taxes and its duty to

give effect to a sister State's binding administrative determination of taxes."

On the other hand, there would appear to be no authority for the proposition supporting the enforcement of foreign tax claims not reduced to a judgment.

These apparently rather modest intra-United States developments, however, would not appear to have any parallels among the member nations of the Commonwealth,<sup>1</sup> or any between Canada and the United States, at least as far as the Canadian authorities are concerned.<sup>2</sup>

It should be noted that Professor Ronald H. Graveson sounded, in his *Observations*, a wise note of caution regarding the enforcement of criminal penalties in a foreign forum. He wrote:

For these reasons I see no general objections to the recognition and enforcement of foreign claims of public law in categories 1 and 2, that is, fiscal and relating to criminal monetary fines. The general constraint of public policy in exceptional cases would, I suppose, continue to apply in both cases. As to the third category, the claims of foreign public law in respect of non-monetary penalties, if such claims are included in the question we have to consider, my first reaction is that an analysis is required of the kinds of claims that would be involved. If, in the absence of such an analysis, one had to generalise, I would think that for the time being one would exclude such claims for reasons I have already mentioned, and impose a general limit on foreign claims of public law that they should relate to money or property.

Subject to this caveat, clearly the topic of Lalive's Report is "an idea whose time has come" and will prove irresistible, at least in the esoteric field of private international law.

This reviewer profoundly regrets that prescribed limitations of space have prevented him from doing even a modicum of justice to these seminal volumes which the Institut produced at its Oslo session in 1977. He draws them to the attention of his American colleagues, not only because of their intrinsic value, but also because they deal with areas that have not been as deeply plumbed in either teaching or scholarly writing in this country as they assuredly deserve.

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*The International Arbitral Process: Public and Private.* By J. Gillis Wetter. Vols. I, II, III, IV, and V. Dobbs Ferry: Oceana Publications, Inc., 1979. \$250 per set.

Up to now there have not been many books in English that afford practicing lawyers a helpful hand through the maze of materials that deal with international dispute settlement. Since few lawyers ever get the chance to participate in international arbitrations, textbooks or other reference

<sup>1</sup> See, e.g., *Government of India v. Taylor*, [1955] A.C. 491 (H.L.).

<sup>2</sup> *United States v. Harden*, [1963] Can. S. Ct. 366, 41 D.L.R.2d 721 (1963).

guides reflecting their learning are rarities. Then, too, authors have never dared to combine public and private international arbitration into a single legal text. Now a distinguished Swedish attorney and scholar has accepted the challenge of searching for a common denominator for private and public international dispute settlement. Well qualified to address these issues, Wetter has spent a major part of his legal career either as an apprentice to trial counsel presenting major international arbitrations, or as assistant to the arbitrators in major, landmark public and private cases.

Arbitration between governments, public arbitration, attains its greatest success when it averts war, such as in the *Alabama Claims* and *Venezuela-Guyana* cases between the United States and Great Britain. The *Rann of Kutch* arbitration between India and Pakistan was credited with permitting the cease-fire agreement of 1965 between two of the world's most populous nations. Containing elements of "pomp and circumstance," as well as technical legal pronouncements, public arbitration has been employed for over a century with success and with little change. Today, faced with the constant search for solutions in troubled areas such as the Middle East, we can take heart from the significant instances where arbitration has averted armed conflict.

As for the private sector, most lawyers are familiar with the rules of procedure of international institutions that handle cases between contracting parties. We are now presented with the first in-depth study of the workings of those institutions and a comparative analysis of the various tribunals that allows attorneys to compare the differences among their rules through a valuable device entitled a "syntagma." By means of his novel presentation and analysis of these rules, Wetter has discovered that a unitary international arbitral process does not exist.

Interestingly, a whole chapter is devoted to U.S. arbitration law; apparently, there is keen interest abroad in the favorable climate accorded international and domestic arbitration by American federal and state courts.

Another illuminating chapter deals with arbitrations between sovereign states and foreign multinational corporations. In these cases ad hoc international arbitration has been the only practical way to create a jurisdictional system "beyond the exclusive control of the State." Wetter's review of portions of the arbitral awards in the cases between Saudi Arabia and the Arabian-American Oil Co., Libya and Texaco Overseas Petroleum and California Asiatic Oil Co., and Libya and British Petroleum Co. yields valuable insight into the international view of the arbitrator's ability to decide his own jurisdiction, the law governing the proceedings, and the applicable substantive law of the claim. In a previously unpublished version of the *BP/Libya* arbitration, we are treated to a rare view of the reopening of a proceeding in which an interim award was rendered.

The enforceability of awards against a foreign sovereign has often been questioned, and appropriate remedies have been thought to be lacking. Some recent court decisions indicate that sovereign immunity may not be

a defense against honoring awards. This would clear the way to effective award enforcement against foreign ministries or agencies.

The author's knowledge of current events in international arbitration is apparent, and he pays ample attention to proceedings in the United Kingdom, France, Switzerland, and the United States. One can forgive the parochial chapter dealing with arbitration in Sweden because the author's humility resonates throughout the volumes and because we are given a unique look into the background of the distinguished Swedes who will hear U.S.-USSR cases in Stockholm under the arrangements between the American Arbitration Association and the USSR Chamber of Commerce and Industry.

Other chapters alternate with some of the more serious reading materials presented. For example, it is interesting to read of the mores of arbitrators, the peculiarities of umpire proceedings in England, and differences between American concepts of party-appointed arbitrators and those held abroad.

The volumes contain a large number of full textual reproductions of decisions and awards. One and a half volumes are devoted to selected arbitration laws, including the recently enacted English Arbitration Act, various public and private rules, arbitration clauses, and multilateral conventions. They are valuable both for teaching and research purposes. Future lawyers will benefit greatly from learning how major public disputes were structured substantively and procedurally.

The author's prologue, in which he sets forth the substantive basis for preparing these volumes, and the epilogue, in which he raises some provocative and controversial issues for the future of international arbitration, are particularly interesting. Seeking greater professionalism for the somewhat "amateurish" arbitration process, reaching a balance between the "adversary" and "inquisitorial" legal systems, determining the fundamentals of the various forms of arbitration, understanding the basic underpinnings of voluntary arbitration by submissions or future agreements, delineating the role of advocacy in international arbitration, and determining how arbitrators identify and adjudicate the parties' claims are fascinating issues worthy of more scrutiny. The author acknowledges as much in his epilogue: "[T]here is much more to say of the international arbitral process, infinitely more." If we are fortunate, Wetter may prepare another volume dealing solely with the as yet unresolved questions so ably raised in the epilogue. I, for one, urge him to do so.

GERALD AKSEN

*American Arbitration Association*

*Folded Lies, Bribery, Crusades, and Reforms.* By W. Michael Reisman. New York: The Free Press; London: Collier Macmillan Publishers, 1979. Pp. ix, 277. Index. \$12.95.

This study in applied sociology of law is focused on the tension among symbols such as integrity, "the public interest," and "democratic responsi-

bility," and what actually goes on in private and public business. The range of data scrutinized by the author and his findings make the book relevant to both international and national operations, and illuminating for any teacher or practitioner whose interest in legal problems of doing business abroad is more than merely technical.

Reisman is extending into the macroarea of late 20th-century big business administration, public and private, the skeptical probing of the American realists of the twenties and thirties into the microarea of judicial administration. The mood obviously owes much to Thurman Arnold's *Symbols of Government*, and to Harold Lasswell (to whom the volume is dedicated).

In the data examined Reisman asks us to set off the publicly avowed "mythical" (or "symbolic") code of behavior, centered on loyalty to the enterprise, under which the operator's conflicts of interest by bribery or otherwise are anathema, from two other levels of perception (pp. 15-93).

One is the operational code which violators of the mythical code nevertheless usually recognize and respect. The existence of the operational code does not mean that *any* departure from the myth system is lawful. "Operators know that some discrepancies . . . are licit, and will be tolerated: others will not" (p. 35). The operational code perhaps stands somewhat to the myth system as Eugen Ehrlich's "living law" to "the formal law."<sup>1</sup>

Second, and contrasting with both the level of the "mythical" or "symbolic" code of behavior and that of the "operational code," are practices that violate both, and are thus deviations in a more fastidious sense. The benchmark for such deviation varies (Reisman thinks) with the culture ("local standards," p. 93), though it tends to lie somewhere between where bribery merely smooths or expedites a decision, and where it secures variance of *the rule for decision* or buys the decisionmaker outright. So also it might separate buying a judgeship for prestige or in order to serve, as opposed to buying one to make money out of it (p. 92).

On public reactions toward "folded lies," Reisman's analysis is also provocative. "Crusades" are more common than "reforms." A "crusade" ritually reaffirms the myth system, and reassures popular concern about it, but leaves elites and their operational code unimpaired (pp. 95-117). Reforms, when they succeed, do effect changes in the operational code, adjusting it to the myth system. A given campaign does not in advance proclaim itself one or the other. It proclaims itself, as it were, by its works. Crusading, as Reisman wittily observes, has tendencies, *inter alia*, to (1) sound and fury; (2) scapegoating; (3) selecting targets downward (outside the elites); (4) eliminating rivals (*i.e.*, using the campaign as a political weapon); and (5) human sacrifice (of vulnerable individuals) (pp. 106-07).

Reisman sees among the deep sources of bribery the struggles between evils and rewards as sanctions, between "capitalism's licit greed" and

<sup>1</sup> See J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 44-47, 589-90, 645, 730 ff. (1966).



"republicanism's civil altruism and disdain for the material" (p. 122), between guilt and glee (both afforded by the successful bribe) (pp. 124-26). Can anything be said about the criteria for determining when it can be "appropriate to tender a bribe" (p. 128)?

In a complex argument, not always as convincing as what has gone before, Reisman sees "role fidelity" within the given cultural context as a possible criterion. Bribery, of course, involves subversion and betrayal of roles; but this is no simple truth. For insofar as roles are culturally determined, societies sometimes seem "bribal" to the point that the role-functions include the receiving of appropriate bribes. "A bribal zone . . . is not a zone of alegality or amorality, but of a different legality or morality" (p. 137). And this is true for the wider society as well as subgroups within it. The more pluralistic a society, the more pervasive the collisions of role-expectations within it. Boundaries between societies and subgroups "create an illusion of distance" that beclouds and complicates expectations, just as rapid change multiplies and modifies their cultural contexts (pp. 138-39). As a result, the pattern of "bribal" and "non-bribal" zones in a country like the United States is likely to be so sinuous and mobile that knowledge and skills for mediating the boundaries, less pretentiously called "fixing," become highly specialized. Furthermore, what may seem to be mere hypocrisy and venality of bribers and bribed may sometimes be better explained in terms of "the network of expectations that divides social space and prescribes different codes for identical acts in different zones" (p. 142).

Even granted that "variance bribes" (which subvert substantive norms) and the outright purchase bribes (which build treachery into social roles) emphatically demand reform, Reisman still warns that we should not be sanguine. As he concludes:

Bribery is an epiphenomenon of a pluralistic world community, and the constant process of exclusive group and loyalty formation. The price of completely eliminating bribery is actually the termination of this ongoing process of individuation, group formation, and self-determination and the replacement of the old philosophical radical conception of pluralism and the dialectical character of truth with a single, unchallengeable authority. Is this the type of world order and psycho-personal organisation we desire? (p. 149).

The epilogue on "The Current Bribery Campaign," touching Lockheed and all that, includes penetrating points on the obstacles to self-reform by multinationals presented by the antitrust law. Well-selected historical material, including many *causes célèbres*, enriches the 173 pages of text, and 79 pages of footnotes; and there is a valuable bibliography. The whole amounts to the kind of thought-provoking work to be expected from the author of *Nullity and Revision*.

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## BRIEFER NOTICES

*The International Law of the Ocean Development. Basic Documents.* By Shigeru Oda. (Leiden: A. W. Sijthoff, 1977. Looseleaf in 13 parts with appendixes.) This is in effect a continuation of the series of the same title,<sup>1</sup> but unlike its bound predecessors it is in looseleaf form. The arrangement of the materials does not follow the pattern of the earlier volumes, an indication that Judge Oda continues to seek the most appropriate organization. As new materials become available generally or on a specific topic, new headings become advisable. Thus, there are, for instance, new headings such as "Status of Land-locked and Geographically Disadvantaged States" (part VII), "Disarmament and International Security" (part XII), and "Scientific Ocean Research" (part XIII). There is no general index to the documents in the three volumes but there is a table of contents which, under each part, should include references to documents in the preceding volumes. This is, however, not always the case. Thus, part XIII does not list all the materials included in vol. II under the corresponding part VI. There also are inconsistencies between the title of a part and its content. Thus, part I, "Conventions on the Law of the Sea," includes references to General Assembly resolutions of 1958 and 1960, and to two resolutions of the Third United Nations Conference on the Law of the Sea of 1973, the text of which is omitted.

Readers looking for a particular document would be well-advised to look for it under more than one possible heading. A good deal of new material will be found in part V, "Proposals and Draft Articles at the UN Seabed Committee and the Third Conference on the Law of the Sea." A brief excerpt from the ICJ judgment in the *Fisheries Jurisdiction* cases is printed in part VI without an explanatory note. Useful information is contained in the appendixes: Selected List of other UN Documents relating to Ocean Development, Index of States Parties to Treaties, and Index of Proposals at the UN Seabed Committee and the Third UN Conference on the Law of the Sea. A little more editorial care and even a provisional index would enhance the usefulness of this valuable series.

LEO GROSS  
Board of Editors

*Las Cortes y la Política Exterior Española (1942-1976). Con especial referencia a su participación en la conclusión de los tratados internacionales.* By Antonio Remiro Brotons. (Valladolid: Universidad de Valladolid, 1977. Pp. 171. Index.) "An authoritative regime," states the author, "is by its very nature incompatible with all ideas of juridical and political control" of foreign policy by the legislature (p. 163). His study shows how even the small degree of intervention by the Cortes in the ratification stage of the treaty process (its only foreign policy participation), which was permitted by certain juridical and regulatory provisions, was nullified in practice because the Franco Government simply ignored, denied, or "interpret[ed]" matters to suit itself. Some nominal reforms in 1957, 1967, and 1971 should have broadened the Cortes's rights of intervention but actually only affected the letter of the law. For example, a rare and unusually lively debate occurred in the Cortes on the Treaty of Friendship and Cooperation of 1976 with the United States. A Senate declaration accompanying the U.S. resolution of consent to ratification expressed the hope that the treaty would aid the process of democratization in Spain, which impelled a number of deputies to describe it as an

<sup>1</sup> Vol. II reviewed in 70 AJIL 406-07 (1976).

"irresponsible," "impertinent," "insolent," "offensive," etc., infringement of Spanish sovereignty (p. 139). Nevertheless, the end result was the usual near unanimous approval.

Written in the period of transition to a post-Franco democratic constitution, the study gives an historical-analytical account of the Cortes's non-participation during the previous 40 years, ending with a brief series of recommendations for remedying past defects. It will also serve as a baseline for later judging the comparative effectiveness of parliamentary control under the new system modeled on those of other West European countries.

RUTH B. RUSSELL

*Versicherung nichtkommerzieller Risiken und die Europäische Gemeinschaft.* By Ignaz Seidl-Hohenveldern. (Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG, 1977. Pp. xxvi, 219. DM 95.) The international legal aspects of the economic development of the Third World are in need of scholarly study in order to help ease the way for such development. It is therefore gratifying to read Dr. Seidl-Hohenveldern's analysis of a crucial aspect of financial investment in the developing parts of the world by capital-exporting countries: the insurance of risks that are not covered by regular commercial insurance. The study is largely limited to the coverage provided by various agencies of the European Community, for which some track record has been established in the past. A central place is reserved for the 1975 decision of the European High Court confirming the exclusive power of the European Community Committee to enter into guarantees in respect to investment risks. The author discusses this case and its implications at length in part III. Part I contains a general analysis of aspects of governmental guarantees for export credit and investment recovery, while part II examines the various programs undertaken by the European Committee in the area of investment insurance through 1977. In part IV the writer develops his own proposals for guarantees or insurance issued on behalf of the European Community for the protection of export and investment in the countries of the Third World. Although only part III contains a legal discussion of the proper distribution of power to regulate international commerce between the organs of the European Community, member countries of the Community, and third countries under the terms of the Treaty of Rome (Article 218(1)), the other parts of the book are equally relevant in exemplifying the central theme of applying international legal principles to, and exploring their possible effect on, the important problem of facilitating and encouraging foreign investment in the developing world. Seidl-Hohenveldern's treatise is a valuable contribution to the practical aspects of this field of law.

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*Introduction Aux Sources des Droits Africains Contemporains: Afrique Sub-Saharienne Indépendante (An Introduction to the Sources on Contemporary African Laws: Independent Sub-Saharan African [sic]).* By J. Vanderlinden. (Belgrade: Institut de Droit Comparé, 1975. Pp. 137.) This introduction to sources of contemporary legislation, case law, and legal writings in Africa provides a useful listing of collections available in 40 African states, along with collections of treaties and constitutions. Also listed are such useful periodicals as the *Journal of African Law*,

*Penant*, and *African Law Studies*. Oddly, the valuable *Verfassung und Recht in Übersee* with its current collection of constitutional materials and changes has been ignored. Although the Liberian Code of Law is listed, equally extensive codes in Ethiopia have been left aside.

The collection is bilingual. This choice was both unnecessary and unfortunate. The researcher must, in every case, resort to the titles of the collections regardless of whether they are in French or English. The comments and instructions have been grossly complicated by alternate interlineation of French and English. Moreover, the English translation is so inadequate (*cf.* English title as reported above) that the reader is obliged to utilize the French in any case.

JOHN H. SPENCER

Asian-African Legal Consultative Committee. *Report of the Sixteenth Session, Held in Tehran, January 26 to February 2, 1975*. (New Delhi: Secretariat of the Asian-African Consultative Committee, 1976. Pp. iv, 182.) Following the trend on the law of the sea pursued at its 13th, 14th, and 15th sessions, the Asian-African Legal Consultative Committee at its 16th session in Tehran continued to rely on the work of the United Nations Conference on the Law of the Sea. Along with reports on the work of that conference, the Secretariat of the Consultative Committee produced brief tentative draft proposals on exclusive economic zones, straits, landlocked states, and archipelagoes, all four of which are characterized by extraordinarily loose and confusing drafting. However, the regime of the seabed, the cause of so much of the current disarray in the Law of the Sea Conference, was largely ignored. The remaining half of the volume is concerned with the "Law Relating to Human Environment." Here the treatment is confined to reporting the discussions at the Stockholm Conference of 1972 and at the sessions of the United Nations Environment Program, and to setting out the basic elements of various maritime conventions for the prevention of pollution.

Of the 32 members, 24 were in attendance. These, however, were outnumbered two to one by the observers, 24 of whom were European and Latin American.

JOHN H. SPENCER

*Obserwatorzy państw w powszechnych organizacjach międzynarodowych* (State Observers in Universal International Organizations). By Genowefa Grabowska. (Warsaw: Państwowe Wydawnictwo Naukowe, 1978. Pp. 190.) After tracing the origins of the practice of having observers to major international conferences of the 19th century (*e.g.*, the Congress of Vienna, the Congress of Berlin), the author then deals with this phenomenon at the League of Nations, and finally concentrates on observers in the United Nations and the UN Specialized Agencies.

New interest in this rather peripheral topic was aroused by the signing of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (not yet in force). The convention, as is known, deals not only with permanent missions but also with permanent observer missions (and, apart from delegations to organs and to conferences, with observer delegations).

There are five states (Switzerland, both Koreas, Monaco, and the Holy See) that have permanent observer missions at the United Nations at present. Grabowska (pp. 78-79) did not know, apparently, that North

Korea had such a mission. There have been important developments in the field during the past 5 years. Apart from the fact that seven international governmental organizations now have a standing invitation to participate in the sessions and the work of the General Assembly as observers (though only some of them keep permanent delegations), two "liberation organizations"—the PLO and SWAPO—obtained similar status in 1974 and 1976, respectively. The latter phenomenon, in spite of its controversial character, should not have been totally ignored by the author.

Articles 17 and 49 of the 1975 Vienna Convention provide for determining precedence on the basis of the alphabetical order of the names of the states used in the particular organization. These articles are unusual compared with their counterparts in the 1961 and 1963 Vienna Conventions, which provide for precedence on the basis of seniority, and the rationale for the difference is not sufficiently explained (p. 116). The author regrets that "the [1975] Convention does not provide for employment as members of the mission of citizens from third countries" (p. 118), but she fails to mention that the nationality requirement under Article 73 is qualified by the words "in principle."

On the whole, though, the level of this short monograph, perhaps the first in its field, is quite good.

RICHARD SZAWLOWSKI  
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*Miedzynarodowe Prawo Srodowiska (Tworzenie i Egzekwowanie)*. By Karol Wolfke. (Wrocław: Ossolineum, 1979. Pp. 178. Zł.32.) Karol Wolfke, professor at Wrocław University in Poland, became known in the West through his important work, *Custom in Present International Law* (1964). His recent study of the creation and enforcement of norms of international environmental law is of similar scholarly caliber. The literature on international environmental law is large and growing, as indicated by the comprehensive bibliography appended to this work, but here we have for the first time a systematic and quite exhaustive analysis of law-making and law-enforcing processes in the environmental field.

The first three chapters examine in detail the principal means of creating environmental law, treaties, declarations of international organizations; general principles of law, and practice of states. In addition, following the model in the Statute of the International Court of Justice, Wolfke investigates court decisions and the opinions of jurists as subsidiary means of ascertaining the norms of law. Then he looks into the metalegal factors that shape environmental law, among which the opinions of natural scientists and natural science organizations are the most important. Of particular interest in this section is the author's examination of the applicability of the Vienna Convention on the Law of Treaties to environmental conventions. He thinks, for example, that a breach of an environmental convention should not warrant terminating or suspending the convention. Environmental conventions in this respect partake of the character of humanitarian conventions.

The following five chapters deal with the problem of enforcement and are remarkably comprehensive. They include an examination of the possibility of the use of force. The author comes to the conclusion that ecological aggression is possible and that it may be repelled by force and be subject to sanctions by the UN Security Council. The most effective enforcement means, however, is the duty of sharing information and the results of research, and more and more this duty is embodied in conven-

tions dealing with pollution. It is a pity that the language barrier precludes as wide an access to this study as it deserves.

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*Neutralnost i paksaktivnost. Medunarodnopravni aspekti.* By Darovin Rudolf. (Split: Čakavski sabor, 1978. Pp. 267. Index.) The author, a Yugoslav scholar, has coined the term "pax-activity" to denote the status of states outside a conflict to which the United Nations is applying collective security measures. In a thorough historical and analytical study, he argues that pax-activity should be recognized as a legal status separate from traditional neutrality and belligerency. He contends that the differences in the methods, motives, and aims of the application of coercive measures by the United Nations distinguish pax-activity from belligerency. Pax-activity is said to involve active support of the victim of aggression, as distinguished from neutrality, which involves abstention and impartiality, and from nonbelligerency, which involves support to one party within the limits of neutrality.

The argument is well documented, with an extensive bibliography, detailed footnotes, and a comprehensive index. Each of the major UN peacekeeping operations is analyzed. Historical examples are drawn from the practice of the League of Nations and from the practice of neutral states in World War II.

The author draws several conclusions from his study. He argues that acceptance of the concept of pax-activity would make it possible for Switzerland to join the United Nations without giving up its permanently neutral status. Neutrality remains important in cases where the United Nations fails to take collective security measures. Once measures are taken, however, all states, both member and nonmember, are governed by the law of pax-activity.

PETER B. MAGGS

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*Environmental Pollution and Individual Rights: An International Symposium.* Edited by Stephen C. McCaffrey and Robert E. Lutz. (Deventer: Kluwer, 1978. Pp. xxiii, 213. Index. Dfl.70.) This book, the first product published by the Environmental Law Committee of the International Bar Association's Section on Business Law, is based on the committee's program presented at the 1976 IBA Conference in Stockholm.

The greater part of the work is composed of papers and narrative overviews which were prepared in response to a formal question involving individual rights and remedies in cases of environmental pollution. A second portion of the book contains legal brief-style responses to a hypothetical pollution incident, as well as the record of a panel on future directions in the field. Finally, there are several appendixes, including a summary outline, a list of contributors, and an extensive matrical display of the key elements of the essays.

In this book one finds a theoretically laudable idea that has failed to reach its full potential, owing to a number of not insubstantial factors. Paramount among them are the magnitude of the undertaking and the difficulty of coordinating and producing a work on a worldwide scale, while still ensuring the currency and accuracy of its content. The end result of the effort is a book that achieves some of its goals, but falls short on others.

As examples of the latter, the overviews of national law and experience are in most cases dealt with too briefly, and the style and quality of these essays vary markedly, notwithstanding extensive editing. Further, in the main portion of the book, several key contributors unfortunately failed to respond as expected, and certain national overviews now consist of discussions unrelated to the central topic (e.g., France) or of translated brief summaries of other works (such as the USSR). While these "fillers" are interesting and informative in their own right, the nexus between them and their companion pieces is weak.

On the other hand, the appended matrixes present a novel and useful approach to the development of a ready research tool by displaying key elements of national law in a uniform format. Note should also be made of the detailed and thoughtful essays on the law and practice of England, West Germany, Hong Kong, and South Africa.

The Environmental Law Committee is to be commended for attempting to create a publication of this sort, but, in the last analysis, future versions would be better published in regular or special issues of a journal such as the *International Business Lawyer* to ensure early availability and more production flexibility.

PETER A. THOMAS  
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*The Year Book of World Affairs 1979.* Edited by George W. Keeton and Georg Schwarzenberger. (London: Stevens & Sons, 1979. Pp. v, 384. Index.) This anthology, published under the auspices of the London Institute of World Affairs, contains 18 research articles dealing with recent economic, political, and legal developments in international relations. As such, it offers to the reader a smorgasbord of topical articles, ranging from Hedley Bull's appraisal of the Third World and international society and Margaret Doxey's treatment of the evolving Commonwealth to Brian Holmes's assessment of the changing role of education in Japan and Carey Joynt's evaluation of behavioral science in the study of international politics.

In the field of international law, six contributions hold special relevance: H. Suganami explores the reasons treaties should be obeyed, given the logic of international morality vis-à-vis the realist political critique; I. Seidl-Hohenveldern reviews the prospects for counter-nationalization, taking the post-World War II experience of Austria as a case study; Yoram Dinstein evaluates the new Geneva Protocols in light of their augmenting the codification of the laws of war; Lyndel V. Prott appraises the future of the International Court of Justice in the context of the evolving world legal system; E. D. Brown analyzes the *Anglo-French Continental Shelf* case and its import for the relationship between "special circumstances" and the corresponding rules of customary international law; and Georg Schwarzenberger examines trends in the ongoing law of the sea in the search for an appropriate model for today's maritime world order.

On balance, the contents of this volume are well documented and supply sufficiently clear, succinct analyses as to be intellectually accessible to the student who peruses them, as well as the layman who desires to learn. As such, the 1979 *Year Book* will be a welcome addition to all libraries concerned either with international politics or currently relevant issues of international law.

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*Kashmir Problem. Its Legal Aspects.* By H. O. Agarwal. (Allahabad: Kitab Mahal Private Ltd., 1979. Pp. viii, 194. Index. Rs.55.) In seven short chapters Agarwal has attempted to present the legal aspects of the Kashmir question. He has supplied a brief historical survey as a backdrop to the "accession" of the state of Kashmir to India after the British Parliament in 1947 granted independence to India and to the newly created state of Pakistan, both of which have since been struggling to get complete possession of Kashmir. Agarwal repudiates Pakistan's charge of Indian aggression and occupation of the state. Towards that end he has relied on rules of international law concerning military occupation of belligerent territory. He has rightly condemned Pakistan for ceding by treaty to China a part of Kashmir territory that Pakistan had occupied. He has adverted to the relevant rules of international law to place the opprobrium of aggression at Pakistan's door.

But he failed to refer in his discussion of aggression in chapter IV on "Invasion and Occupation," to the report of Sir Owen Dixon, the Australian jurist appointed by the UN Security Council to India and Pakistan to seek a solution to the Kashmir problem. Sir Owen pointed out:

When the frontier of the State of Jammu and Kashmir was crossed, I believe, October 20, 1947, by hostile elements, it was contrary to international law, and that when in May 1948, as I believe, units of the regular Pakistan forces moved into the territory of the state, that too was inconsistent with international law [UN Doc. S/1791 5-6 (1950)].

On the whole, Agarwal deserves commendation in presenting to students of international law and relations a readable book of convenient proportions. He has also supplied a series of useful appendixes and an index.

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\* Mention here neither assures nor precludes later review.



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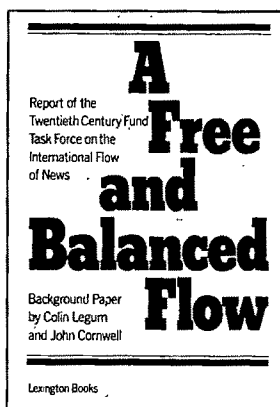
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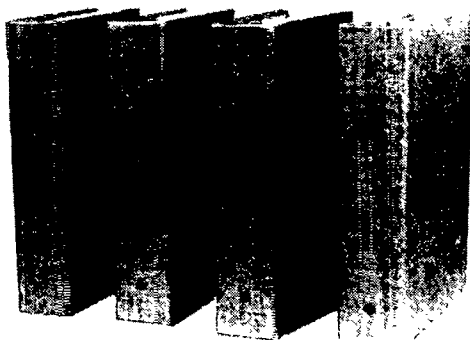
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## NONMILITARY AREAS IN UN PRACTICE

*By Sydney D. Bailey\**

There have been many occasions since the inception of the United Nations when it has been found useful to establish nonmilitary areas. A nonmilitary area is one from which all potential combatants, weapons, military equipment, and military installations are excluded and from which no hostile acts or activities in support of or related to the conduct of military operations may be undertaken. In addition to being of historical interest, demilitarization is again being implemented in Sinai and will almost certainly be resorted to in Namibia and other places in the future. Demilitarization thus gives rise to important questions: By whom may such zones be established? What purposes are they intended to serve? What are the implications for state sovereignty? Do such zones have any status for states not parties to the agreements establishing them or for the United Nations and its agencies? And how effective has the supervisory system been?

### I. WHO MAY ESTABLISH NONMILITARY AREAS

In certain cases, general international law itself stipulates that persons in certain locations shall both desist from military activity and in turn be immune from attack. Thus, international law provides for special duties for diplomatic persons and medical units, and it protects such personnel and premises. More generally, the immunity of nondefended places from attack was recognized in the Brussels Declaration of 1874<sup>1</sup> and the Regulations attached to the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land.<sup>2</sup> The international law requirement of distinguishing between combatant and noncombatant has not only stipulated that the latter shall not be subjected to direct attack but has encouraged practical methods to achieve this protection. The duty to protect is a matter of international law: the use of nonmilitary zones as a technique for such protection is suggested by international instruments but is dependent upon the agreement of the parties. Thus, the Geneva Conventions of 1949 provided that, by agreement between the parties, neutralized zones may be created close to the fighting front for wounded or sick persons, both combatant and noncombatant, and for civilians performing no work of a military character; and that hospital and safety zones may be created for wounded or sick persons, both combatant and noncombatant, and for specified civilian elements in thinly populated areas free from

\* I am greatly indebted to Professor Rosalyn Higgins for advice regarding some of the legal aspects of demilitarization.

<sup>1</sup> DOCUMENTS RELATING TO THE PROGRAM OF THE FIRST HAGUE PEACE CONFERENCE 35 (Carnegie Endowment for International Peace, 1921), Arts. 15-17.

<sup>2</sup> THE HAGUE CONVENTIONS OF 1899 (II) AND 1907 (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND 18-19 (Carnegie Endowment for International Peace, 1915), Arts. 25 and 27.

TABLE I

## NONMILITARY ZONES UNDER ADDITIONAL PROTOCOL I

	Nondefended Localities (Article 59)	Demilitarized Zones (Article 60)
Site	any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse party	any zone which fulfills the specified conditions of demilitarization
Method of creation	declaration to the adverse party by the appropriate authorities or, if the locality does not fulfill all the specified conditions of demilitarization, by agreement between the parties to the conflict	by express agreement, verbal (oral) or in writing, directly or indirectly, in peacetime or after the outbreak of hostilities
Limits	the declaration or agreement should define and describe as precisely as possible the limits of the locality	the agreement should define and describe as precisely as possible the limits of the zone
Persons who may enter or remain	civilians, protected persons under the Geneva Conventions and Additional Protocol I, police forces for the sole purpose of maintaining law and order	civilians, protected persons under the Geneva Conventions and Additional Protocol I, police forces for the sole purpose of maintaining law and order, other persons as agreed between the parties
Activities against the area that are prohibited	it is prohibited to attack the locality by any means whatsoever	it is prohibited to extend military activities to the zone if contrary to the terms of the agreement
Duration	a locality loses its status when it ceases to fulfill the conditions of demilitarization or the conditions specified in any agreement	the status may not be revoked unilaterally, but a party may be released from its obligations if the adverse party commits a material breach

military objectives and large industrial or administrative establishments.<sup>3</sup> The new Additional Protocol I to the Geneva Conventions again leaves the establishment of special status zones of this kind to the parties: an inhabited place in or near the fighting zone that is open to occupation by the opposing party may be given the status of a nondefended locality by declaration or agreement, and demilitarized zones may be created by express agreement between the parties.<sup>4</sup> The differences between nondefended localities and demilitarized zones are shown in table 1. The parties may, "if necessary," agree on "the methods of supervision" and on the signs

<sup>3</sup> 75 UNTS 970 (Art. 23 and Ann. I) and 973 (Arts. 14 and 15, and Ann. I).

<sup>4</sup> UN Doc. A/32/144, Ann. I (1977), Arts. 59 and 60, *reprinted in* 16 ILM 1391 (1977).

to mark the area, to be displayed "where they are clearly visible, especially on its perimeter and limits and on highways." When a nondefended locality or demilitarized zone loses its status, it continues to enjoy the protection of other provisions of the protocol and other rules of international law.

Because it may entail a restraint on sovereignty, the establishment of a nonmilitary area is normally accomplished on the basis of agreement between the parties concerned, even if the precise demarcation of their limits is left for subsequent negotiation. Thus, the Netherlands and the Indonesian Republicans, meeting on board the U.S.S. *Renville*, negotiated demilitarized zones for Indonesia in 1948;<sup>5</sup> the de facto Jewish and Arab authorities in Palestine accepted the proposal of the International Committee of the Red Cross for three civilian sanctuaries in Jerusalem in 1948;<sup>6</sup> Israel and Jordan negotiated in 1948 for a no-man's-land in Jerusalem<sup>7</sup> and for the demilitarization of Mount Scopus,<sup>8</sup> and agreed to respect the neutral status of the former Red Cross sanctuary around Government House;<sup>9</sup> Egypt and Israel agreed to the demilitarization of El-Auja (1949)<sup>10</sup> and parts of Sinai (1974-1979);<sup>11</sup> Israel and Syria negotiated the demilitarization of the Hula area (1949)<sup>12</sup> and a buffer strip on the Golan Heights (1974);<sup>13</sup> India and Pakistan negotiated for demilitarization along the cease-fire line in Kashmir in 1949;<sup>14</sup> the Unified Command negotiated with North Korea and China for a neutral conference zone around Kaesong and Panmunjom (1951)<sup>15</sup> and, as part of the armistice, for a buffer zone along the military demarcation line in Korea (1953);<sup>16</sup> and Egypt, Saudi Arabia, and Yemen agreed to a deep demilitarized buffer zone in Yemen in 1963.<sup>17</sup>

Demilitarization may come about following a recommendation of the Security Council, as happened in Yemen in 1963,<sup>18</sup> and in the Golan Heights and Sinai in 1974 and 1975.<sup>19</sup> The Security Council ordered a mandatory cease-fire in Palestine in 1948, but a proposal for the demilitarization of

<sup>5</sup> 3 UN SCOR, Spec. Supp. (No. 1), UN Doc. S/649/Rev.1 (1948), App. XI, Art. 2.

<sup>6</sup> INTERNATIONAL COMMITTEE FOR THE RED CROSS, HOSPITAL LOCALITIES AND SAFETY ZONES 24-28' (1952); J. REYNIER, A JÉRUSALEM UN DRAPEAU FLOTTAIT SUR LA LIGNE DE FEU 87-88 (1950).

<sup>7</sup> UN Doc. S/845 (1948).

<sup>8</sup> 8 SCOR, Supp. (Apr.-June 1953), UN Doc. S/3015 (1953).

<sup>9</sup> The text of the Israel-Jordan cease-fire agreement of Nov. 30, 1948, and the documents referred to in notes 34, 41, and 50 *infra* have not been published; the full text will be printed in my *How wars end*, to be published by the Clarendon Press, Oxford.

<sup>10</sup> 4 SCOR, Spec. Supp. (No. 3), UN Doc. S/1264/Rev.1 (1949), Art. VIII.

<sup>11</sup> 29 SCOR, Supp. (Jan.-Mar. 1974), UN Doc. S/11198 (1974); 30 SCOR, Supp. (July-Sept. 1975), UN Doc. S/11818 (1975); DEP'T OF STATE, SELECTED DOCUMENTS No. 11, THE EGYPTIAN-ISRAELI PEACE TREATY (1979), reprinted in 18 ILM 362 (1979).

<sup>12</sup> 4 SCOR, Spec. Supp. (No. 2), UN Doc. S/1353/Rev.1 (1949), Art. V.

<sup>13</sup> 29 SCOR, Supp. (Apr.-June 1974), UN Doc. S/11302 (1974).

<sup>14</sup> 4 SCOR, Spec. Supp. (No. 7), UN Doc. S/1430 (1949), Ann. 26, paras. D and E.

<sup>15</sup> 6 SCOR, Supp. (Oct.-Dec. 1951), UN Doc. S/2432 (1951).

<sup>16</sup> 8 SCOR, Supp. (July-Sept. 1953), UN Doc. S/3079 (1953), Art. 1.

<sup>17</sup> 18 SCOR, Supp. (April-June 1963), UN Doc. S/5298 (1963), para. 4; 19 SCOR, Supp. (Jan.-March 1964), UN Doc. S/5501 (1964), para. 13.

<sup>18</sup> SC Res. 179, 18 SCOR, Res. and Dec. 2, UN Doc. S/5331 (1963).

<sup>19</sup> SC Res. 242, 22 SCOR, Res. and Dec. 8, UN Doc. S/8247 (1967).

Jerusalem took the form of an instruction to the mediator "to continue his efforts" to bring this about,<sup>20</sup> and the later proposal of the Security Council was for demilitarization in the Negev to come about as a result of "negotiations . . . between the parties."<sup>21</sup> The famous Resolution 242 on the Middle East simply affirmed the necessity of demilitarization as one way to guarantee the territorial inviolability and political independence of the states of the area.<sup>22</sup> In the case of Jammu and Kashmir, the Security Council asked its subsidiary organs to help bring about demilitarization as a necessary condition for a plebiscite, and it asked the parties to negotiate for that purpose, although complete demilitarization was never achieved.<sup>23</sup> The Security Council has never sought to impose demilitarization by a mandatory resolution.

Demilitarization, of course, can exist *de facto* and without the express agreement of other interested parties. For example, Egypt kept Sinai substantially demilitarized from 1957 to 1967.<sup>24</sup>

## II. PURPOSES OF DEMILITARIZATION

There have been four main reasons for the establishment of nonmilitary areas: to secure sanctuary for protected persons and other noncombatants in time of armed conflict, to provide a neutral base for the negotiation and/or supervision of a cessation of hostilities, to provide an interim solution where there are contending claims as to sovereignty, and to reduce tension along demarcation lines by a separation of forces.

### *Sanctuaries During Armed Conflict*

These are usually established at short notice when fighting is imminent or actually taking place. The most interesting examples date from 1948 when three such sanctuaries were established in Jerusalem as a result of an initiative by the International Committee of the Red Cross (ICRC); they were modeled to some extent on the safety zones established in Madrid in 1936 and Shanghai in 1937. The United Nations and the ICRC had initially hoped that the parties would agree that the entire Jerusalem area should be neutralized and demilitarized, under the UN or Red Cross flag. With the intensification of hostilities when the British mandate lapsed in the middle of May, and in the absence of agreement on wider demilitarization, the ICRC proposed a more modest arrangement for three separate zones under Red Cross protection:

<sup>20</sup> SC Res. 54, 3 SCOR, Res. and Dec. 22, UN Doc. S/902 (1948).

<sup>21</sup> SC Res. 61, 3 SCOR, Res. and Dec. 28, UN Doc. S/1070 (1948).

<sup>22</sup> SC Res. 242, 22 SCOR, Res. and Dec. 8, UN Doc. S/8247 (1967).

<sup>23</sup> SC Res. 80, 5 SCOR, Res. and Dec. 1, UN Doc. S/1469 (1950); SC Res. 91 and 96, 6 SCOR, Res. and Dec. 1, 5, UN Docs. S/2017/Rev.1 and S/2392 (1951); 7 SCOR (572d mtg.) 34-35 (1952); SC Res. 98, 7 SCOR, Res. and Dec. 1, UN Doc. S/2833 (1952); SC Res. 126, 12 SCOR, Res. and Dec. 3, UN Doc. S/3922 (1957).

<sup>24</sup> Y. EVRON, *THE DEMILITARIZATION OF SINAI* 6-10 (1975); W. EYTAN, *THE FIRST TEN YEARS: A DIPLOMATIC HISTORY OF ISRAEL* 33 (1958); E. L. M. BURNS, *BETWEEN ARAB AND ISRAELI* 134, 170 (1962).

Zone 1: the King David Hotel, the Young Men's Christian Association hostel, and the Terra Santa convent.

Zone 2: Government House, the Arab College, the Jewish Agricultural School, and the married quarters at the Allenby Barracks.

Zone 3: the Italian Hospital and School.

Agreement about the zones was reached when the ICRC proposals were accepted by the de facto authorities, the Arabs on May 9 and the Israelis on May 17. The zones were clearly marked with the Red Cross emblem. The only persons admitted were women and children, together with refugees on a temporary basis while fighting was actually taking place. The de facto authorities retained responsibility for civil administration, but the ICRC supervised the status of demilitarization. Military personnel were excluded from the zones, and combatants were asked to accord the zones "absolute respect."<sup>25</sup>

Dr. Dov Joseph, the first Israeli governor of Jerusalem, wrote that the zones were remote from Jewish areas and that no Jewish women or children found refuge in them; this, in Joseph's view, led to a suspicion among the Jews that the ICRC, "possibly through failure to realize the political implications of what they were doing, were serving British interests."<sup>26</sup> As soon as the state of Israel came into being on May 15, the Italian Hospital and School (Zone 3) were occupied by Israeli forces. "The Italians," as Joseph put it, "had agreed to entrust the hospital to Jewish guards,"<sup>27</sup> and the sanctuary status of the zone was thus terminated. Count Bernadotte, the UN mediator, wished to use one of the buildings in Zone 1 for UN staff; but the ICRC objected on the ground that this would violate the neutrality of the zone. When Bernadotte reacted vigorously, the ICRC consulted the parties and on June 15 handed over the King David Hotel in Zone 1 to the United Nations. The nearby YMCA provided sanctuary for about 85 refugees (although Joseph suspected that it had become "a centre of Arab espionage"), and the Terra Santa convent housed about 50 more. Mattresses and blankets were supplied by the YMCA, and nonperishable food came from stocks left by British troops. Part of the staff of the King David Hotel and the YMCA remained in the zone and worked under ICRC supervision, though they were employed and paid by the owners of the buildings. When the fighting was resumed in July, the UN staff left the King David Hotel. It was then occupied by Israeli forces, whereupon the Arabs concluded that the immunity of the zone had come to an end and began to fire into it. The ICRC "demanded" that the Israeli forces be withdrawn, but with no success. In the circumstances, the ICRC had no option but to declare that the immunity of Zone 1 would cease, which took formal effect on July 22. Later attempts by the UN Palestine Truce Commission to create a neutral or demilitarized area

<sup>25</sup> HOSPITAL LOCALITIES AND SAFETY ZONES, *supra* note 6, at 24-28; J. REYNIER, *supra* note 6, at 87-88; P. AZCÁRATE, MISSION IN PALESTINE, 1948-1952, at 124 (1966).

<sup>26</sup> D. JOSEPH, THE FAITHFUL CITY: THE SIEGE OF JERUSALEM 280-81 (1962).

<sup>27</sup> *Id.* at 129.

from the former Red Cross Zone 1, together with the U.S. and French Consulates, were rejected by Israel.<sup>28</sup>

Until the end of August 1948, the Arab College and the Jewish Agricultural School in Zone 2 housed some 30 Arab women and children, and Arab women from neighboring villages entered the zone each day for medical attention. Food and medicines were brought in with great difficulty by donkey from the Old City of Jerusalem. The sanctuary status of the zone was respected until August 16, when Israeli forces attacked Arab positions across the zone and occupied part of the Arab College and the Jewish Agricultural School. Arab forces, in turn, surrounded Government House. The UN Central Truce Supervision Board decided that the Israeli forces had committed "flagrant violations" by attacking Egyptian positions and remaining within the Red Cross zone.<sup>29</sup> It was clear that the proximity of the contending forces had placed the status of the zone in jeopardy, so the UN Truce Supervision Board decided to create an enlarged neutral area surrounding the Red Cross zone, to be supervised by UN observers. On September 4, after Bernadotte had threatened UN sanctions, Israeli and Arab troops that had penetrated the zone withdrew. Count Bernadotte visited the Jewish Agricultural School on the day of his death, as he had been told by his chief of staff that the person in charge was refusing to comply with the agreement on demilitarization. "Various defence installations . . . had not been removed, and eighteen young Jews were being housed there contrary to regulations." The Israelis had asked to be allowed to bring in more young men to help with cleaning, but Bernadotte had refused. When Bernadotte reached the building on September 17, there was some discussion about the precise terms of the agreement on demilitarization, and the ICRC representative suggested that they should proceed to the YMCA, where he kept his papers. It was during this journey that Bernadotte and a French colleague were assassinated. In October, the ICRC handed over the Red Cross zone to the United Nations, in accordance with a written understanding of the previous April. Joseph believed that the departure of the ICRC was in breach of a promise not to leave without informing him "in good time beforehand."<sup>30</sup>

In the course of the civil war in the Dominican Republic in 1965, a neutral zone of refuge was established in Santo Domingo, following an appeal by the Council of the Organization of American States.<sup>31</sup>

<sup>28</sup> HOSPITAL LOCALITIES AND SAFETY ZONES, *supra* note 6, at 29-30, 34-35; ICRC, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 1 JULY 1947-31 DECEMBER 1948, at 107-08 (1949); D. JOSEPH, *supra* note 26, at 272, 280-82; F. BERNADOTTE, TO JERUSALEM 85 (1951); J. REYNIER, *supra* note 6, at 93-94; P. AZCÁRATE, *supra* note 25, at 10-11, 47-48, 101; 3 SCOR, Supp. (Oct. 1948), UN Doc. S/1023 (1948).

<sup>29</sup> UN Doc. S/992 (1948).

<sup>30</sup> HOSPITAL LOCALITIES AND SAFETY ZONES, *supra* note 6, at 31-35; REPORT OF THE ICRC, *supra* note 28, at 108; 3 GAOR, Supp. (No. 11) 40, UN Doc. A/648 (1948); 12 SCOR, Supp. (July-Sept. 1957), UN Doc. S/3892 (1957); J. REYNIER, *supra* note 6, at 94; F. BERNADOTTE, *supra* note 28, at 224, 254-56, 258, 267-68; P. AZCÁRATE, *supra* note 25, at 124-26; D. JOSEPH, *supra* note 26, at 282; FOREIGN RELATIONS OF THE UNITED STATES, 1948, vol. V, pt. 2, at 1319, 1375 (1976).

<sup>31</sup> 20 SCOR, Supp. (April-June 1965), UN Docs. S/6315, S/6364, S/6370 (1965).

During the Bangladesh war, it was possible to establish in Dacca four short-lived sanctuaries, or "neutral enclaves" as U Thant called them, for UN staff, ICRC officials, diplomats and their dependents, and other foreigners awaiting evacuation by air, under joint UN-ICRC auspices. The procedure followed on this occasion seems to have been a little vague, as will often be the case in time of crisis. Thant "informed" India and Pakistan that he "hoped that it would be possible" to establish these zones, and he asked them "to take all necessary measures" to help the United Nations and the ICRC. Thant's report continues, "Eventually, four neutral zones were established. . . ."<sup>32</sup>

We have seen that sanctuaries have been established during fighting, not on the basis of the application of well-established rules of law but rather by an effort to secure a minimum agreement from the parties in respect of particular locations. In the two studies by the UN Secretary-General on human rights in armed conflict, considerable attention was devoted to procedures that might be used for establishing civilian sanctuaries. In the first report, the Secretary-General suggested that four "conditions and requirements" would need to be taken into account: that the designation and recognition of civilian sanctuaries should be possible in time of peace, that the creation of sanctuaries should not confer military advantages on any party to a conflict, that sanctuaries should be identified by special markings and insignia, and that an effective and realistic "system of control and verification" would be needed. In his second report, the Secretary-General suggested that "limitation of accommodation and other circumstances" might make it necessary to establish priorities for admission to sanctuaries: first, wounded and sick civilians, the aged, children under 15, expectant mothers, and mothers of children under 7; and then, "as large a part of the civilian population as possible." It was noted that all of these categories are already entitled to protection under international law. The Secretary-General, taking account of the provisions of the Hague Convention for the Protection of Cultural Property, thought that it might be necessary to establish an international register of civilian sanctuaries in time of peace.<sup>33</sup> This work of the UN Secretary-General in 1969 and 1970 was of considerable help when Additional Protocol I to the Geneva Conventions was being drafted.

#### *Negotiation and/or Supervision of a Cessation of Hostilities*

Two areas have been demilitarized to provide a convenient base for negotiating and later supervising an agreement to cease military operations: Government House in Jerusalem and the Kaesong-Panmunjom-Munsan conference area in Korea.

The Government House area in Jerusalem had been a Red Cross sanctuary until it was handed over to the United Nations in October 1948. When Israel and Jordan concluded a cease-fire agreement for the Jerusalem area on November 30, 1948, the demilitarized status of the Government

<sup>32</sup> 26 SCOR, Supp. (Oct.-Dec. 1971), UN Docs. S/10433 and S/10466 (1971); 26 GAOR (2003d plen. mtg.) para. 10 (1971); U THANT, VIEW FROM THE UN 431-33 (1978).

<sup>33</sup> UN Docs. A/7720 (1969), at 145-52 and A/8052 (1970), at 45-87.

House area was continued.<sup>34</sup> During the armistice negotiations in 1949, Israel proposed partitioning the zone because it lay between the two front lines, but Jordan refused.<sup>35</sup> The armistice agreement of April 3, 1949, defined the demarcation lines as corresponding to those in the earlier cease-fire agreement; they were to be subject to such rectifications as might subsequently be agreed upon by the parties.<sup>36</sup> In June 1949, Israeli forces penetrated the Government House neutral zone but, after the acting UN mediator (Ralph Bunche) invoked U.S. diplomatic help, the troops withdrew. One difficulty about keeping the area tranquil was that Israel and Jordan held maps showing different limits for the zone, both signed by the same UN official.<sup>37</sup>

On the first morning of the Six Day War of June 1967, Government House was entered by three Jordanian soldiers, but they left after about 10 minutes. Israeli troops later occupied Government House and ordered the UN staff to leave (or, as Yitzhak Rabin puts it, took the UN compound from Jordanian troops). The Security Council asked Israel to restore the use of Government House to the United Nations, but, in the meantime, UN observers in Jerusalem established a temporary base in the YMCA building. In August, Israel offered to return Government House and about one-third of the land originally included in the zone to the United Nations. Secretary-General Thant reluctantly agreed, "without prejudice to all rights and claims of the United Nations to the occupancy and possession of the whole of the premises," it being understood that Israel would continue to respect the demilitarized status of the remaining area. At the end of August, the UN staff returned to Government House in an enclave of reduced size, which is now fenced. The Secretary-General tried in 1970 and 1971 to have the full area restored to UN control, but without success. Nevertheless, Israel has placed no military installations in the unreturned part. The Secretary-General still maintains that there is no basis for any Israeli curtailment of UN rights to the Government House compound as it existed from 1948 to 1967.<sup>38</sup>

In the Korean case a convenient place was needed in 1951 so that the Unified Command and the Communist side could meet to discover if Soviet

<sup>34</sup> See note 9 *supra*.

<sup>35</sup> M. DAYAN, *STORY OF MY LIFE* 144-45 (1976).

<sup>36</sup> 4 SCOR, Spec. Supp. (No. 1), UN Doc. S/1302/Rev.1 (1949), Arts. V(1)(b) and VI (11).

<sup>37</sup> FOREIGN RELATIONS OF THE UNITED STATES, 1949, vol. VI, at 1094, 1098, 1114, 1127, 1131-33 (1977); P. AZCÁRATE, *supra* note 25, at 128-29; 12 SCOR, Supp. (July-Sept. 1957), UN Doc. S/3892 (1957), paras. 3-8 and Anns. D and H; 12 SCOR, Supp. (Oct.-Dec. 1957), UN Doc. S/3892/Add.1 (1957).

<sup>38</sup> 22 SCOR (1347th mtg.) 3 (1967); 22 SCOR (1353d mtg.) 198, 232, 242 (1967); 22 SCOR, Supp. (Apr.-June 1967), UN Docs. S/7930, para. 2, S/7930/Add.3, para. 4, S/7930/Add.4, para. 8, S/7930/Add.5, para. 4, S/7930/Add.6, para. 4, and S/7930/Add.7, para. 1 (1967); 22 SCOR, Supp. (July-Sept. 1967), UN Docs. S/7930/Add.20, paras. 32-34, and S/7930/Add.27 (1967); 26 SCOR, Supp. (Jan.-March 1971), UN Doc. S/10124 (1971); 26 SCOR, Supp. (Apr.-June 1971), UN Doc. S/10124/Add.1 (1971); 26 SCOR Supp. (July-Sept. 1971), UN Doc. S/10124/Add.2 (1971); 28 SCOR, Supp. (Apr.-June 1973), UN Doc. S/10929 (1973), para. 34; O. BULL, *WAR AND PEACE IN THE MIDDLE EAST* 114-16, 124, 138 (1976); U. THANT, *supra* note 32, at 255-56, 259-60; Y. RABIN, *THE RABIN MEMOIRS* 105 (1979).



Ambassador Malik's recent radio address provided a satisfactory basis for armistice negotiations. The Unified Command at first suggested the Danish hospital ship *Jutlandia*, to be moored in Wonsan harbor. North Korea and China responded by proposing that the meeting be in Kaesong, near the 38th parallel. This was accepted by the Unified Command, and discussions were duly opened.

Although it had been agreed that the Kaesong conference area should contain no armed personnel except for the minimum needed as military police, demilitarization was not properly respected at first. Armed guards of the Communist side "infested" the conference area, wrote General Ridgway: "Red soldiers with Tommy guns gruffly ordered our envoys about." At one point a Chinese unit "complete with machine guns and 60-mm. mortars" marched directly across the path of some jeeps of the Unified Command. Ridgway protested, and provocation by armed personnel from the North ceased. However, after an incident involving the right of journalists to have access to the conference area, the Unified Command suspended the negotiations. It then proposed that the two sides meet in a circular neutral zone with a 5-mile radius from the center of Kaesong. North Korea and China agreed, on the understanding that a minimum number of personnel with small arms would be allowed into the zone for military police purposes.<sup>39</sup>

Both sides violated the Kaesong area, whether intentionally or unwittingly, and there was a 2-month suspension of negotiations. Agreement was finally reached on a new conference area with a radius of 1,000 yards in the vicinity of Panmunjom, joined to two demilitarized areas with a radius of 3 miles each, one for North Korea and China at Kaesong and one for the Unified Command near Munsan. No hostile acts were to be carried out against the area by regular or irregular forces of either side. Armed personnel were to be excluded from the area, except for military police detachments consisting of two officers and 15 men from each side. There was to be free access to the area and free movement within it.<sup>40</sup>

Panmunjom was thereafter used for the armistice negotiations, although both sides committed violations of the area. In 1953 Panmunjom was incorporated in a demilitarized buffer zone along the military demarcation line; it provided a base for the Military Armistice Commission, the Neutral Nations Repatriation Commission, the Indian Custodial Force, and the Neutral Nations Supervisory Commission, and their subsidiary bodies. There is an agreement between the two sides about the Panmunjom joint

<sup>39</sup> 6 SCOR, Supp. (July–Sept. 1951), UN Docs. S/2265, S/2266, and S/2267 (1951); M. RIDGWAY, *THE KOREAN WAR 198–99* (1967); W. G. HERMES, 2 UNITED STATES ARMY IN THE KOREAN WAR 16, 18, 28 (1966); W. H. VATCHER, PANMUNJOM: THE STORY OF THE KOREAN MILITARY ARMISTICE NEGOTIATIONS 3, 5, 24–25, 31–37 (1958).

<sup>40</sup> 6 SCOR, Supp. (July–Sept. 1951), UN Docs. S/2304, S/2311, S/2326, and S/2341 (1951); 6 SCOR, Supp. (Oct.–Dec. 1951), UN Docs. S/2361, S/2408, S/2412, and S/2432 (1951); 7 SCOR, Spec. Supp. (No. 3), UN Doc. S/2377 (1951); 7 SCOR, Supp. (Jan.–Mar. 1952), UN Doc. S/2469 (1952); M. RIDGWAY, *supra* note 39, at 199–202; C. T. JOY, *HOW COMMUNISTS NEGOTIATE* 31–36 (1955); W. G. HERMES, *supra* note 39, at 40–50; W. H. VATCHER, *supra* note 39, at 55–66, 73–75.

security area, which in 1976 was divided into two parts, one under North Korean and Chinese control and the other under the control of the Unified Command.<sup>41</sup>

*Interim Solution for Contending Claims to Sovereignty*

This form of demilitarization was proposed for the Jerusalem area in 1948 and for the whole of Kashmir from 1950 onwards, and was implemented for Mount Scopus in 1948 and the El-Auja and Hula areas in 1949.

The UN partition plan for Palestine had provided that Jerusalem and the surrounding area would be demilitarized and neutral.<sup>42</sup> Partition as envisaged by the General Assembly was never achieved, but just before the resumption of fighting in the Middle East in July 1948, Count Bernadotte proposed to the two sides that Jerusalem be demilitarized. Israel replied that it was prepared to discuss the idea "under certain assumptions," but the Arabs gave a rather vague refusal. The Security Council persisted with the matter and, in its resolution of July 15 establishing a mandatory cease-fire, instructed Bernadotte to "continue his efforts" to bring about the demilitarization of Jerusalem, without prejudice to its future political status. Two days later, the Arab League sent a cable to Secretary-General Trygve Lie stating that the Arab states had earlier accepted Bernadotte's proposal "in principle." Although this message was contrary to Bernadotte's understanding of what had happened earlier in the month, he at once submitted to the two sides a working paper that he hoped would serve as a basis for technical discussion. The Arabs responded by again rejecting demilitarization but agreeing to "a permanent cease-fire" in Jerusalem, while Israel turned down Bernadotte's plan because at that time he intended that Jerusalem should ultimately come under Arab rule. As there was now uncertainty as to precisely what Israel's position was, UN officials pursued the matter with Dov Joseph, the Israeli representative in Jerusalem, who said that Israel had never agreed to demilitarization in principle but had simply indicated that its readiness to discuss any plan "did not exclude" the possibility of discussing demilitarization, including the demilitarization of Jerusalem. Bernadotte considered Israel's new position "especially regrettable," as the Arabs had by now submitted to him their own "far-reaching" proposal for the demilitarization of Jerusalem. In the circumstances, Bernadotte had no option but to inform the Security Council that demilitarization was unlikely to be attained "in the near future," although he still believed that such a course, more than any other, would ensure the safety of the holy places and religious buildings.<sup>43</sup> His final report

<sup>41</sup> 8 SCOR, Supp. (Apr.-June 1953), UN Docs. S/2991, S/2999, and S/3017 (1953); 30 SCOR, Supp. (Oct.-Dec. 1975), UN Doc. S/11861 (1975); 31 SCOR, Supp. (Oct.-Dec. 1976), UN Doc. S/12263 (1976); 33 SCOR, Supp. (Jan.-Mar. 1978), UN Doc. S/12544 (1978); UN Doc. S/13113 (1979). For the text of the agreement on the headquarters area of the Military Armistice Commission, see *supra* note 9.

<sup>42</sup> GA Res. 181 (III) (1947).

<sup>43</sup> 3 SCOR, Supp. (July 1948), UN Docs. S/888, para. 31, S/906, and S/979; 3 SCOR (332d mtg.) 2-5, UN Docs. S/872 and S/873 (1948); 3 SCOR, Supp. (Aug. 1948), UN Docs. S/961 and S/979; 3 SCOR (349th mtg.) 20, 24; 3 SCOR (554th mtg.) 40-41, UN Doc. S/977 (1948); 3

to the Security Council proposed that Jerusalem and the surrounding area be placed under UN control, and the demilitarization of Jerusalem remained a UN aspiration. In 1949 the General Assembly restated its intention that Jerusalem should be under a special international regime administered by the United Nations, although the Security Council had some weeks previously decided to postpone indefinitely its discussion of demilitarization.<sup>44</sup>

Demilitarization was achieved, however, for the Mount Scopus area of Jerusalem, comprising the Hadassah Hospital, the Hebrew University, the village of Issawiya (normally inhabited by Arabs but controlled by Israel), and the Augusta Victoria Hospice (controlled by Jordan), which was an enclave inside Jordanian territory from 1948 to 1967. Mount Scopus occupied a key position overlooking Jerusalem. According to a senior UN official, "Whoever controls Mount Scopus controls the road northwards to Ramallah and Nablus [the biblical Shechem], and eastwards towards Jericho and Amman."<sup>45</sup> In April 1948, a Jewish convoy taking supplies to Mount Scopus had been savagely attacked by the Arabs in revenge for the carnage at Deir Yasin.<sup>46</sup> The United Nations was able to secure an agreement about Mount Scopus just before the renewal of fighting in July 1948 as a result of a direct meeting between the commanders of the Israeli and Jordanian forces. The text was hastily written on the back of an envelope and typed the following day. It provided that the area delineated on "the attached map" was to be under the UN flag and UN protection, and that the United Nations would be responsible for its security. Access was to be through UN check posts and all military personnel were to withdraw. The area was not to be used as a base for military operations, nor was it to be attacked or unlawfully entered. Arab and Jewish armed civilian police were to be "placed on duty under the United Nations Commander." Except with the agreement of the parties, the population was to be limited to those persons needed for the operation of the area, "plus the present population of the [Arab] village of Issawiya." The United Nations was to ensure the supply of food and water, the replacement of "necessary personnel in residence on Mount Scopus," and that "properly accredited individuals" could visit. The trouble with "the attached map" was that, as with the Government House area, there were two of them, showing different lines, both initialed by the same UN official, so that there were areas regarded by Israel as within its enclave and by Jordan as outside it.<sup>47</sup>

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GAOR, Supp. (No. 11) 12-13, UN Doc. A/648 (1948); SC Res. 54 and 56, 3 SCOR, Res. and Dec. 22 and 24, UN Docs. S/902 and S/983 (1948); F. BERNADOTTE, *supra* note 28, at 145, 148, 160-61, 183, 188-89, 195, 199-204, 206-07; D. JOSEPH, *supra* note 26, at 281, 312-16.

<sup>44</sup> 3 GAOR, Supp. (No. 11) 18, UN Doc. A/648 (1948); GA Res. 303 (IV) (1949); 4 SCOR (453d mtg.) 4 (1949).

<sup>45</sup> 3 GAOR, Supp. (No. 11) 25, UN Doc. A/648 (1948); E. L. M. BURNS, *supra* note 24, at 158; C. HORN, *SOLDIERING FOR PEACE* 3 (1966).

<sup>46</sup> P. AZCÁRATE, *supra* note 25, at 19; J. REYNIER, *supra* note 6, at 69-77, 79-81, 213; D. JOSEPH, *supra* note 27, at 77-78.

<sup>47</sup> UN Doc. S/1025 (1948); Meron, *The Demilitarization of Mount Scopus: a regime that was*, 4 ISRAEL L. REV. 501, 519 (1968); 3 SCOR (333d mtg.) 3 (1948); 6 SCOR, Supp. (Apr.-June 1953), UN Doc. S/3015, Annex; F. BERNADOTTE, *supra* note 28, at 86, 137, 140-43, 182, 192-

The armistice agreement between Israel and Jordan (April 3, 1949) provided for the creation of a special committee of the two parties to enlarge the scope of and improve the armistice agreement. Among the matters to be dealt with by the special committee was "resumption of the normal functioning of the cultural and humanitarian institutions on Mount Scopus and free access thereto."<sup>48</sup> The committee met a few times but was unable to make any progress about Mount Scopus: Jordan wished to maintain the status quo until the political climate improved, whereas Israel blamed Jordan for the failure to make progress and regarded it as "standing non-compliance from the side of Jordan."<sup>49</sup>

The original Mount Scopus agreement was supplemented in November 1949 by an annex providing that in the first and third weeks of every month, half of the Jewish personnel there would be relieved and supply convoys would have access to the area, both operations to be under UN supervision.<sup>50</sup>

A year later, the UN chief of staff issued a directive about convoys to Mount Scopus. No arms, ammunition, military equipment, or documentary material containing military information was to be allowed in the convoys. Each convoy was to be inspected by UN observers in the presence of Israeli and Jordanian officers, and each convoy was to be protected by the Arab Legion while passing through territory under Jordanian control.<sup>51</sup>

There were frequent difficulties about access to and the policing of Mount Scopus, complicated by inconsistent interpretations of the various agreements. A number of incidents in 1952 and 1953 were investigated by UN observers. From 1957 to 1958, a personal representative of Secretary-General Hammarskjöld visited the area and reached new understandings with the Governments of Israel and Jordan, designed to clarify and to some extent strengthen the original demilitarization agreement. In particular, the United Nations was to check on the implementation of the original agreement, assume "exclusive responsibility" for ensuring that convoys conformed with the agreed procedures, and investigate complaints.<sup>52</sup>

Problems continued, however, particularly in areas where Arabs lived or

94, 197-99; P. AZCÁRATE, *supra* note 25, at 187-88; E. L. M. BURNS, *supra* note 24, at 157; D. JOSEPH, *supra* note 26, at 248-49, 266, 278-79, 289-315; 13 SCOR, Supp. (Apr.-June 1958), UN Doc. S/4030 (1958), para. 80.

<sup>48</sup> 4 SCOR, Spec. Supp. (No. 1), UN Doc. S/1302/Rev.1 (1949), Art. VIII.

<sup>49</sup> 6 SCOR, Supp. (Oct.-Dec. 1951), UN Doc. S/2388 (1951), paras. 28-31; 7 SCOR, Supp. (Oct.-Dec. 1952), UN Doc. S/2833 (1952), para. 36; 11 SCOR, Supp. (Apr.-June 1956), UN Doc. S/3596 (1956), para. 99 and Ann. 6; 12 SCOR, Supp. (Oct.-Dec. 1957), UN Doc. S/3919 (1957), paras. 2-11.

<sup>50</sup> See note 9 *supra*.

<sup>51</sup> Meron, *supra* note 47, at 509.

<sup>52</sup> D. JOSEPH, *supra* note 26, at 248-49; W. EYTAN, *supra* note 24, at 40; E. L. M. BURNS, *supra* note 24, at 153-54, 157-58; C. HORN, *supra* note 45, at 83-85; O. BULL, *supra* note 38, at 63-67, 88-91; E. H. HUTCHINSON, VIOLENT TRUCE: A MILITARY OBSERVER LOOKS AT THE ARAB-ISRAELI CONFLICT 20-29, 40-41, 86-89 (1956); 7 SCOR, Supp. (Oct.-Dec. 1952), UN Docs. S/2833, paras. 27-28 and 37-38, and S/2833/Add.1 (1952); 8 SCOR, Supp. (Apr.-June 1953), UN Doc. S/33015 (1953); 13 SCOR, Supp. (Apr.-June 1958), UN Doc. S/4030 (1958), para. 76 and n.12; UN Press Release SG/653 (1958).

worked but Israeli police were on patrol. There was a serious incident in 1958: four Israelis lost their lives and a UN observer, Lieutenant-Colonel G. A. Flint of Canada, was killed by a bullet that had almost certainly been fired from territory under Jordanian control. Part of the trouble stemmed from the two maps of the enclave, as Arabs sniped at Israeli police patrolling in a provocative way in the disputed areas.<sup>53</sup>

During the Six Day War of June 1967, Israel occupied East Jerusalem and the Arab territory lying on the West Bank of the Jordan River, which terminated the isolation and demilitarized status of the Mount Scopus area.

Demilitarization also arose following Israel's offensive in the Negev in October 1948. The Negev contained a number of isolated Jewish settlements that had been defended by Israeli forces, but the bulk of the area was under Arab control. The Security Council called for a cease-fire followed by a withdrawal of forces, but the vacated territory was not to be reoccupied by the Arabs so that there would be created "such neutral or demilitarized zones as may appear advantageous."<sup>54</sup>

Israel was determined to retain the territory occupied during the October fighting, and there followed some strenuous negotiations between Ralph Bunche and Abba Eban. Finally, on November 13, Bunche issued a memorandum acceptable to Israel that indicated provisional demarcation lines. There was to be "an orderly observed withdrawal of forces" from positions in the Negev not held before the fighting started in October and the creation of a wide area from which all patrolling and military movement would be excluded. Otherwise, movement of armed forces and military supplies would be at the discretion of the UN observers, but there would be no limitations on the movement of normal nonmilitary supplies. Israel would withdraw from Beersheba, which would become a demilitarized Arab town under an Egyptian civil administrator. All these measures were to be provisional only, and the good offices of UN personnel would be available to help the parties to establish permanent lines and neutral or demilitarized zones.<sup>55</sup>

In the event, Israel did not withdraw but completed the occupation of the Negev in the following months. During the armistice negotiations in Rhodes, Egypt took up Bunche's proposal that Beersheba have an Egyptian military governor and also suggested that the armistice demarcation line follow the provisional line Bunche had proposed on November 13, on the ground that no advantages gained from a breach of the binding cease-fire should be confirmed in the armistice agreement. Israel regarded the Egyptian proposal for Beersheba as "absurd," and the matter was not pursued, but it was during

<sup>53</sup> 13 SCOR, Supp. (Apr.-June 1958), UN Docs. S/4011, S/4012, and S/4030 (1958); 13 SCOR, Supp. (July-Sept. 1958), UN Doc. S/4050/Add.1 (1958); 22 SCOR, Supp. (Apr.-June 1967), UN Docs. S/7867, S/7873, S/7876, S/7882, S/7886, and S/7922 (1967); C. HORN, *supra* note 45, at 69, 93-94, 250; O. BULL, *supra* note 38, at 63-67, 70, 88-91.

<sup>54</sup> 3 SCOR (367th mtg.) 37-38 (1948); 3 SCOR (374th mtg.) 33 (1948); 3 SCOR (378th mtg.) 63 (1948); 3 SCOR, Supp. (Nov. 1948), UN Doc. S/1064 (1948), para. 5; SC Res. 61, 3 SCOR, Res. and Dec. 28, UN Doc. S/1070 (1948).

<sup>55</sup> UN Press Release PAL/381 (1948).

the discussion of this matter that there arose the idea of a demilitarized zone in the El-Auja area.<sup>56</sup>

After Israel rejected the proposal for an Egyptian governor in Beersheba, Egypt made a similar proposal, first for Bir Asluj and then for El-Auja. Israel was quite unwilling to allow Egyptian forces to return to El-Auja but offered to withdraw the main body of its own troops from the area, leaving only a token force under UN supervision, and to make El-Auja the seat of the Mixed Armistice Commission. Eventually, Bunche put forward a proposal to demilitarize the area completely, which, after a certain amount of haggling, was accepted by both Egypt and Israel.<sup>57</sup>

The armistice agreement provided for the demilitarization of the village of El-Auja and its vicinity, with both Egyptian and Israeli forces totally excluded. The entry of armed forces into the area or any failure to respect demilitarization, if confirmed by UN personnel, would constitute "a flagrant violation" of the armistice. On the Egyptian side, an area was established in which defensive positions were not allowed.<sup>58</sup>

There were increasing difficulties in the El-Auja zone and the surrounding area; in 1955 Israeli forces entered the zone and Egypt established defensive positions in the prohibited area. When Dag Hammarskjöld visited the Middle East in the spring of 1956, he concluded that both Israel and Egypt "are or must be presumed to be, to a greater or lesser extent," violating the armistice agreement. A plan for the restoration of full compliance was submitted to the parties and, reported Hammarskjöld, "has not met with any objections."<sup>59</sup>

In July 1956, however, Israel began to restrict the movement of UN observers in the zone, and in the first phase of the Sinai campaign in October, Israel took full control. After withdrawing from Sinai in 1957, Israel took the view that the armistice agreement was no longer in effect, and the demilitarization of El-Auja was not continued.<sup>60</sup>

A demilitarized zone was also set up in the Hula area east and north of Lake Tiberias. Most of this territory had been allocated to the Jewish state in the UN partition plan, but it had been partly occupied by Syrian or other Arab forces in the fighting in 1948. During the armistice negotiations between Israel and Syria, the most difficult question was what arrangements should be made for this area, since both parties believed they had a valid claim to it. It was Syria that first proposed demilitarization, and at a later

<sup>56</sup> W. EYTAN, *supra* note 24, at 33-35; FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 37, at 689-90, 707, 718, 749, 755, 760, 764.

<sup>57</sup> FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 37, at 689-90, 701-02, 705-07, 713, 718-19, 731-32, 734-35, 749, 752, 761; E. L. M. BURNS, *supra* note 24, at 26.

<sup>58</sup> 4 SCOR, Spec. Supp. (No. 3), UN Doc. S/1264/Rev.1 (1949), Art. VIII; E. L. M. BURNS, *supra* note 24, at 92.

<sup>59</sup> 5 SCOR, Supp. (Sept.-Dec. 1950), UN Doc. S/1797 (1950), paras. 2-4; 9 SCOR, Supp. (Jan.-Mar. 1954), UN Doc. S/3172 (1954); 11 SCOR, Supp. (Apr.-June 1956), UN Doc. S/3596, paras. 67-71, 84, and Ann. 5; B. URQUHART, HAMMARSKJÖLD 136 (1972); E. L. M. BURNS, *supra* note 24, at 92-98, 101, 104-07, 134-35, 145-46, 160, 181; O. BULL, *supra* note 39, at 55-56.

<sup>60</sup> 11 SCOR, Supp. (July-Sept. 1956), UN Doc. S/3659 (1956), Annex; 11 SCOR (748th mtg.) 17-18 (1956); W. EYTAN, *supra* note 24, at 33; E. L. M. BURNS, *supra* note 24, at 170.

stage Ralph Bunche devised an acceptable compromise stipulating that three sectors with a total area of slightly over 25 square miles would be demilitarized.<sup>61</sup>

The armistice agreement provided that the demarcation lines were to be "midway between the existing truce lines" or "along the international boundary," and the demilitarized zone was to comprise the areas between those demarcation lines and the international boundary. Most of the zone had formed part of mandated Palestine, but a narrow strip in the central sector lay on the Syrian side of the frontier. Demilitarization of the Hula area had a twofold purpose: to minimize the possibility of friction and incidents by separating the armed forces of the two parties, and to provide for "the gradual restoration of normal civilian life" without prejudice to an ultimate settlement. All military and paramilitary forces were to be excluded from the zone. The chairman of the Mixed Armistice Commission was empowered to authorize the return of civilians and the employment of "limited numbers of locally recruited civilian police . . . for internal security purposes."<sup>62</sup>

Ralph Bunche made clear during the negotiations that administration in the Hula zone was to be "on a local basis, without raising general questions of administration, jurisdiction, citizenship and sovereignty." The chairman of the Mixed Armistice Commission would not "assume responsibility for direct administration" of the zone, but local administration would "take shape" under his general supervision.<sup>63</sup>

The Hula demilitarized zone was a constant source of contention. So long as there was hostility between Israel and Syria, there were bound to be suspicions on both sides that the other party was manipulating the situation for purposes of national advantage. Syria, of all Israel's Arab neighbors, was the least willing to accept Israel's right to exist, still less Israel's right to gain military advantage from a draining project close to the zone or to extend the bed of the Jordan River or to expropriate Arab-owned land for development purposes. There were endless disputes about land cultivation and policing and about the competence of the Mixed Armistice Commission and its UN chairman.<sup>64</sup> The whole of the zone was occupied by Israel during the Six Day War in June 1967.

<sup>61</sup> N. BAR-YAACOV, *THE ISRAEL-SYRIAN ARMISTICE: PROBLEMS OF IMPLEMENTATION, 1949-1966*, at 43-63 (1967); W. EYTAN, *supra* note 24, at 43; N. LORCH, *THE EDGE OF THE SWORD: ISRAEL'S WAR OF INDEPENDENCE, 1947-1949*, at 43 (1961); *FOREIGN RELATIONS OF THE UNITED STATES*, *supra* note 37, at 1030-32, 1053-55, 1100-02, 1225, 1231, 1233-35.

<sup>62</sup> 4 SCOR, Spec. Supp. (No. 2), UN Doc. S/1353/Rev.1 (1949), Art. V and Ann. II.

<sup>63</sup> 6 SCOR (542d mtg.) 98 (1951).

<sup>64</sup> 6 SCOR, Supp. (Apr.-June 1951), UN Docs. S/2049, S/2067, S/2084, S/2088, S/2099, S/2101, S/2111, S/2113, S/2118, S/2120, S/2122, S/2123, S/2124, S/2127, S/2136, S/2138, S/2139, S/2148, S/2173, S/2185, and S/2213 (1951); 6 SCOR, Supp. (July-Sept. 1951), UN Docs. S/2234 and S/2300 (1951); 6 SCOR, Supp. (Oct.-Dec. 1951), UN Docs. S/2359 and S/2389 (1951); 7 SCOR, Supp. (Oct.-Dec. 1952), UN Doc. S/2833 (1952), paras. 45-61; 8 SCOR, Supp. (Oct.-Dec. 1953), UN Doc. S/3122 (1953); 8 SCOR (645th mtg.) 15-20 (1953); 10 SCOR, Supp. (Jan.-Mar. 1955), UN Doc. S/3343 (1955); 11 SCOR, Supp. (July-Sept. 1956), UN Doc. S/3659 (1956), sec. III of Annex and App. B; 12 SCOR, Supp. (Apr.-June 1957), UN Doc. S/3815 (1957); 12 SCOR, Supp. (July-Sept. 1957), UN Doc. S/3844 (1957); 13 SCOR, Supp.

In another case of contending claims, Kashmir, the cease-fire was never converted into a truce, but Britain persistently advocated the establishment of neutral or demilitarized zones.<sup>65</sup> In 1949 India and Pakistan agreed to establish a demilitarized buffer zone along the cease-fire line.<sup>66</sup> Demilitarization in this zone was a useful step, but it fell far short of the wish of the Security Council to bring about the complete demilitarization of all of Jammu and Kashmir by the withdrawal of non-Kashmiri tribesmen and Pakistani nationals and the progressive withdrawal of Indian forces.<sup>67</sup>

*Reduction of Tension by Disengagement of Military Forces*

Demilitarization of this kind has been resorted to in Indonesia (1948), the no-man's-land of Jerusalem (1948), Kashmir (1949), Korea (1953), Yemen (1963), the Golan Heights (1974), and Sinai (1974-1979). In 1964 U Thant proposed the creation of completely demilitarized buffer zones in Cyprus between the opposing armed forces; but the Greek Cypriots criticized the plan as being likely to perpetuate the notion of partition.<sup>68</sup> After the Turkish invasion of 1975, however, a new role of the UN force there was to patrol a de facto buffer zone that had been established in the north of the island, separating the Turkish-controlled portion from that under Greek Cypriot rule.<sup>69</sup>

In the negotiations following the Netherlands "police action" in Indonesia in 1947, the UN Good Offices Committee (GOC) included in its first plan a provision for demilitarized zones, which were to be established on the basis of proposals submitted by the parties, taking account of geographical and topographical features. If the parties should prove unable to agree on the limits of the zones, the matter would be referred to the GOC. All military personnel, together with arms and equipment, would be withdrawn, but civil police would remain. The zone would be supervised by the military observers. Although this element of the Good Offices Committee's plan was acceptable to the two sides, the Netherlands rejected the plan on other grounds.<sup>70</sup>

When the truce was finally concluded on board the U.S.S. *Renville*, the

(Oct.-Dec. 1958), UN Doc. S/4124 (1958); 15 SCOR, Supp. (Jan.-Mar. 1960), UN Doc. S/4270 (1960); 18 SCOR, Supp. (July-Sept. 1963), UN Doc. S/5401 and Addenda; 21 SCOR, Supp. (Oct.-Dec. 1966), UN Docs. S/7561/Rev.1 and S/7573 (1966); SC Res. 93, 6 SCOR, Res. and Dec. 7, UN Doc. S/2157 (1951); N. BAR-YAACOV, *supra* note 61, at 66-113, 182-213, 282-87, 318-38; E. L. M. BURNS, *supra* note 24, at 111, 113-18; C. HORN, *supra* note 45, at 69, 77-80, 115-25; O. BULL, *supra* note 39, at 49-52, 54, 77, 87-88, 95, 101-03, 110.

<sup>65</sup> FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 31, pt. 1 at 447.

<sup>66</sup> 4 SCOR, Spec. Supp. (No. 7), UN Doc. S/1430/Add.1 (1949), Ann. 26, pt. II. See also 5 SCOR, Supp. (Sept.-Dec. 1950), UN Doc. S/1791, Ann. II.

<sup>67</sup> SC Res. 47, 3 SCOR, Res. and Dec. 3, UN Doc. S/726 (1948); SC Res. 80, 5 SCOR, Res. and Dec. 1, UN Doc. S/1469 (1950); SC Res. 91 and 96, 6 SCOR, Res. and Dec. 1, 5, UN Docs. S/2017/Rev.1 and S/2392 (1951); 7 SCOR (572d mtg.) 34-35 (1952); SC Res. 98, 7 SCOR, Res. and Dec. 1, UN Doc. S/2833 (1952); SC Res. 126, 12 SCOR, Res. and Dec. 3, UN Doc. S/3922 (1957).

<sup>68</sup> 19 SCOR, Supp. (July-Sept. 1964), UN Doc. S/5950 (1964), paras. 33 and 232(b); 19 SCOR (1151st mtg.) 22 (1964); 29 SCOR, Supp. (Oct.-Dec. 1974), UN Doc. S/11568 (1974), paras. 16-17.

<sup>69</sup> 29 SCOR, Supp. (Oct.-Dec. 1974), UN Doc. S/11568 (1974), paras. 16-17.

<sup>70</sup> 3 SCOR, Spec. Supp. (No. 1), UN Doc. S/649/Rev.1 (1948), paras. 22-24.



demilitarization arrangements proposed by the GOC were repeated, with four additional provisions:

- (1) the "average width" of the zones was to be "approximately the same" on each side of the status quo line;
- (2) the zones were to be without prejudice to the rights, claims, or position of the parties;
- (3) the term "civil police" did not exclude the temporary use of military personnel under civil control for police purposes; and
- (4) the zones were to be expanded as the atmosphere improved.

In most areas demilitarized zones were delineated without difficulty, but the Netherlands opposed a proposal to extend their depth on the ground that the Republican side had not put a complete stop to infiltration and espionage. Demilitarization continued until the second "police action" in December 1948.<sup>71</sup>

A demilitarized no-man's-land was created in Jerusalem in 1948 as a result of an agreement concluded under UN auspices between the Israeli and Jordanian military commanders. The limits of the area were fixed "as far apart as possible" and were to be marked on the ground with barbed wire. Even civilians were to be excluded from living in the area, but they were to have access to a well between the German Hospital and the Hebrew University, and the Arab Hospital at Beit Safafa was to be "respected as a medical institution." One Arab police station was to be allowed in the zone at an agreed location, and limited patrols by the Arab Legion were to take place in part of the zone at the discretion of the UN mediator. A UN observer was to visit the area "regularly" to ensure that the agreement was being observed. There were special provisions for entry by civilians to recover personal possessions, for the removal of Arab municipal records of a nonmilitary nature, for the recovery of Jewish articles of religious value, and for the return of disabled Arab ambulances. The UN mediator later reported that the agreement was "generally accepted and adhered to," though a small number of incidents had occurred.<sup>72</sup>

Fighting was resumed in July 1948, and when a mandatory UN cease-fire went into effect, it was not possible to renew the no-man's-land agreement. There was, however, a de facto no-man's-land between Israeli and Jordanian forces, running from Jerusalem to Latrun and beyond, which was "considered to be in United Nations hands." This situation was confirmed in the armistice agreement, but when military officers from the two sides came to demarcate the lines, they were attacked by angry villagers who objected to having their land and houses divided up on the basis of military convenience. There was a show of force by the two armies the next day and the disagreeable task was duly completed.<sup>73</sup>

<sup>71</sup> *Id.*, UN Doc. S/649/Rev.1, App. XI; 3 SCOR, Supp. (June 1948), UN Docs. S/780, ch. V, and S/848/Add.1, ch. V (1948).

<sup>72</sup> UN Docs. S/845 (1948) and S/1025 (1948); 3 GAOR, Supp. (No. 11) 35, UN Doc. A/648 (1948).

<sup>73</sup> 3 GAOR, Supp. (No. 11) 41, UN Doc. A/648 (1948); M. DAYAN, *supra* note 35, at 144-45.

In the Kashmir case, the cease-fire line was demarcated by the Indian and Pakistani military commanders in 1949. It was agreed that troops on each side would remain at least 500 yards from the line, except for one sector along a river. Provision was also made for a substantial, rectangularly shaped demilitarized area adjacent to the demarcation line, from which troops were to be entirely excluded.<sup>74</sup> This demilitarization continued de facto after the wars of 1965 and 1971.<sup>75</sup>

During the Korean War, Britain repeatedly proposed that a demilitarized buffer zone be established to separate the military forces of the two sides when the fighting stopped. General MacArthur, however, considered this plan a cowardly device to protect the North Korean regime; Britain's policy of appeasing the Communists, he said, reminded him of Munich.<sup>76</sup>

Nevertheless, both parties to the armistice negotiations favored the creation of a buffer zone, and the first substantive item of the agenda was to decide on a procedure for fixing a demarcation line between the sides "so as to establish a demilitarized zone." The Communists proposed a zone 10 kilometers in depth on each side of the 38th parallel, whereas the Unified Command favored one 20 miles wide following or slightly to the north of the military line of separation. As negotiations proceeded, each side modified its position, and in the end agreement was reached on a demilitarized zone 2 kilometers in depth on each side of the line of contact at the time the armistice went into effect. It took only a week when fighting was quiescent for officers of the two sides to draw up the boundaries.<sup>77</sup> Suitable markers were to be erected along the limits of the zone under the supervision of the Military Armistice Commission. No hostile acts were to take place within, from, or against the zone, and the only persons allowed in it would be those concerned with relief or civil administration, not exceeding one thousand from each side, and persons specifically authorized to enter by the Military Armistice Commission. The number of civil police and the arms to be carried by them were to be specified by the Military Armistice Commission, which was also empowered to authorize other personnel to carry arms.<sup>78</sup>

In the event, there have been numerous violations of the demilitarized zone; the most spectacular were the tunnels constructed under it by North Korea.<sup>79</sup>

Demilitarization was also resorted to after the Middle East war of 1973. Nonmilitary buffer zones were established on the Golan Heights and in Sinai, with adjoining zones of limited armaments.

<sup>74</sup> 4 SCOR, Spec. Supp. (No. 7), UN Doc. S/1430/Add.1 (1949), Ann. 26.

<sup>75</sup> I am grateful to George Sherry of the UN Secretariat for information on this point (letters of Feb. 16, 1979, Feb. 21, 1979, March 15, 1979).

<sup>76</sup> D. ACHESON, *PRESENT AT THE CREATION* 465 (1969); C. WHITNEY, *MACARTHUR: HIS RENDEZVOUS WITH HISTORY* 411, 417 (1956); S. DAYAL, *INDIA'S ROLE IN THE KOREAN QUESTION* 118 (1959).

<sup>77</sup> 7 SCOR, Spec. Supp. (No. 3), UN Doc. S/2507 (1952); W. G. HERMES, *supra* note 39, at 113-19, 484-85; W. H. VATCHER, *supra* note 39, at 79-86, 201; L. M. GOODRICH, *KOREA: A STUDY OF US POLICY IN THE UNITED NATIONS* 187-88 (1956); M. RIDGWAY, *supra* note 39, at 202-03, 225.

<sup>78</sup> 8 SCOR, Supp. (July-Sept. 1953), UN Doc. S/3079 (1953), Art. 1.

<sup>79</sup> 30 SCOR, Supp. (Oct.-Dec. 1975), UN Doc. S/11861 (1975), Annex.

The October War, which Israelis associate with Yom Kippur and Arabs with Ramadan, had an important effect on the psychology of all the parties. After the cease-fire called for by the Security Council on October 22 took hold, the nonpermanent members of the Council insisted on passing a resolution blessing the Geneva peace conference; for the first time in the history of the United Nations, not one of the permanent members cast an affirmative vote.<sup>80</sup> The process of separating the military forces of the two sides was not achieved in Geneva, however, but with the help of the peripatetic Henry Kissinger.

Although both Egypt and Israel had accepted the first cease-fire of October 22, 1973, Israeli forces continued to press against the Egyptian Third Army. It thus became a crucial element of Egyptian policy to reinstate the lines of October 22. Kissinger realized that Israel would not withdraw and proposed, instead, to make the lines "irrelevant." In Egypt, Kissinger negotiated with the surprisingly amenable President Sadat, whereas in Israel he had to confront the whole cabinet. Moshe Dayan, fully recovered from the traumas of October, was the most ingenious person on the Israeli side. He had come up with a concept for disengagement in Sinai, with a demilitarized buffer zone and adjoining zones in which weapons and forces would be limited but not prohibited. Kissinger made this concept the basis for his first round of shuttle diplomacy and was soon able to persuade Egypt and Israel to accept a U.S. compromise plan.<sup>81</sup> Military redispersions began on January 25, 1974, and were completed within 6 weeks. A reconstituted UN Emergency Force was stationed in the "zone of disengagement," as the buffer zone was called, and on each side of this zone were areas of limited armaments and forces, under periodic UN inspection.<sup>82</sup> The force limitations were not specified in the brief disengagement agreement but in letters from President Nixon to President Sadat and Prime Minister Meir, and the United States agreed to buttress UN peacekeeping with its own aerial reconnaissance and to make the data available to both sides. Sadat gave the United States private assurances that he would allow nonmilitary Israeli cargoes to pass through the Suez Canal once it was cleared, and the United States assured the Israelis that there would be no capricious withdrawal of the UN Force.<sup>83</sup>

Disengagement on the Golan Heights was much trickier to pull off since Syria had not emerged from the war in the same mood of confidence as

<sup>80</sup> SC Res. 344, 28 SCOR, Res. and Dec. 13, UN Doc. S/11156 (1973).

<sup>81</sup> E. O'BALLANCE, *NO VICTOR, NO VANGUARD: THE YOM KIPPUR WAR* 257-58 (1978); W. QUANDT, *DECADE OF DECISIONS: AMERICAN POLICY TOWARDS THE ARAB-ISRAELI CONFLICT, 1967-1976*, at 214-25 (1977); M. GOLAN, *THE SECRET CONVERSATIONS OF HENRY KISSINGER* 160-61 (1976); M. DAYAN, *supra* note 35, at 562-63; E. R. F. SHEEHAN, *THE ARABS, ISRAELIS, AND KISSINGER* 108-09 (1976); A. SADAT, *IN SEARCH OF IDENTITY* 293 (1970); B. & M. KALB, *KISSINGER* 530-42 (1974).

<sup>82</sup> 29 SCOR, Supp. (Jan.-Mar. 1974), UN Doc. S/11198 (1974).

<sup>83</sup> A. SADAT, *supra* note 81, at 275; M. DAYAN, *supra* note 35, at 569-70; M. GOLAN, *supra* note 81, at 165, 168-69; E. R. F. SHEEHAN, *supra* note 81, at 109-11.

There were the usual difficulties over implementation, as the agreement referred to an artillery battery, which in Israel has 6 guns but in Egypt 12. W. QUANDT, *supra* note 81, at 228.

Egypt. President Assad had initially demanded that Israel withdraw from all Syrian territory captured in 1967 and 1973, and he seemed unwilling to comply with the requirements of the Geneva Prisoners of War Convention until that was conceded. Kissinger saw Assad on February 26, 1974, and found him flexible on procedure but tough on substance. Israel proposed a minor disengagement that would have left Quneitra in Israeli hands, but Kissinger insisted that Israel would have to give up all the territory captured in 1973, which was no surprise to Eban or Dayan. Kissinger did not disclose to Assad what the Israeli ideas were, but sought to persuade him of the merits of a three-zone concept.<sup>84</sup>

By April, Syria seemed in a more accommodating mood, and Kissinger decided to transmit the Syrian ideas to the Israelis. Nixon, though severely weakened by the Watergate affair, tried to sweeten the pill for Israel by approving a massive arms deal. In May, Kissinger embarked on a new round of itinerant diplomacy, but he found the Israelis as obdurate as ever. "Why should Assad be rewarded for having gone to war against Israel and lost?"<sup>85</sup> In Damascus, Kissinger stressed the internal opposition to Golda Meir and disclosed some, but not all, of the concessions that Israel was willing to make.<sup>86</sup>

Soon the only major difference related to Quneitra and the surrounding area. Kissinger felt as if he were dealing with rug merchants in a Middle Eastern bazaar, haggling over a few hundred meters.<sup>87</sup> Finally, at the end of May, agreement was reached on a demilitarized buffer zone and two adjoining zones in which arms and forces would be limited. Quneitra was to be returned to Syria; however, it was largely destroyed by Israeli forces before they withdrew. A UN Disengagement Observer Force would be stationed in the demilitarized zone; it would inspect the two zones of limited armaments and use its best efforts to maintain the cease-fire. As in Sinai, there would be U.S. aerial reconnaissance. As part of the disengagement agreement, all POW's were to be repatriated. Assad assured Kissinger that the Syrian side of the line would not be used for guerrilla attacks on Israel, and this undertaking was transmitted to Israel by Nixon.<sup>88</sup>

To help in drawing the disengagement lines for the rugged Golan Heights, Kissinger provided aerial photographs with "extraordinarily accurate detail" rather than ordinary maps,<sup>89</sup> but even so, the lines crossed natural features in such an arbitrary way that both sides have committed permanent violations, which have been winked at by the other.

The second disengagement agreement for Sinai was much more difficult to achieve than the first, since Egypt was demanding that Israel leave the vital Mitla and Gidi Passes as well as the Abu Rudeis and Ras Sudr oil fields, and Israel was asking for an Egyptian commitment to real peace. Kissinger

<sup>84</sup> W. QUANDT, *supra* note 81, at 232, 233, 236-37; M. GOLAN, *supra* note 81, at 182, 189; A. EBAN, *AN AUTOBIOGRAPHY* 567, 574 (1978).

<sup>85</sup> W. QUANDT, *supra* note 81, at 240.

<sup>86</sup> *Id.* at 237-41; A. EBAN, *supra* note 84, at 559.

<sup>87</sup> A. EBAN, *supra* note 84, at 574; M. GOLAN, *supra* note 81, at 195, 206; E. R. F. SHEEHAN, *supra* note 81, at 119, 124; W. QUANDT, *supra* note 81, at 241-43.

<sup>88</sup> 29 SCOR, Supp. (Apr.-June 1974), UN Doc. S/11300/Add.2 and 3 (1974); E. R. F. SHEEHAN, *supra* note 81, at 143; M. GOLAN, *supra* note 81, at 208.

<sup>89</sup> W. QUANDT, *supra* note 81, at 242 n.51.

embarked on another round of shuttle diplomacy in March 1975, but without early success. He then said bluntly that the Israelis had been unbelievably shortsighted, and he announced that there would be a major "reassessment" of U.S. policy.<sup>90</sup>

But the setback was only temporary, and in August Kissinger was able to produce a new and more elaborate agreement. The parties agreed that the conflict in the Middle East should not be resolved by force. There were again to be a demilitarized buffer zone and adjoining zones of limited armament and forces, under UN supervision.<sup>91</sup> In addition, the United States agreed to provide an early warning system equipped with the latest unmanned detection techniques and staffed by civilians.<sup>92</sup> There were important commitments by the parties and the United States that were not published as part of the disengagement agreement, but these were not kept secret for long. The United States agreed to vote against any proposal in the Security Council that "affects or alters adversely" the disengagement agreement or that would alter adversely Security Council Resolutions 242 and 338 "in ways which are incompatible with their original purpose." The United States further agreed not to "assist" any proposals "detrimental to the interests of Israel" and not to recognize or negotiate with the Palestine Liberation Organization so long as it did not recognize Israel's right to exist and did not accept Resolutions 242 and 338.<sup>93</sup>

The third Sinai disengagement agreement emerged from Camp David on March 26, 1979. In each subphase of Israeli withdrawal, to be spread over a period of 3 years, there is to be "an interim buffer zone" between the parties. When withdrawal is completed, there will be a wide zone on the Egyptian side that will contain only UN personnel and Egyptian civil police, and a narrow zone on the Israeli side in which military forces, installations, and weapons will be limited. The United States agreed to maintain the Sinai early warning system for a time and to continue aerial surveillance until the final Israeli withdrawal. The United States also undertook to exert its utmost efforts to persuade the Security Council to agree to the permanent stationing of UN personnel in the designated zones or, failing that, to ensure "an acceptable alternative multinational force."<sup>94</sup> As the Soviet Union has objected to having any UN peacekeeping force support the Camp David accords,<sup>95</sup> and as Israel considers that the UN Truce Supervision Organization (UNTSO) would not be completely reliable because it could be withdrawn on the whim of the Secretary-General,<sup>96</sup> interim arrangements have been made for a continuance of the U.S. surveillance mission in Sinai,

<sup>90</sup> *Id.* at 260, 262-63, 265-67; M. GOLAN, *supra* note 81, at 229-30, 243; E. R. F. SHEEHAN, *supra* note 81, at 156-62, 165.

<sup>91</sup> W. QUANDT, *supra* note 81, at 272-73; 30 SCOR, Supp. (July-Sept. 1975), UN Doc. S/11818 and Add.1 (1975); A. SADAT, *supra* note 81, at 296.

<sup>92</sup> Half-yearly reports have been made to the President and transmitted to Congress.

<sup>93</sup> JERUSALEM POST WEEKLY, Aug. 26, 1975, Sept. 23, 1975, and Oct. 21, 1975; *Early Warning in Sinai: Hearings Before the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 249-53 (1975); E. R. F. SHEEHAN, *supra* note 81, at 190.

<sup>94</sup> THE EGYPTIAN-ISRAELI PEACE TREATY, *supra* note 11.

<sup>95</sup> The mandate of the UN Emergency Force lapsed on July 24, 1979.

<sup>96</sup> UN Doc. S/13578 (1979).

staffed by about 140 civilians, in cooperation with UNTSO observers. There is informal coordination between the parties about military patrols. At the time of going to press (April 1980), there were plans to expand UNTSO's operation in the Sinai sector to about 53 military observers, stationed at four desert posts together with Ismailia and Cairo. There seems little immediate prospect that supervision could be undertaken by a peacekeeping force acting under the authority of the UN Security Council, and the present largely unwritten arrangements could well prove precarious if bilateral relations between Egypt and Israel were to take a turn for the worse.

### III. THE IMPLICATIONS FOR SOVEREIGNTY

Full exercise of authority over territory to which one has title is a normal attribute of sovereignty. Indeed, sovereignty is the term for the "totality of international rights and duties" recognized by international law as residing in "an individual territorial unit—the state."<sup>97</sup> Sovereignty has sometimes been described as the state's attribute of more or less plenary competence.<sup>98</sup> It has long been recognized, of course, that states can choose to limit their sovereignty through agreement.<sup>99</sup> All of the forms of nonmilitary area described above represent an interesting type of restraint on sovereignty, in that they limit free movement in what is claimed by one party to be its own territory, as well as the deployment of military forces. Many of them also entail the presence of a third party with no territorial rights in the classic sense of the term, the United Nations. Sometimes the zone is given a special status to enable UN personnel to perform a role not directly related to demilitarization (e.g., Government House, Jerusalem); sometimes, conversely, the United Nations is there to help ensure the special status of the area involved (e.g., Kashmir, the Golan Heights, Sinai).

These nonmilitary areas do not, however, entail shared sovereignty in the normal sense of the term.<sup>100</sup> The United Nations has the powers ascribed to it in the agreement between the parties. Perhaps its intended role in the abortive proposal of the Council of Foreign Ministers for the neutrality and demilitarization of Trieste (1946)<sup>101</sup> and the General Assembly's initial plan for a special international regime for the Jerusalem area (1947)<sup>102</sup> would have approached a transfer of something comparable to sovereignty. The special legal regimes for the nonmilitary areas referred to above do not

<sup>97</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] ICJ REP. 174, 180.

<sup>98</sup> Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT'L L. 93-182 (1976-77). And see generally W. SUKIENICKI, *LA SOUVERAINETÉ DES ÉTATS EN DROIT INTERNATIONAL MODERNE* (1927); and I. DELUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* (1974).

<sup>99</sup> *S.S. Wimbledon*, [1923] PCIJ, ser. A, No. 1.

<sup>100</sup> Compare A. CORET, *LE CONDOMINIUM* (Paris 1960).

<sup>101</sup> 2 SCOR, Supp. (No. 1), UN Doc. S/224 (1946), Enc. 6, Art. 3.

<sup>102</sup> 2 GAOR, Res. (1947) 131, Res. 181.

affect sovereignty; other outstanding examples of such regimes are those for Antarctica<sup>103</sup> and outer space.<sup>104</sup>

#### IV. THE STATUS OF NONMILITARY AREAS FOR NONPARTIES

It would seem that there is almost always a general obligation to respect the status of nonmilitary areas, since one or more of three circumstances will normally obtain:

(1) The area is demilitarized and undefended because it contains protected persons, buildings, or installations.

(2) The status of demilitarization arises from agreement between the parties. If there is agreement to demilitarize, it must be assumed that the area consists entirely of territory under the sovereignty of one or the other of the parties or is the subject of their contending claims. If all claimants have agreed to demilitarization, the status would seem to be valid *erga omnes*, since the right to make or exclude military deployments on one's own territory cannot be challenged. Perhaps the one exception is outer space, which was demilitarized by the agreement of many states, although claims regarding sovereignty there have not been made.

(3) The status of demilitarization arises from a binding resolution of the Security Council under Article 40 of the Charter. Indeed; there are dicta in the International Court's opinion on the effects of the termination of the mandate in Namibia that indicate that even non-binding resolutions may create legal regimes with objective reality for third parties.<sup>105</sup>

#### V. SUPERVISION OF DEMILITARIZED STATUS: THE UN EXPERIENCE

The demilitarized zone in Korea and the Kaesong-Panmunjom-Munsan conference area still exist, and there are buffer zones in Kashmir, on the Golan Heights, and in Sinai. A proposal for a demilitarized zone on the northern frontier of Namibia is now being discussed,<sup>106</sup> and there have been informal suggestions for a demilitarized zone in south Lebanon if ever the Beirut Government is able to establish its authority over the different armies and factions.

Much of the experience of nonmilitary zones since 1945 comes from the Middle East, which may be *sui generis* because of incompatible territorial claims in some areas.

Except when the status arises from the presence of protected persons, demilitarization offers no security in time of war; in fact, Professor N. Bar-Yaacov insists that the object of a demilitarized zone is "confined to peacetime."<sup>107</sup> Israel has occupied several demilitarized areas in preparation

<sup>103</sup> The Antarctic Treaty, 1959, 12 UST 794, TIAS No. 4780.

<sup>104</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 1967, 18 UST 2410, TIAS No. 6347, 610 UNTS 2.

<sup>105</sup> [1971] ICJ REP. 16, 50-54.

<sup>106</sup> UN Docs. S/13611; S/13621, S/13634, and S/19376 (1979).

<sup>107</sup> N. BAR-YAACOV, *supra* note 61, at 157, 318.

for or in the course of hostilities: the Red Cross zones in Jerusalem in May and July 1948, the El-Auja demilitarized zone in 1955, and the Jerusalem-Latrun no-man's-land and the Mount Scopus and Hula demilitarized zones in 1967.

In wartime emergency, a nondefended sanctuary may be created hurriedly without much attention to such matters as the limits of the area, which categories of persons shall have access or be excluded, how it shall be supervised, and the emblems to be used to indicate its nonmilitary status. Sanctuaries may be created in areas enjoying diplomatic immunity or under Red Cross or United Nations protection, but they are likely to be short-lived: they soon will either lose their nonmilitary status or be converted into more enduring kinds of demilitarized area.

The other kinds of demilitarized area have features in common, and similar problems tend to arise.

It hardly needs stressing that the perimeters of such areas should be clearly delineated both on large-scale maps and by physical markers on the ground, as has been done for the joint security area in Korea. It is difficult enough if there is a lack of congruence between maps and ground markers, but a preposterous situation arises if (as was the case for the Mount Scopus and Government House areas of Jerusalem) there exist inconsistent official maps. A party may be reluctant to have the perimeters of a nonmilitary area marked on the ground for fear that a line on the ground in course of time becomes an international frontier: that was why Israel objected to marking the limits of the Hula demilitarized zone. It should be affirmed, however, as Israel has often stressed and as Ralph Bunche noted in the Hula context, that demilitarization *per se* does not affect sovereignty.<sup>108</sup>

Any agreement to create a nonmilitary area should provide for a total prohibition on weapons and military installations other than those that are expressly permitted, and there should be agreement about overflights by military aircraft.

General Odd Bull, who has had considerable experience in UN operations, believes that effective supervision of demilitarized areas requires the stationing of international military forces on the ground: "The experience of UNTSO showed that observers alone are not enough."<sup>109</sup> But whatever system of supervision and monitoring is used, there should be provision for random checks both inside the area and of materials entering it. The experience with sophisticated sensors and surveillance techniques used by the U.S.-manned Sinai Field Mission since 1975 could be tapped for the effective supervision of other nonmilitary areas.<sup>110</sup> The normal principles regarding freedom of movement of supervisory personnel should apply.

The question of personnel allowed to reside in or visit nonmilitary areas is even more difficult than the question of military hardware. In theory, it would seem logical to admit civilians, medical staff, chaplains, and fighters who have been rendered *hors de combat* (sick and wounded), as well as

<sup>108</sup> *Id.* at 57, 64, 84-86, 320; E. L. M. BURNS, *supra* note 24, at 113; O. BULL, *supra* note 38, at 50, 51, 103.

<sup>109</sup> O. BULL, *supra* note 38, at 176.

<sup>110</sup> Eight reports of the Sinai Support Mission have been issued.



specified categories of personnel for guard and security duties, but this arrangement hardly takes account of persons who are farmers by day and irregular fighters by night. Palestinian guerrillas have often operated from primarily civilian refugee camps, and the Israeli *nahals* are settlements of young people who undertake both agricultural and military functions.

Moreover, in inhabited areas there is police work to be done, and in many parts of the world it is customary for some or all police to bear arms. General E. L. M. Burns of Canada, who headed the UN truce organization in the Middle East and later commanded the UN Emergency Force in Sinai, has noted that Israeli frontier police "are more than an ordinary police-force . . . they are all trained soldiers [and] their introduction into the [Hula] demilitarized zone was essentially a violation of the demilitarization principle. . . ." Generals Carl von Horn and Odd Bull, both of whom served as chief of staff of the UN truce observers, have written of the provocative activities of the Israeli police in the Mount Scopus demilitarized enclave. One of them records how the police "tricked" the UN observers, who then "broke faith" with the other party to the demilitarization agreement. A senior UN official always places the word *police* in quotation marks when writing of the Israeli police activities in the Mount Scopus area, and he also mentions more than once that Israeli police in the Hula demilitarized zone used armored personnel carriers.<sup>111</sup> Agreements for nonmilitary areas usually provide for civilian police in order to maintain law and order, but after the *Renville* agreement on Indonesia, the parties accepted as a temporary measure that military personnel under civilian control could be used for police purposes.<sup>112</sup> The Mount Scopus agreement specified a maximum number of police and stated that they would be "placed on duty under the United Nations Commander"—an unhappily ambiguous phrase.<sup>113</sup> In the Kaesong conference area in Korea, a minimum number of military police were allowed, but General Ridgway considered that the Communists were not respecting the agreement when they introduced personnel with machine guns and mortars.<sup>114</sup> In an ideal world, policing of nonmilitary areas would be done by UN personnel, but then an ideal world would be one large nonmilitary area and policing would be unnecessary.

It is usual to specify whether limited numbers of military personnel will be allowed in nonmilitary areas for security and guard duties, as well as the arms they may carry. In the agreement on the headquarters area for the Military Armistice Commission in Korea, the number of "security personnel" from each side is specified, and it is laid down that each man is allowed one rifle or one pistol. Even an agreed limitation of this kind is no guarantee that difficulties will not occur, or that seemingly trivial incidents will not escalate. In 1976, a group of security guards from the Unified Command

<sup>111</sup> E. L. M. BURNS, *supra* note 24, at 96, 114, 117; C. HORN, *supra* note 45, at 69, 83–85, 93, 119, 123; O. BULL, *supra* note 38, at 65–67.

<sup>112</sup> 3 SCOR, Spec. Supp. (No. 1), UN Doc. S/649/Rev.1 (1948), App. XI, Art. 5; 3 SCOR, Supp. (June 1948), UN Doc. S/848/Add.1 (1948), ch. V, sec. 6.

<sup>113</sup> 8 SCOR, Supp. (Apr.–June 1953), UN Doc. S/3015 (1953), Art. 4.

<sup>114</sup> M. RIDGWAY, *supra* note 40, at 199.

were trimming a tree in the joint security area near Panmunjom when they were attacked by North Korean guards, and two U.S. officers, one of whom was unarmed, were beaten to death with clubs and axes.<sup>115</sup>

None of the nonmilitary areas since 1949 were expressly created in accordance with the Geneva Conventions, and nonmilitary areas have not yet been established in accordance with Additional Protocol I. But the Geneva texts do not have to be followed to the letter; they constitute guidelines to be adapted to differing circumstances. The disadvantage of the provisions of Additional Protocol I, which became apparent in the conference of government experts convened by the International Committee of the Red Cross, was that they might be thought to have the effect of weakening the general protection to be extended to civilians.<sup>116</sup> This eventuality can hardly be prevented by clever legal drafting, however: it is a problem of psychology rather than of law.

Demilitarization is a form of arms control and provides interim solutions to problems connected with armed conflict, either to assist in the protection of those entitled to immunity from direct attack or to facilitate the transition from war to peace. Experience with sophisticated ground sensors and aerial reconnaissance in Sinai is reassuring; such detection techniques could be adapted for use elsewhere, particularly in the increasingly frequent cases where there is the danger that peace will be disturbed by irregular military forces not under proper control.

But more should not be expected of demilitarization than it can bear. In particular, it is no surety against major and deliberate attack, as has been repeatedly shown in the Middle East. Properly supervised demilitarization, at its best, helps to reveal infiltration but does not prevent it.

<sup>115</sup> 31 SCOR, Supp. (Oct.-Dec. 1976), UN Doc. S/12263 (1976), para. 6.

<sup>116</sup> ICRC, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, para. 3.205 (1972):

# STATE LIABILITY FOR ACCIDENTAL TRANSNATIONAL ENVIRONMENTAL DAMAGE BY PRIVATE PERSONS

By Günther Handl\*

## I. INTRODUCTION

A striking feature of our times is that private individuals and corporations are engaging increasingly in activities that may result in significant accidental damage to the transnational environment.<sup>1</sup> The international community has responded to this phenomenon by strengthening the transnational accountability of the private actors.<sup>2</sup> Significant efforts have been made to obtain wide international acceptance of the principle of "equal right of access," that is, the right of the actual or potential victim of transnational pollution to have recourse, for the purposes of both prevention and compensation, to the national authorities that exercise jurisdiction or control over the private actor concerned.<sup>3</sup> A similar endeavor is discernible towards

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<sup>1</sup> The more exotic activities that come to mind include weather modification, the operation of nuclear fuel cycle facilities, private launchings of satellites and rockets (a particularly interesting example is that of the German OTRAG corporation which until recently conducted launching experiments in Zaire), offshore mineral operations, and future seabed mining activities. As to the creation of transnational risks in general, see Handl, *An International Legal Perspective on the Conduct of Abnormally Dangerous Activities in Frontier Areas: The Case of Nuclear Power Plant Siting*, 7 *ECOLGY L.Q.* 1 (1978).

<sup>2</sup> Of course, in socialist countries with a socialist system of ownership of the instruments and means of production either in the form of property of the state or of collective farms and other cooperative organizations and their associations (see, e.g., Articles 20–26 of the Fundamentals of Civil Legislation of the USSR and the Union Republics, in *FUNDAMENTALS OF LEGISLATION OF THE USSR AND THE UNION REPUBLICS* 150, 160–63 (1974)), many of the transnationally hazardous activities engaged in by private individuals in market economies are carried on by state enterprises. Compare Uibopuu, *Environmental Law in the Soviet Union—National and International Aspects*, in *EUROPEAN ENVIRONMENTAL LAW* 433 (Ercman ed. 1977). Still, a differentiation between categories of "private" and "state" activities is necessary to establish the parameters of state liability. For the state *qua* state will become transnationally liable only if the activity is attributable to it or implicates it in its capacity as the territorial sovereign. The crucial test for the incurrence of state liability in the latter sense thus remains the "nature of the activity."

Maintenance of a distinction between the differing forms of "state" liability is important in the context of securing adequate financial resources for compensation. See *infra* sec. VI; and P.-M. DUPUY, *LA RESPONSABILITÉ DES ETATS POUR LES DOMMAGES D'ORIGINE TECHNOLOGIQUE ET INDUSTRIELLE* 125–28 (1976).

<sup>3</sup> See, in particular, OECD Council Recommendation on Principles concerning Transfrontier Pollution, Title D (Principle of Equal Right of Hearing), OECD Doc. C(74) 224; Recommendation on Equal Right of Access in Relation to Transfrontier Pollution, OECD Doc.

ensuring, at least in certain cases, that the private actor will maintain minimal financial resources for compensating victims of accidental transnational pollution damage.<sup>4</sup>

Less attention has been paid to the question of state liability, even though in theory, if not in practice, states have retained ultimate control over the private actors concerned.

The purpose of this paper is to examine the critical role states must play in any transnational liability scheme and the implications of state liability<sup>5</sup> with regard to prevention of and compensation for transnational environmental damage. How crucial this role can be is illustrated by the example of transnational pollution damage caused by so-called single-ship or single-plant companies. More often than not, the assets of these corporations are essentially tied up in the vessel or plant concerned. Once an accident has occurred, the corporate assets are likely to be lost for the purpose of defraying the costs of the damage. Adequate alternative financial resources might not be available or accessible.<sup>6</sup> Thus, comprehensive compensation of the transnational victims may well depend on whether the state is found to share a financial responsibility as regards these victims. On the other hand, if states do retain control over the private actors, state liability is obviously in

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C(76) 55 (Final); Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, OECD Doc. C(77) 28 (Final). See further Art. 3 of the 1974 Nordic Environmental Protection Convention, *reprinted in* 13 ILM 591, 592 (1974); and Principle 14 of the Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or more States, UNEP Doc. GC.6/CRP.2 (1978), *reprinted in* 17 ILM 1091, 1097, 1099 (1978).

<sup>4</sup> Examples again include nuclear power activities, the offshore exploration and exploitation of mineral resources, and the maritime transportation of oil. Various related international agreements provide for minimum financial resources to be available to meet accident liabilities: See, e.g., Art. 10 of the 1960 OECD Convention on Third Party Liability in the Field of Nuclear Energy [hereinafter cited as Paris Nuclear Liability Convention], *reprinted in* 55 AJIL 1083, 1089 (1961); Art. VII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage, *reprinted in* 2 ILM 727, 737 (1963); Art. VII of the 1969 International Convention on Civil Liability for Oil Pollution Damage [hereinafter CLC], *reprinted in* 9 ILM 45, 52-55 (1969); the 1971 Convention on the Establishment of an International Fund for Oil Pollution Damage, *reproduced in* 11 ILM 284 (1972); and Arts. 8 & 9 of the 1977 London Convention on Civil Liability for Oil Pollution Damage from Offshore Operations, *reprinted in* 16 ILM 1450, 1453 (1977). See also the industries' self-regulation in this respect: The Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution [TOVALOP], *reproduced in* 8 ILM 497 (1969); Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution [CRISTAL], *reprinted in* 10 ILM 137 (1971); and the Offshore Pollution Liability Agreement [OPOL], *reprinted in* 13 ILM 1409 (1974).

<sup>5</sup> "International liability," as used here, denotes a "secondary" or "functional" international obligation, namely, that of compensation, which arises vis-à-vis the victim state as a result of the polluting state's violation of its "primary" obligation, i.e., its "responsibility" to ensure that activities under its control or jurisdiction do not cause extraterritorial environmental damage.

<sup>6</sup> Conceivably, a lifting of the corporate veil would allow access to the financial resources of those who stand behind the single-ship or single-plant company. However, this strategy offers, at best, a dubious prospect of compensation: national courts might be reluctant to pierce the veil, as it is likely to involve complex and time-consuming proceedings and, particularly in situations of catastrophic transnational damage, may fail to open up adequate funds for the satisfaction of the transnational claims after all.

issue and would seem to bear directly on the effectiveness of accident prevention efforts.

Consequently, the issue to be analyzed here is whether and, if so, to what extent a state may be held liable for transnational damage brought about by activities of private persons. More specifically, can such direct state liability<sup>7</sup> be incurred only internationally, *i.e.*, vis-à-vis the state(s) affected by transnational pollution, or can it also be incurred vis-à-vis the individual victim of such pollution? In the final analysis, the fundamental question is whether the present international system of allocating liability for transnational pollution and, conversely, of providing legal means of redress, is responsive to the purported goals of international environmental law: the minimization of accidental transnational pollution and the provision of an effective system of compensation.

## II. INTERNATIONAL LIABILITY AND STATE CONTROL OVER PRIVATE ACTIVITIES

It is a well-established principle of international law that the international liability a state may incur for acts of private persons is a function of that state's control over the activities concerned. Fundamental to this principle is the notion that the international allocation of competences entails commensurate responsibilities vis-à-vis the international community. Thus, territorial sovereignty, the exclusive right to exercise the functions of a state within a certain portion of the globe,

cannot limit itself to its negative side, *i.e.* to excluding the activities of other States; for it serves to divide between the nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.<sup>8</sup>

Ultimately, of course, "physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States," as the International Court of Justice emphasized in its *Namibia* Advisory Opinion.<sup>9</sup>

This functional perspective on territorial sovereignty, on the state's

<sup>7</sup> The term "direct state liability" is used here to denote an international legal duty of compensation for transnational injury which, as will become apparent *infra*, is merely activated upon the miscarriage of a private hazardous activity, *i.e.*, the injurious conduct. It must be seen as founded on the idea that express or implicit state authorization of the creation of transnational risks by private entities entails the controlling state's international duty of indemnification of any damage suffered extraterritorially. For details, see text at notes 153-156 *infra*.

<sup>8</sup> *Island of Palmas Case (Netherlands, United States)*, 2 R. Int'l Arb. Awards 829, 839. For a similarly concise formulation of the functional notion of territorial sovereignty, see C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 6-7 (1928). See also Suzuki, *A State's Provisional Competence to Protect Human Rights in a Foreign State*, 15 TEX. J. INT'L L. (1980).

<sup>9</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ REP. 16, 54, para. 118.

control over territory, people, and resources as the ultimate repository of its international liability, is indeed a cornerstone of international environmental law. Thus, Principle 21 of the Declaration on the Human Environment of the 1972 UN Stockholm Conference, in laying down the basic rule governing the international responsibility of states with regard to the environment,<sup>10</sup> commits them "to insure that activities within their jurisdiction or control do not cause damage to areas beyond the limits of national jurisdiction."<sup>11</sup>

Before the Stockholm Declaration, much of the state practice and key judicial decisions<sup>12</sup> dealt with the international liability of states in the context of activities carried on within state territory. In the *Corfu Channel* case, for example, the ICJ stated, as a principle of international law of general applicability "every State's obligation not to allow knowingly its territory to be used contrary to the rights of others."<sup>13</sup> By contrast, the scope of the obligation under Principle 21 extends to activities conducted anywhere outside a state's territory as long as that state has priority in exercising control over the injurious conduct.<sup>14</sup> Consequently, private activities in outer

<sup>10</sup> Thus GA Res. 2996 (XXVII), Dec. 15, 1972, 27 UN GAOR (Supp. No. 30) 42. The resolution was adopted by a vote of 112 to 0, with 10 abstentions. It had been approved by the General Assembly's Second Committee by a vote of 111 to 0, with 11 abstentions. Abstaining votes were cast by Eastern bloc countries. A probably representative explanation of the nonsubstantive grounds for abstention by these countries may be that of the Cuban delegate to the Second Committee, who stated that "his delegation ha[d] abstained from the vote because it had not participated in the Stockholm Conference; however the draft [resolution] contained elements that it unreservedly approved." UN Doc. A/C.2/SR.1479, para. 39. Not only must the resolution be viewed as declaratory of existing customary principles of international law, but under the circumstances it might very well signify state practice giving rise to expectations of instant compliance. On instant customary law in general, see, e.g., Jennings, *The United States Draft Treaty on the International Seabed Area—Basic Principles*, 20 INT'L COMP. L.Q. 433, 437–40 (1971). On recommendations as declaratory statements of existing law, see, e.g., Schreuer, *Recommendations and Traditional Sources of International Law*, 20 GERMAN Y.B. INT'L L. 103, 110–11 (1977). On the specific issue of the legal relevance of GA Res. 2996 (XXVII), as expressive of well-established state practice, see Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AJIL 50, 66–72 (1975). In any event, there should be little doubt as to the resolution's authoritative contents.

For a rare contrary view, see Fitzgerald, in discussion of the International Law Association on *Legal Aspects of the Conservation of the Environment*, in ILA, REPORT OF THE FIFTY-SEVENTH CONFERENCE, MADRID 1976, at 564, 573 (1978).

<sup>11</sup> Report of the Stockholm Conference, UN Doc. A/CONF.48/14, at 7, reproduced in 11 ILM 1416, 1420 (1972).

<sup>12</sup> The most important of these is the *Trail Smelter* decision, in which the arbitral tribunal held that

no State has a right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

3 R. Int'l Arb. Awards 1905, 1965. This pronouncement was made in the face of the fact that, as Read notes, "[t]he subject matter of the dispute did not directly concern the two governments; nor did it involve claims by United States citizens against the Canadian government." Read, *The Trail Smelter Dispute*, 1 CANADIAN Y.B. INT'L L. 213 (1963).

<sup>13</sup> [1949] ICJ REP. 4, 22.

<sup>14</sup> As to the notion of such priority, see text at notes 31–47 *infra*.

space, on the high seas, or on the seabed should clearly come within the ambit of Principle 21.<sup>15</sup>

This extension of the principle is simply a corollary of the fact that states have retained the position of principal actors in the transnational arena. Various multilateral agreements testify to the continued preeminence of states. By making state control the prerequisite for permitting private activities in areas beyond national jurisdiction, they also make it the point of departure for determining the international liability of states if such activities cause an abridgment of other states' rights. Thus, Article VI of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space provides for the international responsibility of states parties to the treaty for "national activities in outer space . . . whether such activities are carried on by governmental agencies or by non-governmental entities."<sup>16</sup> Virtually the same provision is found in Article XIV of the 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies.<sup>17</sup> Similarly, the 1972 Convention on Liability for Damage Caused by Objects Launched into Outer Space imposes absolute liability on the "launching State,"<sup>18</sup> which is defined as including "a State from whose territory or facility a space object is launched."<sup>19</sup> Therefore, the convention clearly imposes international liability on the controlling state for injurious activities undertaken by private organizations.

Activities by nongovernmental entities in the marine environment beyond national jurisdiction can also bring into play the international liability of the controlling state. Admittedly, one can only draw inferences on the subject from the 1958 Geneva Conventions on the Law of the Sea,<sup>20</sup> and the same must be said of many of the environmental protection conventions of the early seventies. While the latter establish a clear linkage between control and responsibility,<sup>21</sup> liability is only inferable through recourse to the general principle of law that every violation of an obligation entails a duty of reparation.<sup>22</sup>

<sup>15</sup> See also Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. J. INT'L L. 423, 493 (1973).

<sup>16</sup> 18 UST 2410, TIAS No. 6347, 610 UNTS 206.

<sup>17</sup> Recently adopted by the UN General Assembly and opened for signature; text in Report of the Comm. on the Peaceful Uses of Outer Space, Annex II, 34 UN GAOR (Supp. No. 20) 33, UN Doc. A/34/20 (1979), and 18 ILM 1434, 1439 (1979).

<sup>18</sup> With regard to damage caused by a space object on the surface of the earth or to aircraft in flight, see Art. II of the convention, 24 UST 2389, TIAS No. 7762, reproduced in 10 ILM 965 (1971).

<sup>19</sup> Art. 1, para. (c)(ii).

<sup>20</sup> For example, Art. 24 of the Convention on the High Seas, 450 UNTS 82, 13 UST 2312, TIAS No. 5200. Compare in this context Brownlie, *A Survey of International Customary Rules of Environmental Protection*, 13 NAT. RESOURCES J. 133-84 (1973).

<sup>21</sup> See, e.g., Art. 15 of the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping of Ships and Aircraft, reprinted in 11 ILM 262, 264 (1972); Art. VII of the 1972 London Dumping Convention, reprinted in *id.* at 1291, 1300; Arts. 1, 3, 4, and 5(1) of the 1973 International Convention for the Prevention of Pollution from Ships, reprinted in 12 *id.* at 1319, 1320-23 (1973); and Art. 12 of the 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources, reprinted in 13 *id.* at 352, 360 (1974).

<sup>22</sup> Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits), [1928] PCIJ, ser. A, No. 17, at 29.

The Third United Nations Conference on the Law of the Sea, however, has specifically affirmed the interdependence of state control over private activities and state liability for the pollution of the marine environment in its draft of a new convention. For example, Articles 94 and 217 of the revised Informal Composite Negotiating Text (ICNT/Rev.2) make states responsible for ensuring compliance by vessels of their registry or flying their flag with applicable international rules and standards to prevent, reduce, and control pollution of the marine environment.<sup>23</sup> The separate and generic Article 235 complements this obligation by emphasizing that if it is violated, states will be liable in accordance with international law.<sup>24</sup> Direct reference to a state's incurrance of international liability is made in the provisions of the ICNT/Rev.2 on activities in the seabed Area (Article 139) and on the conduct of marine scientific research (Article 263). Generally speaking, any such activities carried on by nationals, if they contravene the respective provisions of the ICNT, may entail the international liability of the controlling state.<sup>25</sup>

Finally, those multilateral treaties that channel liability to the operator and/or owner of nuclear power facilities, nuclear vessels, oil tankers, and offshore oil and gas rigs do not constitute evidence of a rejection of the principle that a state is ultimately accountable under international law for private activities subject to its control. These treaties establish the exclusive liability of certain private parties and therefore expressly consider only civil liability issues.<sup>26</sup> By necessary implication, the issue of the potential international liability of the controlling state is left untouched. Some of these agreements also expressly deny preemption of the public international law avenue for compensation.<sup>27</sup> Indeed, rather than weakening the link between state control over private activities and the state's potential international liability, certain treaties on nuclear liability, for example, clearly strengthen it. Thus, Article III of the 1962 Convention on the Liability of Operators of Nuclear Ships<sup>28</sup> and Article VII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage<sup>29</sup> explicitly provide for the controlling state's subsidiary liability if the operator's insurance or financial security is inadequate to satisfy claims for compensation.<sup>30</sup>

While recent trends in international environmental law leave no doubt about the continued pivotal nature of the linkage of state control and state liability with regard to private activities, they have given rise to a different

<sup>23</sup> Revised Informal Composite Negotiating Text for the Ninth Session, UN Doc. A/CONF.62/WP.10/Rev. 2 (1980).

<sup>24</sup> Para. 1.

<sup>25</sup> Art. 139, para. 1 and Art. 263, para. 2. For further details, see *infra* at p. 541.

<sup>26</sup> See, e.g., the 1969 CLC, which channels liability to the "owner" of the vessel causing the oil spill. Art. III of the CLC, *supra* note 4.

<sup>27</sup> See Ann. II to the 1960 Paris Nuclear Liability Convention and Art. XVIII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage, *supra* note 4.

<sup>28</sup> Reprinted in 57 AJIL 268, 270 (1963).

<sup>29</sup> *Supra* note 4.

<sup>30</sup> It would seem that if states become liable vis-à-vis private claimants on a subsidiary basis, they must a fortiori be liable internationally, i.e., vis-à-vis the victim state. As to the subsidiary function of "direct state liability," see *infra* sec. VI.



problem concerning the allocation of liability. In certain situations it is increasingly difficult to establish which state should be deemed to exercise "control" in the sense of the element that determines liability. This phenomenon is particularly acute in respect of vessel-source pollution because coastal state jurisdiction has greatly expanded and now significantly overlaps with what used to be exclusive flag state jurisdiction.<sup>31</sup> In such a situation of parallel jurisdiction, the decisive question obviously becomes which of the two states ought to be considered to have priority in exercising control over the vessel concerned. This question ultimately aims at establishing which of the potential defendant states was in a better position to help prevent the specific polluting event or conduct. In short, the task is to determine the party that has been identified elsewhere as the better pollution cost avoider.<sup>32</sup>

Not surprisingly, the law on the international liability of states for transnational environmental injuries is so rudimentary<sup>33</sup> that the aforesaid environmental protection agreements fail to provide guidance on the test to be applied in a situation of concurrent state jurisdictions over the polluting vessel. The Institute of International Law, however, has discussed the issue in connection with a resolution on measures concerning pollution of the marine environment.<sup>34</sup> Although the text of the resolution does not reflect any concern for the problem, the records of the debates reveal a different picture. A number of members of the Institute regarded the comparative evaluation of each state's "control" from the point of view of its relevance to

<sup>31</sup> An example of a most dramatic (unilateral) extension of coastal state jurisdiction is Canada's enactment of the Arctic Waters Pollution Prevention Act in 1970, in which Canada claimed jurisdiction to prescribe standards of vessel construction, navigation, and operation and, if necessary, to ban passage of any foreign vessel in the area concerned, namely, up to 100 miles seaward, north of the 60th parallel. Can. Rev. Stat. c.2 (1st Supp. 1970), reproduced in 9 ILM 543 (1970). A coastal state's exercise of such jurisdictional powers has since been vindicated with regard to pollution prevention and control in ice-covered areas. Art. 234 of the ICNT/Rev. 2. For more details on present coastal state jurisdiction over prescription and, especially, enforcement, see text at note 36 *infra*.

<sup>32</sup> "The issue becomes not *whether* avoidance is worth it, but which of the parties is relatively more likely to find out whether avoidance is worth it." Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060-61 (1972). The authors suggest this test, it is true, to determine which party—as between injurer and victim—ought to bear the costs of a given accident. Nevertheless, the basic rationale would also seem to have direct relevance for the very allocation of liability in a situation in which more than one state can be presumed to exercise some control over the injurious activity.

<sup>33</sup> One of the most recent multilateral environmental protection conventions, the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, illustrates perfectly that a refined and detailed conception of transnational liability has not yet evolved. In a formulation that is rather representative of many other similar conventions, Article XIII instructs states to "co-operate in the formulation and adoption of appropriate rules and procedures for the determination of: (a) civil liability . . . ; and (b) liability . . . for damage resulting from the violation of obligations under the present Conventions and its protocols." Reprinted in 17 ILM 511 (1978). See generally, *infra* secs. III-VI.

<sup>34</sup> *Etudes des mesures internationales les plus aptes à prévenir la pollution des milieux maritimes*, INSTITUT DE DROIT INTERNATIONAL, 53 ANNUAIRE 255 (1969 II).

pollution prevention as the crucial element in allocating primary responsibility, and thus, by implication, primary international liability as between coastal and flag states.<sup>35</sup>

The logic of this approach is impeccable. Consider, for example, the following case: a crude oil carrier, while passing through the territorial sea of a foreign state, violates a traffic separation scheme promulgated by that state and in consequence causes an accident resulting in oil pollution damage to a third state. Whose potential liability might be in issue in such a situation, that of the flag state or that of the coastal state? The answer would obviously depend on the relevance of each state's control over the vessel to the occurrence of the accident. Given the wide powers a coastal state may now be said to enjoy over foreign vessels passing through its territorial sea (as evidenced in particular in Articles 22, 211(4), and 220(2) of the ICNT<sup>36</sup>), it is

<sup>35</sup> See, in particular, the debate on Article I of the proposed resolution, *id.* at 278-87. For a similar awareness of the problem, see Treves, *Les Tendances récentes du droit conventionnel de la responsabilité et le nouveau droit de la mer*, 21 ANNUAIRE FRANÇAIS DE DROIT INT'L 765, 782-83 (1975). Compare Oda in the debates of the Third Committee of the Third Law of the Sea Conference on the preservation of the marine environment, UNCLOS III, 2 OFFICIAL RECORDS 370, para. 7 (1974).

<sup>36</sup> It is true that in 1974, in the *Fisheries Jurisdiction* cases the ICJ held that the "various proposals and preparatory documents produced in this framework [of UNCLOS III] . . . must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law." *Fisheries Jurisdiction* case (United Kingdom v. Iceland), Merits, [1974] ICJ REP. 3, at 23, para. 53. More recently, in 1977, the arbitral tribunal in the delimitation between the United Kingdom and France of disputed continental shelf concluded as to the legal significance of the then current version of the ICNT:

In the opinion of the Court . . . neither the records of the Third United Nations Conference on the Law of the Sea nor the practice of States outside the Conference provide any such conclusive indication that the Continental Shelf Convention of 1958 is today considered by its parties to be already obsolete and no longer applicable as a treaty in force.

The United Kingdom of Great Britain and Northern Ireland and the French Republic *Delimitation of the Continental Shelf*, Decision of 30 June 1977, Cmnd. 7438, Misc. No. 15 (1978), cited from 18 ILM 397, 417, para. 47 (1979).

Since then, the ICNT has been further refined and clearly has become more representative of strongly held expectations of the international community at large. The sections of the ICNT here cited, of course, are in themselves indicative of relevant state practice. For a proper perspective on the international legal significance of the records of such international conferences, etc., see, e.g., Jennings, *Recent Developments in the International Law Commission: Its Relation to the Sources of International Law*, 13 INT'L & COMP. L.Q. 385 (1964); and C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 19-24 (1965). Thus, the following statement on the 1969 Vienna Convention on the Law of Treaties is decidedly off the point: "[The convention—though widely quoted—] is not to be deemed a recognized manifestation of international law unless one would agree to put a premium on laxity and imprecision. . . ." Bos, *The Recognized Manifestations of International Law: A New Theory of "Sources,"* 20 GERMAN Y.B. INT'L L. 9, 65 (1977).

In any event, practice outside the conference, namely, in the form of national legislation, appears to be supportive of our claim of existing wide coastal state jurisdiction. Indeed, in some instances of practice, national claims to jurisdiction clearly exceed the limits of what in the ICNT emerges as the legitimate exercise of jurisdiction. An example in point is the U.S. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. §§1251-1376 (1977)). For a good overview of the issues involved, see Note, *The Clean Water Act of 1977: Expanded Competence over*

likely that coastal state control would be the determining factor. This assumption is premised, of course, on the finding that the pollution damage is indeed the exclusive consequence of the tanker's failure to comply with navigational safety rules. More pertinent to this analysis, the cause might be attributed at least partially to ineffectual policing by the coastal state of its own accident prevention regulations. For the purpose of determining which of the "controlling" states might be more relevantly implicated in the accident, this view should prevail. Although the flag state's "control" over the crew's training, in particular its knowledge of applicable international law, including the duty to comply with coastal state regulations, might theoretically be in issue,<sup>37</sup> the coastal state itself is probably in a better position to forestall the injury to the third state; it can monitor the traffic in its territorial sea and police compliance with its rules and regulations, and thus anticipate the possibility of a harmful accident. On the other hand, if the accident resulted exclusively from a mechanical breakdown of the vessel's engine or steering system, flag state control would be the more appropriate factor in allocating international liability. After all, in such circumstances flag states must be deemed to be in a relatively better position to ensure safety at sea with regard to vessels of their registry or flying their flags, given international recognition of their basic enforcement jurisdiction in respect of design, construction, and equipment standards and the seaworthiness in general of such vessels.<sup>38</sup> The point is that, if conscientiously applied,<sup>39</sup> a

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*Vessel-Source Pollution*, 18 VA. J. INT'L L. 289 (1978); N.Y. Times, Jan. 6, 1978, at 1, col. 4; and 1 INT'L ENVIRONMENTAL REP. 66 (1978). The ICNT provisions cited above thus may justifiably be taken to represent an internationally valid allocation to coastal states of jurisdiction over foreign vessels passing through their territorial sea.

<sup>37</sup> See, in particular, ICNT Art. 94, para. 4(b) and (c).

<sup>38</sup> To be sure, verification of a ship's compliance with design, construction, and equipment standards is largely entrusted to so-called classification societies, such as Lloyd's Register of Shipping or the American Bureau of Shipping. But the safety of construction and of equipment certificates now required under the 1974 Convention for the Safety of Life at Sea (SOLAS) and the international oil pollution prevention certificate, which will become obligatory pursuant to the 1973 Convention for the Prevention of Pollution from Ships (MARPOL), are issued under the authority of the flag state, which assumes full responsibility for the certificate. See Regulation 5 of Annex I to the 1973 MARPOL Convention, *supra* note 21, at 1341; and Regulation 6 of the 1960 SOLAS Convention, 16 UST 187, TIAS No. 5780. Basic flag state enforcement jurisdiction has in this respect been very clearly reaffirmed in Articles 94(3) and (4), and 217(1), (2), and (3) of the ICNT. Generally speaking, only flag states may thus enforce compliance by vessels of their flag with the aforementioned standards. See also Regulation 6 of the Annex to the 1978 Protocol relating to the 1974 SOLAS Convention, IMCO Doc. TSPP/CONF/10/Add.1, reproduced in 17 ILM 583 (1978). As to subsidiary port state enforcement jurisdiction, see *infra* note 40.

<sup>39</sup> Quite obviously, the problem has been one of effective enforcement by the flag states. R. M'GONIGLE & M. ZACHER, POLLUTION, POLITICS AND INTERNATIONAL LAW: TANKERS AT SEA 338 (1979). See also OECD Study on Flags of Convenience, in 4 J. MARITIME L. & COM. 231 (1972-73); Report on I. The Best Means of Preventing Accidents to Shipping and Consequential Marine and Coastal Pollution, and II. Shipping Regulations ("Bruce Report"), [1978-79] EUR. PARL. Doc. (No. 555) 15, para. 24 (1978); and Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AJIL 604 (1979). The improper enforcement by flag states of safety and pollution prevention standards is not limited to flags of convenience states alone; for a good overview, see R. M'GONIGLE & M. ZACHER, *supra*, at 218-31.

jurisdictional regime of this kind is the less expensive way to ensure a requisite minimum of safety at sea.<sup>40</sup>

That in a situation of concurrent state control establishment of international liability for transnational injury presupposes a determination of which state has priority in controlling the incriminated activity, is clearly indicated in an analogous arbitration case. In *Robert E. Brown (United States) v. Great Britain*,<sup>41</sup> the United States Government brought a claim for damages for a denial of justice allegedly suffered by its national at the hands of authorities in South Africa. The United States based its claim against Great Britain, *inter alia*, on the assertion that British liability was involved because of its peculiar relation of suzerainty with the South African Republic.<sup>42</sup> The arbitral tribunal, however, flatly rejected this argument by noting that although such a relationship existed between the two countries, British authority over the South African Republic "fell far short of what would be required to make . . . [Britain] responsible for the wrong inflicted upon Brown. . . ."<sup>43</sup>

[I]t is plain that Great Britain as suzerain, reserved only a qualified control over the relations of the South African Republic with foreign powers. . . . Nowhere is there a clause indicating that Great Britain had any right to interest herself in the internal administration of the country, legislative, executive or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way. Indeed, the only remedy which Great Britain ever had for maladministration affecting British subjects and those of other Powers residing in the South African Republic, was . . . to resort to war.<sup>44</sup>

In the words of the International Law Commission, the crucial determinant in the allocation of international liability between the dominant

<sup>40</sup> As between coastal and flag states, this is certainly true. See, e.g., summary of Quincy Wright's intervention in the debates on *Etude des mesures internationales*, *supra* note 34, at 286: "Il admet que la responsabilité de l'Etat du pavillon doit être affirmée avant celle de l'Etat riverain. Les dispositions stipulées . . . (construction des navires, instruments de navigation, etc.) doivent être appliquées par l'Etat du pavillon plus encore que par l'Etat riverain." Expansive coastal state enforcement jurisdiction in respect of vessel standards has been strongly resisted both at IMCO conferences and at UNCLOS III, on the persuasive grounds that such a conferment of powers on the coastal state would result in unacceptable economic burdens on shipping due to the delays suffered by vessels subjected to coastal state inspections. On the other hand, port state enforcement jurisdiction with regard to vessel design, construction, equipment, and manning standards, seems to be unnecessarily circumscribed by provisions upholding basic flag state jurisdiction (*see supra* note 38) and providing, *inter alia*, for port state inspection only where "there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of [the required certificates]." ICNT Art. 217, para. 3; Art. 5, para. 2 of the 1973 MARPOL Convention, *supra* note 21, at 1322-23; and Regulation 19 of the 1960 SOLAS Convention, *supra* note 38, at 234. Compare Art. 4 of the 1976 ILO Convention concerning Minimum Standards in Merchant Ships, No. 147.

<sup>41</sup> 6 R. Int'l Arb. Awards 120.

<sup>42</sup> *Id.* at 129-30.

<sup>43</sup> *Id.* at 130.

<sup>44</sup> *Id.* at 131.

and the dependent state was in this case the specific distribution between them of effective power and control over the conduct that caused the injury.<sup>45</sup> Applied *mutatis mutandis* to a situation of concurrent state jurisdiction over a private activity that has resulted in pollution, this reasoning translates into the postulate that only the state that exercises effective control over the activity may incur international liability.<sup>46</sup> Effective control thus denotes the state control with the closer causal relationship to the activity. Determination of the locus of effective control requires analysis as to which among the potentially liable states would have been the "cheapest accident avoider," i.e., the state whose control bore most directly on the occurrence of the accident.<sup>47</sup>

In summary, the international liability of a state for acts of private persons as a function of state control over the activities concerned remains a fundamental tenet of international environmental law; and when private activities are theoretically subject to concurrent control by different states, the state that has priority in controlling the polluting conduct is the one that may incur international liability.

### III. INTERNATIONAL LIABILITY FOR TRANSNATIONAL POLLUTION IN GENERAL

It has been noted that the wide terms of Principle 21 of the Stockholm Declaration, by referring to the responsibility of the controlling state to ensure that no extraterritorial environmental damage is caused, "lend some apparent support" to the thesis that the state becomes internationally liable for transnational pollution damage "in all cases, regardless of the precautions which that State has taken."<sup>48</sup> As will be seen presently, this thesis indeed stands on shaky grounds.

<sup>45</sup> See Report of the International Law Commission on the work of its thirty-first session, 34 UN GAOR, Supp. (No. 10) 261, UN Doc. A/34/10 (1979).

<sup>46</sup> Note in this context that Article 31 of the ICNT imposes "responsibility" on the flag state for damage caused by a warship or other government ship operated for noncommercial purposes. As the flag state's control over its naval and other noncommercial vessels remains unaffected by coastal state enforcement jurisdiction, and as consequently the former presumably continues to exercise "effective control," it is also likely to be liable to third parties in the event of damage resulting from nonobservance of the latter's laws and regulations concerning passage. See also Article 42(5) for a similar affirmation of the relevance of "effective control."

<sup>47</sup> This situation must be distinguished from the case where a joint venture is involved, which may entail joint and several liability of the states concerned. For further discussion, see Goldie, *A General Review of International Environmental Law: A Survey of Capabilities, Trends and Limits*, in HAGUE ACADEMY OF INTERNATIONAL LAW, COLLOQUIUM 1973: THE PROTECTION OF THE ENVIRONMENT AND INTERNATIONAL LAW 25, 88-91 (C. Kiss ed. 1975) [hereinafter cited as 1973 HAGUE COLLOQUIUM].

<sup>48</sup> De Aréchaga, *International Law in the Past Third of A Century*, 159 RECUEIL DES COURS 1, 272 (1978 I); see also Hardie, in the discussions in the International Law Association on *Legal Aspects of the Conservation of the Environment*, ILA, REPORT OF THE FIFTY-FIFTH CONFERENCE, NEW YORK 1972 [hereinafter cited as ILA 1972 REPORT] 481, 482 (1974); and Dupuy, *International Liability of States for Damage caused by Transfrontier Pollution*, in OECD, LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 345, 357 (1977).

Whether the provision concerned constitutes a basis for the imposition of liability for or without fault has already been reviewed in detail elsewhere.<sup>49</sup> But since the issue has remained something of a *cause célèbre* among international lawyers,<sup>50</sup> a brief reevaluation appears appropriate. Indeed, reconsideration of the issue may be essential in providing a proper perspective on the interrelationship between private activities causing transnational damage and the international liability of states.

The specific question to be reexamined is whether the occurrence, pure and simple, of such damage represents a violation of international law by the controlling state or whether the additional element of fault is required before the international duty embodied in Principle 21 can be said to be breached. A review of the debates within the Preparatory Committee charged with drafting the Stockholm Declaration clearly reveals strong opposition by several delegates to the idea that Principle 21 could be interpreted as imposing absolute or strict liability on the controlling state. Instead, it was maintained that negligence remained a prerequisite before the controlling state's responsibility under international law might be successfully invoked.<sup>51</sup> No further specific discussions on the basis of liability took place at the conference itself, but Principle 22 of the Stockholm Declaration commits states to "cooperate to develop further the international law regarding liability and compensation."<sup>52</sup> Obviously, the Stockholm Conference did not resolve the issue of liability for transnational pollution, in particular its nature and scope.<sup>53</sup> Thus, Principle 21 cannot supply the theoretical foundation for a claim that present international law in general stipulates such liability without regard to fault on the part of the controlling state. Indeed, what evidence does exist tends to suggest that Principle 21 points in the opposite direction, namely, to liability for fault as the inspiring theory. In any event, clear confirmation of the fault principle as the international legal standard of liability for transnational pollution in

<sup>49</sup> See, e.g., Sohn, *supra* note 15, at 485-93; and Handl, *Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited*, 13 CANADIAN Y.B. INT'L L. 156, 158-62 (1975). Compare Dupuy, *supra* note 48, at 356-59.

<sup>50</sup> While the general standard of international liability appears to be clearly based on fault—not in the sense of culpable negligence or malice on the part of the individual state agent but in the sense of a violation of an international obligation incumbent upon the state—the argument that, as a general principle of international law, a state's strict liability flows from any infliction of significant transnational environmental damage lingers on. For a most recent resurrection of this view, see J. SCHNEIDER, *WORLD PUBLIC ORDER OF THE ENVIRONMENT: TOWARDS AN INTERNATIONAL ECOLOGICAL LAW AND ORGANIZATION* 163-67 (1979); see further Stein, *Legal Problems and Institutional Aspects of Transfrontier Pollution*, in OECD, *PROBLEMS IN TRANSFRONTIER POLLUTION* 285, 290 (1974); and Statement by the Canadian Delegation on State Responsibility in Cases of Transfrontier Pollution, OECD Doc. ENV/TFP/78.5 at 5-6 (1978). Compare Hendewerk, *Liability for Transfrontier Environmental Damage in the Federal Republic of Germany*, in *LEGAL PROTECTION OF THE ENVIRONMENT IN DEVELOPING COUNTRIES* 243, 262 (Carrillo Pietro & Nosedal eds., 1976): "there exist no definite rules concerning the measure of liability (negligence or liability without fault) . . ."; and Jessup, in the ILA discussions, *supra* note 48, at 468, 472-73.

<sup>51</sup> See UN Doc. A/CONF.48/P.C.12, Ann. 15, para. 65 (1971).

<sup>52</sup> Stockholm Declaration, *supra* note 11, at 1420.

<sup>53</sup> See Handl, *supra* note 49, at 161; and Sohn, *supra* note 15, at 485-96.

general emerges from an analysis of different instances when the issue of liability was pertinently raised.

After abortive attempts to introduce into the international law on state responsibility for injuries to aliens the notion of *risque étatif*, a standard of strict liability, the notion has recently enjoyed something of a renaissance in the context of debates about the international liability standard applicable to transfrontier pollution damage in general.<sup>54</sup> A number of key international decisions are usually relied on by certain writers as evidence of a trend towards general acceptance of strict liability in international law.<sup>55</sup> There is no need here to retrace in detail the well-established arguments on why the *Trail Smelter* case presents a questionable precedent for the "strict liability" proposition,<sup>56</sup> why the *Lac Lanoux* case tends to suggest a contrary result,<sup>57</sup> and why, finally, the *Corfu Channel* decision must be considered to stand for the exact opposite of the asserted trend.<sup>58</sup> Suffice it to consider the latter, which most commentators have interpreted as an unambiguous application by the ICJ of a standard of negligence with regard to liability for the transnational injury involved.<sup>59</sup>

The case arose over the damage sustained by a British naval convoy when it ran into a minefield while passing through the Channel within Albanian territorial waters. The ICJ did not proceed on the assumption that Albania was strictly liable, as evidenced by the fact that the Court did not limit itself to verifying a causal link between the existence of mines within Albania's boundaries and the damage sustained by the British vessels. Instead, it inquired into whether the Albanian authorities had known the mines were

<sup>54</sup> See, e.g., Fauchille, in the debates in the Institute of International Law on *Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou guerre civile*, IDI, 18 ANNUAIRE 233, 234-37 (1900); and G. SCHELLE, *DRÖIT INTERNATIONAL PUBLIC* 695-702 (1944). For further details and a general review of this evolution, see P.-M. DUPUY, *supra* note 2, at 15-24; and J. GOLDSCHMIDT, *DAS PROBLEM DER VÖLKERRECHTLICHEN GEFÄHRDUNGSHAFTUNG UNTER BERÜCKSICHTIGUNG DES ATOM- UND WELTRAUMRECHTS* 123-42 (59 Studien zum Intern. Wirtschaftsrecht u. Atomenergierecht, 1978).

<sup>55</sup> See, e.g., Goldie, *supra* note 47, at 70; J. SCHNEIDER, *supra* note 50.

<sup>56</sup> For a detailed exposition, see Handl, *supra* note 49, at 167-68. See further Weiss, *Who Pays for Weather Modification Damage*, 4 ENVIRONMENTAL L. & POL'Y 22, 23 (1978); Pacteau, *Les Problèmes juridiques internationaux de la pollution*, in *LES ASPECTS JURIDIQUES DE L'ENVIRONNEMENT* 141, 166 (Actes du colloque de la section belge de l'Institut International de Droit d'Expression Française, Namur, October 25-26, 1974, 1975); Kiss, *Problèmes juridiques de la pollution de l'air*, 1973 HAGUE COLLOQUIUM, *supra* note 47, at 145, 172; C. KISS, *SURVEY OF CURRENT DEVELOPMENTS IN INTERNATIONAL ENVIRONMENTAL LAW* 46 (IUCN Environmental Policy & Law Paper No. 10, 1976); and G. TESAURO, *L'INQUINAMENTO MARINO NEL DIRITTO INTERNAZIONALE* 156-57 (1971). *Contra*, however, Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 RECUEIL DES COURS 99, 122 (1966 I).

<sup>57</sup> For details, see Handl, *supra* note 49, at 168-70.

<sup>58</sup> *Id.* at 165-67.

<sup>59</sup> See, e.g., de Aréchaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 531, 537 (Sørensen ed. 1968); Bleicher, *An Overview of International Environmental Regulation*, 2 ECOLOGY L.Q. 1, 28 (1972); Levy, *La Responsabilité pour omission et la responsabilité pour risque en droit international public*, 65 REV. GÉN. DROIT INT'L PUB. 744, 747 (1961); Hostie, *The Corfu Channel Case and International Liability of States*, in *LIBER AMICORUM OF CONGRATULATIONS FOR ALGOT BAGGE* 89, 92 (1964); L. OPPENHEIM, 1 *INTERNATIONAL LAW* 343 (8th ed. Lauterpacht, 1955); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 426 (2d ed. 1973).

there and whether they had had an opportunity to notify the British unit in time. In short, the Court was asking whether the authorities had not willingly or negligently caused the damage by failing to warn the approaching convoy.<sup>60</sup>

The recent assertion that "[a]n even clearer illustration of the application of strict liability in the context of environmental injury is the *Gut Dam* arbitration"<sup>61</sup> is also difficult to accept. Indeed, the claim that "[t]he arbitral tribunal was . . . clearly *adopting* a standard of strict liability"<sup>62</sup> amounts to an outright distortion of the issues before the tribunal. This dispute between the United States and Canada had its origin in 1952 when extensive flooding and erosion damage occurred on the U.S. side of the St. Lawrence River. Affected U.S. citizens claimed that the damage was due to Canada's construction in 1901 of Gut Dam, which was to improve navigation on the river. As the dam was to extend across the international boundary between Adams and Les Galops Islands, U.S. approval had been sought and obtained, subject to the condition that the Canadian Government indemnify U.S. citizens<sup>63</sup> for any damage or detriment incurred as a result of the construction or operation of the dam. When all other attempts at settling the claims of the injured U.S. citizens failed and the issue of compensation was finally submitted to arbitration in 1967, the tribunal was not called upon to pronounce either on Canada's liability in principle or on the standard of liability to be applied. Both these questions had been preempted by the intergovernmental agreement, which provided for strict liability for transnational damage caused by the construction or operation of the dam.<sup>64</sup> Moreover, in a diplomatic note sent to the United States Government in 1952, the Canadian Government had expressly acknowledged its obligation to pay compensation, provided the damage concerned was attributable to the dam.<sup>65</sup> The tribunal thus faced the much more limited task of arbitrating damages.<sup>66</sup> Therefore, it quite obviously did not "adopt a standard of strict liability."

<sup>60</sup> See [1949] ICJ REP. 22-23.

<sup>61</sup> J. SCHNEIDER, *supra* note 50, at 165.

<sup>62</sup> *Id.* at 166 (emphasis added). See also Schneider, in Joint Proceedings of the Canadian Council on International Law (6th Annual Conference) and Canada-United States Law Institute (1st Annual Conference), 1 CANADA-UNITED STATES L.J. 106 (1978).

<sup>63</sup> The actual reference in the U.S. Secretary of War's communication of approval to the Canadian Government—an essential part of the intergovernmental agreement permitting the construction of Gut Dam—was to "property owners of Les Galops Islands, or . . . any other citizens of the United States"; cited in report by the Chairman of the U.S. Foreign Claims Settlement Commission of May 4, 1965, reproduced in 4 ILM 473 (1965).

<sup>64</sup> This follows clearly from Article 2 of the U.S. Secretary of War's communication, *supra* note 63. See also J. BALLENEGGER, LA POLLUTION EN DROIT INTERNATIONAL 207 (1975).

<sup>65</sup> See report by the Chairman, *supra* note 63, at 474.

<sup>66</sup> "They [the Canadian Government] had accepted liability in effect and were only arbitrating damages." Beesley, 1973 HAGUE COLLOQUIUM, *supra* note 47, at 497. Specifically, the tribunal determined only which class of persons was entitled to compensation under the indemnity provision of the original agreement; whether a time limit applied to the Canadian obligation; and finally, questions of causation and of the quantum of damages relating to the outstanding U.S. claims under consideration. Decision of the Tribunal of Feb. 12, 1968, excerpted in Canada-United States Settlement of Gut Dam Claims (September 27, 1968): Report of the U.S. Agent Before the Lake Ontario Claims Tribunal, reproduced in 8 ILM 118, 133-40 (1969).



Apart from this fundamental flaw in the characterization of the *Gut Dam* arbitration as a valid precedent for judicial recognition of the principle of strict liability for extraterritorial environmental damage, as an instance of state practice the adoption by treaty of a standard of strict liability is of questionable evidentiary relevance. For contrary to the conflict situation envisaged in Principle 21 in which state conduct is lawful *per se*, hence not subject to a neighboring state's veto,<sup>67</sup> Canada's construction of the dam necessitated work on the U.S. bank of the river, and hence required specific authorization by the victim state.<sup>68</sup> Accordingly, Canada's assumption of strict liability for any injury to U. S. citizens was a condition insisted upon by the United States, the *quid pro quo* for its consent, which it might have been perfectly justified in withholding. Given these circumstances, it is difficult to see how the *Gut Dam* arbitration could have any significance in the debate on the general liability standard when transnational pollution damage is caused by state conduct that is not *ab initio* already subject to the neighboring state's approval.

If international case law does not provide a basis for affirming strict liability for transnational pollution as a generally accepted principle, neither does international legal practice, which very definitely confirms a fault standard as the fundamental test for allocating international liability for transnational pollution in general.<sup>69</sup> Most recently, the Institute of International Law in its resolution on the pollution of international

<sup>67</sup> "Lawful *per se*," as used here, denotes conduct that is not *ab initio* contrary to international law, because not violative of a specific conduct-related norm. Such conduct may, of course, become unlawful if it produces significantly harmful extraterritorial environmental effects. An activity lawful *per se* thus is not subject to a neighboring state's veto in the absence of evidence of such effects. See the *Lac Lanoux* case, 24 ILR 101, 132. On the issue of the legality of creating transfrontier risks in general, see Handl, *supra* note 1.

<sup>68</sup> For an exactly analogous treaty arrangement, see, *e.g.*, the 1950 State Treaty between the Grand Duchy of Luxembourg and the Land Rhineland-Palatinate in the Federal Republic of Germany concerning the Construction of a Hydro-Electric Power-Plant on the Sauer (Sûre) at Rosport/Ralingen, reprinted in 11 INT'L PROTECTION OF THE ENVIRONMENT (Rüster & Simma eds., 1977).

<sup>69</sup> See, *e.g.*, J. BALLENEGGER, *supra* note 64, at 231-32; Morin, 1973 HAGUE COLLOQUIUM, *supra* note 47, at 325; Handl, *supra* note 49, at 170-77; and Lester, *River Pollution in International Law*, 57 AJIL 828, 850-51 (1963). This appears also to be the Canadian Government's position:

Under international law every State has a duty to prevent, as far as possible, its own nationals and foreign nationals within its territory from committing injurious acts against other States. A State which does not comply with this duty, either intentionally or maliciously or through culpable negligence is guilty of an international offence for which it has to bear original responsibility. . . . "[A] State must, according to international law, bear vicarious responsibility for such injurious acts of private individuals as it is unable to prevent." This vicarious responsibility is unrestricted for official acts of administrative officials and military and naval forces; but for acts of private persons it is only relative. The sole duty of the State is to exercise due diligence to prevent internationally injurious acts on the part of private persons.

Memorandum of the Legal Division of the Department of External Affairs, reprinted in J. CASTEL, *INTERNATIONAL LAW* 1072 (3d ed. 1976) (emphasis added). For an unpersuasive reading of this memorandum as affirming the direct liability of the controlling state, see Weiss, *supra* note 56, at 24. The above Canadian position is further refined in the Statement of the Canadian Delegation, *supra* note 50, at 7, in which express reference was made to the exceptional extraconventional incidence of strict state liability.

watercourses reconfirmed that international customary law's principle of "due diligence" was the standard for evaluating the controlling state's compliance with its obligation to avoid extraterritorial environmental damage.<sup>70</sup> This position also has found expression in numerous OECD documents.<sup>71</sup> In short, it seems well established that the duty of prevention incorporated in Principle 21 of the Stockholm Declaration, insofar as it pertains to transnational pollution damage, does not automatically entail the international liability of the controlling state if such damage occurs.

Rather, the duty of prevention has to be interpreted narrowly. The correctness of this view seems to be corroborated by draft Article 23 on the law of state responsibility, which was recently adopted by the International Law Commission. Despite its tortuous wording, the article clearly conveys the idea that a state's international obligation, which is phrased as a duty to prevent the occurrence of certain events such as extraterritorial environmental damage, may be considered violated not when the event occurs but when the prohibited event and negligence imputable to the state coincide.<sup>72</sup>

#### IV. DIRECT LIABILITY OF STATES: TRENDS IN DECISION

While the preceding analysis shows that the activities carried on by nonstate entities and private persons that result in transnational pollution will, in general, not engage the controlling state's international liability, there are some instances of state practice that indicate the opposite. Thus, in a few such cases, controlling states have clearly assumed direct liability by providing for compensation for the victims.<sup>73</sup> In other situations, victim states have asserted their right under international law to obtain compensation from the controlling state without alleging negligence on the part of the latter. Moreover, multilateral treaty regimes on outer space and nuclear activities<sup>74</sup> provide for the controlling state's international liability for private activities irrespective of whether the state itself is at fault. The question therefore arises whether those instances might signal a gradual change in the

<sup>70</sup> See Art. II, together with Art. III, para. 1 of the resolution on "The Pollution of Rivers and Lakes and International Law," adopted at the Institute's Athens session, Sept. 4-13, 1979.

<sup>71</sup> E.g., in Note by the Secretariat on the International Responsibility of States in Relation to Transfrontier Pollution, OECD Doc. ENV(76) 3, at 4 (1976); Dupuy, *Due Diligence in the International Law of Liability*, OECD Doc. ENV/TFP/76.11, also in OECD, *LEGAL ASPECTS OF TRANSFRONTIER POLLUTION* 369 (1977); and Dupuy & Smets, *International Liability for Damage Caused by Transfrontier Pollution*, OECD Doc. ENV/TFP/77.14, at 2 (1977).

<sup>72</sup> Article 23, "Breach of an international obligation to prevent a given event," reads as follows: "When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result." Report of the International Law Commission, *supra* note 45, at 245. For the Commission's commentary, see [1978] 2 Y.B. INT'L L. COMM'N, pt. 2, at 81-86.

<sup>73</sup> As to the theoretical legal implications of such a transnational compensation arrangement, see *infra* sec. VI.

<sup>74</sup> See the 1967 Treaty on Outer Space, *supra* note 16; the 1972 Outer Space Liability Convention, *supra* note 18; and the 1962 Nuclear Ship Liability Convention, *supra* note 28; as well as the 1963 Vienna Nuclear Liability Convention, *supra* note 29.

general standard of liability for transnational pollution damage, or whether they represent recognition of a specific category of liability that must be accommodated within the overall framework of international liability in which fault, in general, has remained an essential requirement. As will be seen shortly, there is indeed reason to believe that general international law allows distinctions to be drawn among different categories of potential liability situations. *Prima facie*, the distinctive criterion appears to be continuous as against accidental transfrontier pollution; apparently, the former engages the international liability of the controlling state only when the state incurs fault in failing to prevent the damage from occurring, while the latter entails strict liability. However, in the final analysis, the crucial element in a state's original liability for private activities turns out to be the transnational significance of the risk associated with the activity concerned.

*Direct Liability and the Emerging Law of the Sea*

As has been noted, some articles of the latest version of the ICNT specifically speak of the controlling state's liability for transnational environmental damage caused by private activities. Yet, none of these provisions *per se* imply a standard of strict liability. For example, Article 139 is addressed to the issue of state liability in the context of seabed activities. It is phrased in terms of the state's failure to carry out its responsibility, *i.e.*, to assure that activities of persons or entities under its control conform with the ICNT's provisions on the exploration and exploitation of the resources of the seabed beyond national jurisdiction.<sup>75</sup> The language resembles strongly that of Principle 21, and thus is indicative of a liability standard based on fault. This impression is reinforced by a rider to the provision that expressly enters the reservation that determination of the state's liability shall be subject "to applicable principles of international law."<sup>76</sup>

Similarly, the provision on the conduct of marine scientific research does not seem to imply a standard of direct liability. The relevant paragraph 3 of Article 263 merely refers to the liability standard of Article 235, which covers responsibility and liability for the protection and preservation of the marine environment in a generic fashion. It also stipulates that state liability shall be "in accordance with international law."<sup>77</sup> With all the relevant provisions subject to this overriding qualification, the ICNT would appear to rule out direct liability as a generally applicable standard, an impression that is confirmed by the ICNT's history.

One of the earliest official documents to lay down fundamental principles for the guidance of the conference's Second Committee is the Declaration

<sup>75</sup> Para. 1 of ICNT Art. 139.

<sup>76</sup> The key section of Article 139, paragraph 1 reads: "Without prejudice to applicable principles of international law and article 21 of annex II damage caused by the *failure* of a State Party to carry out its responsibilities under this Part shall entail liability" (emphasis added). Article 21 of Annex II speaks of "liability for wrongful damage" of the contractor, an obvious indication of a fault standard.

<sup>77</sup> Paras. 1 and 3, respectively.

of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction.<sup>78</sup> Article 14 clearly suggests direct liability of the controlling state:

Every state shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international regime to be established. . . . Damage caused by such activities shall entail liability.<sup>79</sup>

The international controversy surrounding the legal significance of this General Assembly resolution in the context of unilateral national authorizations of seabed mining operations<sup>80</sup> is only marginally relevant to understanding its significance as an interpretive standard for the ICNT itself. For whether some of the specific principles adopted in the declaration amount to "instant customary law" or whether they were only "intended to be a general basis for subsequent negotiation of an internationally agreed regime,"<sup>81</sup> it is hardly conceivable that as technical a detail as the liability standard would have been settled authoritatively in a first resolution that otherwise addresses itself only to very basic and general principles.

An interpretation of state liability for damage from seabed activities as being strict, "in accordance with applicable principles of international law," therefore could not be persuasively argued by invoking the declaration itself. Furthermore, at UNCLOS III the proponents of direct liability have suffered increasingly noticeable setbacks. A typical case in point is the provision on state liability for private vessels in transit through international straits. The Soviet draft document originally submitted to the UN Seabed Committee called for the flag state's direct liability for any environmental damage inflicted on the strait state.<sup>82</sup> In summarizing the main trends to emerge at the initial session of the conference, the chairman of the Second Committee, by contrast, refers to direct liability vis-à-vis strait states only as an alternative proposal, and, at that, one envisaging the flag state's liability merely on a subsidiary basis.<sup>83</sup> In the end, the ICNT contains no reference whatever to the flag state's direct liability in the event of pollution damage caused by a private vessel in transit.

<sup>78</sup> GA Res. 2749 (XXV), reproduced in 10 ILM 220 (1971).

<sup>79</sup> *Id.* at 223.

<sup>80</sup> For further details, see, e.g., Ambassador-at-Large E. Richardson, at plenary meeting of UNCLOS III, September 15, 1979, cited in Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)*, 73 AJIL 1, 35 n.119 (1979); *The Status of the Third United Nations Conference on the Law of the Sea: Hearing Before the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 58-60 (1979); and Orrego Vicuña, *Les Législations nationales pour l'exploitation des fonds des mers et leur incompatibilité avec le droit international*, 24 ANNuaire FRANÇAIS DE DROIT INT'L 810 (1978).

<sup>81</sup> Oxman, note 80 *supra*, at 35 n.119.

<sup>82</sup> UN Doc. A/AC.138/SC.II/L.7 (1972).

<sup>83</sup> Provision 63, Formula B, Main Trends in the Second Committee, UN Doc. A/CONF.62/C.2/WP.1, at 39 (1974). See also the corresponding Provision 65 for overflight of foreign-registered aircraft; *id.* at 39-40.

Significantly, there has been a progressive de-emphasis of the controlling state's direct liability through the various stages of the text's evolution.<sup>84</sup> Upon examination, direct liability obviously has not found the requisite consensus within the respective committees to emerge as the general liability standard applicable to seabed activities, transit through straits, or the conduct of scientific research.<sup>85</sup> At the same time, repeated reference in the ICNT to a state's incurring liability for transnational environmental injury from private activities as being "in accordance with applicable principles of international law" suggests that the idea of direct liability may not have been discarded altogether. Perhaps the prevailing view was stated by the delegate from Trinidad and Tobago when he justified placing primary liability for environmental damage on the party actually responsible, whether a state, or a public or private entity, by concluding: "The State could in any case have a residual responsibility to ensure that adequate reparation was made for any damage caused."<sup>86</sup>

#### *International Claims Situations*

Apart from the foregoing examples of established and gradually evolving multilateral treaty regimes, there are few relevant instances of state practice. The scarcity of such evidence might appear to undermine the development of a persuasive argument that under emerging principles of international law and in well definable circumstances, the controlling state's liability must be considered engaged as a matter of fact, without regard to whether the state itself has violated an international obligation. However, the narrow evidentiary basis of this argument can be explained satisfactorily. After all, in a majority of transfrontier pollution cases the controlling state's responsibility will be directly in issue, hence also the state's liability as a result of its failure to meet its obligations under international law. Thus, in most situations involving continuous transfrontier pollution, the pollutants' crossing of the boundary will be widely known and their effects on the exposed environment will have been gradually built up. These factors will automatically bring into play the state's international responsibility to restrain the source of the pollution in order to prevent a crossing of the

<sup>84</sup> For example, an earlier version of the responsibility and liability provision for damage from national activities in the seabed Area did not contain the qualifying rider of the present Article 139; text at note 76 *supra*. Instead, it simply stipulated that "[d]amage caused by such activities shall entail liability on the part of the State . . . concerned, in respect of activities which it undertakes itself or authorizes." Art. 17, para. 1 of Part I of the Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8 (1975), reproduced in 14 ILM 682, 687 (1975).

<sup>85</sup> Note, for example, the view expressed by the French delegate:

His delegation saw no reason to depart from the conventional rules on State liability in international law, particularly civil liability for acts of nationals in the performance of their activities. That problem should be dealt with in specific conventions, which, like the 1969 Brussels Convention, ensured victims the compensation they needed to repair the damage without implicating the State.

Fourth meeting of the Third Committee, UNCLOS III, 2 OFFICIAL RECORDS 330, para. 33 (1975).

<sup>86</sup> *Id.* at 321, para. 74.

international legal threshold of "significant extraterritorial environmental effects."<sup>87</sup> If the latter occurs, the controlling state's liability will derive from its having been negligent or otherwise at fault for not stopping the private activity from developing into a source of serious transfrontier damage. In the alternative, if significant transfrontier damage does not result from a gradual intensification of the cumulative effects of transboundary pollutants, but the virtually instantaneous and foreseeable consequence of the normal functioning of the private activity, the controlling state's liability will again flow from violation of its international obligation of prevention. When there is a high risk of serious transnational pollution damage, that is, when the activity concerned necessarily entails external costs of this nature, the controlling state clearly violates Principle 21 of the Stockholm Declaration.

Instances of state practice that are of interest in the present context, of course, do not fall into either category of transnational pollution. To begin with, they relate to international environmental disputes in which the pollution damage is intrinsically accidental, that is, of an estimated low probability. Additionally, among the cases of accidental transfrontier pollution, the only ones that are truly relevant to the present discussion are those in which the controlling state's acquiescence in the injurious private conduct appears to have been reasonable in the light of precautionary measures taken to avoid realization of the transnational pollution risk.<sup>88</sup> Initially, then, we must look for international claims concerning state liability for private activities that are characterized by the absence of specific references to the controlling state's fault in the occurrence of the transnational pollution damage.

Given these restrictive parameters, it should be obvious why the data base for the above proposition remains narrow. Yet, despite the complete absence of relevant international case law<sup>89</sup> and the limited number of pertinent treaties, the evidence that does bear on the issue will support some firm affirmative conclusions. An important link in this chain of evidence is provided by several bilateral environmental conflict situations in which the question of liability was raised or settled without reference to violation by the controlling state of its international responsibility.

One case in which the victim state's claim to compensation turned out particularly well is the controversy over the *Cherry Point Oil Spill* between the

<sup>87</sup> As to this threshold notion, see the Trail Smelter decision, *supra* note 12; and generally, G. Handl, Hazardous Activities in Frontier Areas: International Legal Restraints on Significant Transnational Risk-Creation, OECD Doc. ENV/TFP/78.14, at 3, 6-7 (1978).

<sup>88</sup> Frequently, the reasonableness or due diligence standard is reduced to the notion that, as between polluting and polluted states, the resource allocation must be efficient, that is, that the costs of pollution prevention and of pollution damage should be in balance. While this goal of maximizing the aggregate utility of the resource remains an essential element of "reasonableness," the latter implies additional relevant factors such as fairness and justice. For details, see Handl, *The Principle of "Equitable Use" as Applied to Internationally Shared Natural Resources: its Role in Resolving Potential International Disputes over Transfrontier Pollution*, 14 REV. BELGE DROIT INT'L 40, 46-47 (1978-79); and OECD Doc. ENV/TFP/77.19.

<sup>89</sup> See *supra* sec. III. *Contra*, but unpersuasive, Wildhaber, *Die Öldestillieranlage Sennwald und das Völkerrecht der grenzüberschreitenden Luftverschmutzungen*, 21 ANNUAIRE SUISSE DE DROIT INT'L 97, 117 (1975); and Jenks, *supra* note 56.

United States and Canada. Consequently, it might serve as an introductory illustration, even though the issue of compensation appears to have been resolved ultimately not on the basis of the international legal principle invoked by Canada but as a result of the private polluter's offer to meet the costs of the clean-up. In a strict sense, the *Cherry Point Oil Spill* incident cannot be viewed as an instance of state practice in which the controlling state assumed international liability for a private activity, as the official U.S. response to the Canadian claim has remained unclear, and the issue of compensation may have been preempted by private action.<sup>90</sup> Still, the initial claim is worth detailed consideration because in itself it is highly instructive.

In 1972 the *World Bond*, a tanker registered in Liberia, leaked 12,000 gallons of crude oil into the sea while unloading at the Atlantic Richfield refinery at Cherry Point, Washington. The oil eventually spread to Canadian waters and befouled beaches in British Columbia.<sup>91</sup> The Canadian Government thereupon sent a note to the U.S. State Department in which it expressed its "grave concern about this ominous incident" and noted that "the government wishe[d] to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, [would] . . . be paid by those legally liable."<sup>92</sup> In reviewing the international legal implications of the oil spill, the Canadian Secretary of State for External Affairs noted:

We are especially concerned to ensure observance of the principle established in the 1938 Trail smelter arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and *shall be responsible to pay compensation for any injury so suffered*. Canada accepted this responsibility in the Trail smelter case and we would expect that the same principle would be implemented in the present situation.<sup>93</sup>

The interesting aspect of this statement is the Canadian Government's interpretation of the *Trail Smelter* case as a precedent for the *Cherry Point* claims, namely, as imposing strict and original liability on the United States in respect of both clean-up and damage costs incurred in British Columbia. According to the Canadian Government, the mere fact that the private activity was carried on within U.S. jurisdiction and control—thus, without regard to whether the United States itself was at fault—gave rise to U.S. responsibility to pay compensation.

In a case involving Austria and Yugoslavia, the victim state not only

<sup>90</sup> According to the parliamentary statement, *infra* note 92, the offer extended only to payment of clean-up operations. In any event, a careful analysis of the reaction by the state to which the claim for compensation was addressed is crucial to determining the probative value of a given instance of state practice. Handl, *supra* note 1, at 14–15, and cases cited; and Kirgis, *Technological Challenge to the Shared Environment: United States Practice*, 66 AJIL 290, 295 (1972).

<sup>91</sup> See 3 INTERNATIONAL CANADA 93 (1972); and N.Y. Times, June 10, 1972, at 36, col. 5.

<sup>92</sup> Statement by the Secretary of State for External Affairs of June 8, 1972, in the House of Commons, summarizing the text of the note, quoted in 3 INTERNATIONAL CANADA 93 (1972).

<sup>93</sup> Statement of June 8, 1972, in the House of Commons, excerpted in 11 CANADIAN Y.B. INT'L L. 333, 334 (1973) (emphasis added).

forcefully invoked the direct liability of the controlling state but also succeeded in having its claim to compensation accepted by the latter. In 1956 the operators of several hydroelectric facilities located along the Austrian section of the River Mura, which flows into Yugoslavia, attempted to forestall major flooding by releasing accumulated sediments and mud and partially draining the reservoirs. The very first experiment, however, resulted in unexpectedly major pollution of the river, including the section that for approximately 40 kilometers marks the international boundary between the countries.<sup>94</sup> Yugoslavia put forward a claim for damages for economic loss incurred by two paper mills and for damage to fisheries. In 1959 the two countries agreed to a settlement pursuant to which Austria paid monetary compensation and also delivered a certain quantity of paper to Yugoslavia.<sup>95</sup>

Although this settlement was reached after extensive discussions within the Permanent Austro-Yugoslavian Commission for the Mura, the result was in no way predetermined by the 1954 Mura agreement that, *inter alia*, set up the commission.<sup>96</sup> In other words, the Austrian Government did not accept strict liability for transnational damage caused by the activities of nongovernmental entities<sup>97</sup> in consequence of a preexisting treaty obligation. The *Mura* case therefore clearly represents an instance of state practice in which the controlling state's strict and original liability was found to be engaged by the injurious private activities.<sup>98</sup>

A most interesting case, because it confirms flag state liability<sup>99</sup> strictly,

<sup>94</sup> Protokoll über die ausserordentliche Tagung der gemischten Murkommission vom 15. April 1959 [Memorandum concerning the Special Session of the Mixed Commission for the Mura], BKA [Federal Chancellery]: GZ 106.454-2a/59; BMfLuF [Federal Ministry of Agriculture and Forestry]: Zl. 46.709-IV/9/59.

<sup>95</sup> *Ibid.*

<sup>96</sup> 396 UNTS 75.

<sup>97</sup> The operators, though public legal corporations, represent clearly "private" entities for our purposes. This is also indicated by the very wording of the settlement: "Upon compliance with the obligations pursuant to para. 1 [the delivery of paper] and para. 2 [payment of 300,000 Austrian shillings], all Yugoslavian *claims against the Republic of Austria as well as other Austrian legal entities* shall be deemed satisfied and completely compensated." Protokoll, *supra* note 94 (translation provided; emphasis added). In any event, in applying the activity test, *supra* note 2, one would have to conclude that whether or not the acting corporation must be considered an agency or instrumentality of the state, the conduct could not directly engage the state's liability *qua* territorial sovereign. See also the ILC's commentary on Art. 11 (conduct of persons not acting on behalf of a state) of its draft articles on state responsibility, [1975] 2 Y.B. INT'L L. COMM'N 71.

<sup>98</sup> This resolution of the dispute clearly contradicts Prof. Berber's draft resolution, Article 7 of which provides for state liability only in the case of negligence. *Report on Flood Control*, in ILA 1972 REPORT, *supra* note 48, at 43, 87-88 (1974).

<sup>99</sup> As to the basic applicability of the "control-responsibility" function to flag state jurisdiction, see text at notes 14-15 *supra*; Caffisch, *Some Aspects of Oil Pollution from Merchant Ships*, 4 ANNALES D'ETUDES INTERNATIONALES 213, 228 (1973); Morin, 1973 HAGUE COLLOQUIUM, *supra* note 47, at 342-43; Fleischer, *Pollution from Seaborne Sources*, in 3 NEW DIRECTIONS IN THE LAW OF THE SEA 78, 98 (Churchill, Simmonds, & Welch eds., 1973); and Stein, *Responsibility and Liability for Harm to the Marine Environment*, 6 GA. J. INT'L & COMP. L. 41, 53 (1976). As to Canada's invocation of port state liability for calling foreign vessels, see the *Cherry Point* incident, text at note 93 *supra*. By contrast, only 2 years earlier, in discussing the legal implications of the grounding of the Liberian-registered oil tanker *Arrow* off the coast of Nova Scotia, and the resulting pollution



therefore directly, is that of the Liberian tanker *Juliana*. In the first major oil tanker accident affecting Japan, this Taiwanese-owned vessel<sup>100</sup> ran aground and split apart off Niigata, on the west coast of the Japanese island of Honshu. Oil seeping from the wreck washed ashore and had a significantly damaging impact on local fisheries. The Liberian Government apparently offered 200 million yen in compensation, which the fishermen reportedly accepted.<sup>101</sup>

The controlling state, in this case the flag state, assumed liability for extraterritorial environmental damage caused by what for our purposes falls clearly into the "private activity" category. It seems, moreover, that no allegations of any specific wrongdoing on the part of Liberia were made on an official diplomatic level, which makes the assumption of liability by the flag state especially interesting.<sup>102</sup>

Finally, reference should be made to the controlling state's assumption, in principle, of liability on behalf of private entities. The instance in point concerns the compensation arrangements negotiated by the United States and Canada in connection with exploratory drilling in the Beaufort Sea off the Mackenzie River delta, in 1976 and 1977. Dome Petroleum Ltd.,<sup>103</sup> a Canadian corporation, sought authorization from the Canadian Government to initiate offshore oil and gas operations. These plans caused considerable concern in neighboring Alaska. Questions were raised about the adequacy of safety measures adopted for the program and, in particular, the availability of compensation funds to potential pollution victims outside

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of adjacent Canadian waters, the Canadian Minister of Justice had noted: "The position is . . . that we have adequate controlling and remedial measures at our disposal. What we do not have . . . is a means through which to attribute liability in the event of accidents of this kind." 1 *INTERNAT'L CANADA* 46 (1970). This statement was made, however, before the 1972 Stockholm Conference expressly confirmed general state responsibility for transnational pollution damage.

<sup>100</sup> Per telephone conversation with Arthur MacKenzie, director of the Tanker Advisory Center, New York.

<sup>101</sup> See *The (London) Times*, Dec. 2, 1971, at 8, col. 1; and Rousseau, *Chronique des Faits Internationaux*, 79 *REV. GÉN DROIT INT'L PUB.* 842 (1975).

<sup>102</sup> It should be noted, however, that in particular circumstances, for example, when inadequate compensation of transnational pollution victims might have had a detrimental impact on the flag states' interests, e.g., on the right of navigation through international straits, flag states either have themselves indicated willingness to assume full liability for vessel-source pollution or have provisionally been termed "liable" therefor. An example of the former is the Japanese Government's reported willingness to compensate for pollution damage caused by the grounding of the Japanese supertanker *Showa Maru* in the Straits of Malacca in 1975. Reference in *Star-News* (Singapore), Jan. 17, 1975, reprinted in *Tankers and the Marine Environment: Hearings before the Nat'l Ocean Policy Study of the Senate Comm. on Commerce (Part I)*, 94th Cong., 1st Sess. 140 (1975); and N. MOSTERT, *SUPER SHIP* 351 (Warner Books, 1975). An example of the latter is the Malaysian Government's initial reaction to the oil spill caused by the Philippine flag vessel *Diego Silang* upon collision with 2 other vessels in the Straits of Malacca. See Exhibit A: Tanker Advisory Center, New York, N.Y.: Worldwide Tanker Casualty Returns—Third Quarter 1976, in *Recent Tanker Accidents, Hearings before the Senate Comm. on Commerce (Part I)*, 95th Cong., 1st Sess. 239, 247 (1977).

<sup>103</sup> Besides Dome Petroleum, Hunt International and Gulf Oil had requested drilling authorization. See *N.Y. Times*, June 7, 1977, at 59, col. 2; and talk by Martin Low, Department of Justice (Canada) on "International Conflict Avoidance: Canada-United States Co-operation in Matters of Transfrontier Pollution," given at Cornell Law School, March 27, 1979.

Canada in view of the significant risk of an oil spill intrinsic to drilling in the difficult physical environment of the Arctic.<sup>104</sup> Subsequent U.S.-Canadian discussions focused on the adequacy of compensation in the event of transboundary pollution as the key issue between the two Governments. Pursuant to the settlement eventually reached, Dome Petroleum was required to post bond to secure compensation to potential U.S. pollution victims. The Canadian Government itself guaranteed the availability and the payment of the sums involved.<sup>105</sup> The Canadian Government thus committed itself to accept liability on a subsidiary basis in the event the bonding arrangement proved somehow inadequate to meet the full costs of the transnational pollution.<sup>106</sup>

*Evidence Pointing Towards a Residual Role of Direct Liability*

One of the clearest formulations yet of a controlling state's internationally owed obligation—as liability without fault—to compensate victims of transfrontier pollution caused by private activities can be found in the 1969 draft European Convention on the Protection of Fresh Water against

<sup>104</sup> 7 INTERNAT'L CANADA 84-85 (1976); and Pimlott, *The Arctic Offshore Gamble*, 38 LIVING WILDERNESS 16 (1974). The U.S. Government's intervention in this matter is explained not only by the threat of potentially disastrous transboundary effects on U.S. environmental resources, but also by the fact that any mishap suffered by Dome Petroleum in its offshore drilling operations, whose commencement the United States considered somewhat premature given the state of the technology, was likely to have a significantly adverse impact on public acceptance of similar offshore programs planned by the U.S. and the Alaskan Governments. As to the domestic controversy surrounding the auction of drilling rights in the waters off the North Slope of Alaska, see N.Y. Times, Nov. 26, 1979, at A18, col. 3, and Dec. 9, 1979, at 26, col. 1. As to the ensuing multiple litigation: 10 ENVIRONMENTAL REP. 1569 (1979); and N.Y. Times, Jan. 23, 1980, A12, col. 4.

<sup>105</sup> De Mestral, *Pollution Issues: Coopération, et règlement des différends Canada-Etats Unis dans le domaine de la protection de l'environnement*, in Joint Proceedings, *supra* note 62, at 78, 94. See also statement by the Canadian Parliamentary Secretary to the Minister of Fisheries and the Environment, in the House of Commons, May 17, 1977, excerpted in 15 CANADIAN Y.B. INT'L L. 393-94 (1978); and compare de Mestral, *The Prevention of Pollution of the Marine Environment Arising from Offshore Mining and Drilling*, 20 HARV. INT'L L.J. 469, 491 (1979).

<sup>106</sup> The resolution in 1973 of the longstanding Colorado salinity problem appears to have been characterized as another example of a controlling state's acceptance of strict liability for private conduct causing transnational pollution. See Andrassy (1973 HAGUE COLLOQUIUM, *supra* note 47, at 496), who, in connection with a U.S. obligation to compensate Mexico (and Austria's indemnification of Yugoslavia in the *Mura* case, text at notes 95-98 *supra*), noted that "[l]e crois qu'il faut dire que ces devoirs sont plus stricts que ce qui paraissait être dit par certains orateurs."

This view of the Colorado salinity settlement, however, is problematical. If one accepts that in the 1973 agreement the United States did indeed undertake to render compensation to Mexico—and evidence to this effect is persuasive; see Article 7 of Minute No. 242, Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, TIAS No. 7708, reprinted in 12 ILM 1105 (1973)—there nevertheless remains the fact that Mexico's view of the matter is that the United States had violated its obligations under the 1944 agreement. See, e.g., Gonzales-de-León, *The Mexican Position: National and International Considerations*, 15 NAT. RESOURCES L. 109 (1975); and Lobato, *Legal Considerations, Interpretations and Projections of Minute 242*, *id.* at 35, 37-40. Compare Furnish & Ladman, *The Colorado River Salinity Agreement of 1973 and the Mexicali Valley*, *id.* at 83, 95-96; and generally, Brownell & Eaton, *The Colorado Salinity Problem with Mexico*, 69 AJIL 255 (1975).

Pollution.<sup>107</sup> Motivated by the need to provide a speedy and effective remedy for victims of transfrontier water pollution, the drafters opted for a compensation solution whose salient feature is Article 8: "The liability for compensation . . . shall attach to the contracting State in whose territory any water pollution arises. . . ."<sup>108</sup> The controlling state's liability was thus envisaged to be strict. Though adopted by the Consultative Assembly of the Council of Europe, the draft failed to get the necessary endorsement of the Committee of Ministers, which based its rejection, *inter alia*, on the allegation that the principle of state liability, as laid down in the draft convention, as yet had no comparable counterpart in international law.<sup>109</sup>

However, the Council's negative reaction to this "progressive first draft"<sup>110</sup> should not weigh too heavily against the basic thrust of this presentation, which seeks merely to establish that in special circumstances private conduct entailing transnational pollution damage engages the direct international liability of the controlling state. By contrast, the 1969 draft convention clearly establishes direct state liability for transfrontier water pollution as a fundamental principle. The proposition that liability without fault is the generally applicable international legal standard has, however, already been rejected as inconsistent with state practice and relevant international judicial precedents. On the other hand, if the second draft convention<sup>111</sup> cannot be invoked as a precedent for direct liability in the sense of a liability standard of exceptional applicability, this is not because the second draft expressly denies the cogency of differing liability standards. Rather, the explanation lies in the fact that this time the drafters made no attempt at all to come to terms with the intricate problem of liability.<sup>112</sup>

Of course, neither draft convention can be taken to represent strong evidence of growing community expectations one way or the other. But when considered together they nevertheless provide an important perspective on the relevance of direct liability: first, they do not contradict the argument that direct liability represents an exceptional phenomenon under present general international law; second, adoption of the general liability reference in the second draft may indicate at least a strong sentiment among members of the Council's Ad Hoc Committee favoring incorporation of a limited direct liability provision.<sup>113</sup>

Recently, the need for a more discriminating approach to the issue of state liability for transfrontier water pollution seems to be taking hold. The obvious touchstone for this development is the work of the Institute of

<sup>107</sup> Text in 2 Legal Problems Relating to the Non-Navigational Uses of International Watercourses 243, UN Doc. A/CN.4/274 (1974).

<sup>108</sup> *Id.* at 248.

<sup>109</sup> Council of Europe, Committee of Ministers, Doc. CM(70) 134, reproduced in *id.* at 249-50.

<sup>110</sup> Thus Hendewerk, *supra* note 50, at 265.

<sup>111</sup> 1974 Draft European Convention for the Protection of International Watercourses against Pollution, CECA Doc. 3417, at 3 (1974).

<sup>112</sup> Thus, as to international liability, Article 21 merely defers to "rules applicable under general international law to any liability of States for damage caused by water pollution." *Id.* at 11. And see Draft Explanatory Report on the European Convention for the Protection of International Watercourses against Pollution, CECA Doc. 3417 Addendum 27-28 (1974).

<sup>113</sup> See Draft Explanatory Report, *supra* note 112, at 27-28.

International Law on the topic of freshwater pollution.<sup>114</sup> As was already noted, Article II, in combination with Article III, paragraph (1) of the resolution adopted at the 1979 session at Athens, reflects "due diligence" as the general standard of liability. Article III, paragraph 2 elaborates: "Such measures [*i.e.*, for the prevention and abatement of pollution] shall be particularly strict in the case of ultrahazardous activities or activities which pose a danger to highly exposed areas or environments."<sup>115</sup>

It goes without saying that the requirements that flow from the notion of due diligence vary according to the circumstances of the activity creating the transnational risk.<sup>116</sup> The interesting aspect of Article III rather lies in the subtle inconsistency in its approach to the question of exceptional risk. Thus, while the functional notion of "due diligence" is emphasized, its inherent logic, that at a certain point on the scale of significant transnationally hazardous conduct the standard of "due diligence" itself would merge into a standard of liability without fault, is not acknowledged. Still, a latent concern about the need to differentiate between abnormally dangerous activities and other conduct responsible for transnational pollution surfaces clearly in Article VI of the resolution. It stipulates that "States should conclude international conventions concerning in particular . . . the procedure for special arrangements providing in particular for objective liability<sup>117</sup> systems . . . with regard to pollution brought about by ultrahazardous activities."<sup>118</sup>

"Objective liability," as used in this provision, must be understood to mean liability without fault; it must imply that the controlling state would be directly liable for transnational pollution damage caused by an ultrahazardous activity engaged in by private persons or entities. The resolution thus might be taken to endorse the principle of direct liability as an exceptional standard applicable to abnormally dangerous private activities of transnational concern, albeit in the form of a treaty-based regime. In other words, it would clearly reject the argument that direct liability may have become an exceptional standard of transnational accountability based on customary international law or justifiable as a general principle of law.

<sup>114</sup> *Supra* note 70. The International Law Commission's study of the law of the nonnavigational uses of international watercourses, by contrast, has not yet proceeded beyond consideration of the very general organizational principles. Report of the International Law Commission, *supra* note 45, at 470-71.

<sup>115</sup> Resolution of the Institute, *supra* note 70.

<sup>116</sup> See *Island of Palmas case*, *supra* note 8, at 839, 840. Compare Brownlie, who refers to "relatively strict liability" as applicable, *inter alia*, to "situations not involving acts of officials but which a normal government [*sic*] would be expected to control." *Supra* note 20, at 180. The liability standard thus advocated, of course, remains based on fault; the crucial test remains that of "due diligence."

<sup>117</sup> As to the established notion of "objective responsibility" used in this quotation, see, *e.g.*, Note by the Secretariat, *supra* note 71, at 3-4: "the factor taken into consideration is not the (subjective) behaviour of a State, but the (objective) occurrence of damage outside the area under its jurisdiction." This definition also approximates that of Anzilotti, who, it appears, first termed the consequence of a violation of international law "objective responsibility." D. ANZILOTTI, *1 CORSO DI DIRITTO INTERNAZIONALE* 409-10 (4th ed. 1955).

<sup>118</sup> Compare Note by the Secretariat, *supra* note 71, at 18, which commends the "need for special vigilance in regard to specially threatened areas and ultra-hazardous activities."

The Institute's cautious acceptance of strict liability reflects reservations among its members that go beyond the incidence in general international law of direct liability. They go to the very foundation of the general principle of strict liability in the international legal system and thus pose a basic issue that must be dealt with and clearly distinguished from the more particular objective of this inquiry.

The concern that underlies the resolution has been succinctly characterized elsewhere: "[T]his type of responsibility only results from conventional law, has no basis in customary law or general principles and, since it deals with exceptions rather than general rules, cannot be extended to fields not covered by the specific instruments."<sup>119</sup>

These reservations are not representative of the views of all the members of the particular commission of the Institute,<sup>120</sup> and they fly in the face of the above examples of state practice.<sup>121</sup> Moreover, they appear to stand in awkward contrast to the fact that the International Law Commission has recently initiated work on international liability for so-called lawful activities, which *prima facie* would indicate the existence in general international law of strict state liability.<sup>122</sup> The implausibility of denying that extraconventional strict liability exists in present international law could certainly be laid out in greater detail; but it would require extending this inquiry to the incidence of strict liability, first, in international relations in general (*i.e.*, beyond the more limited circumstances that, it is submitted, give rise to direct liability), and second, as a general principle of law.<sup>123</sup> Such a detailed

<sup>119</sup> De Aréchaga, *supra* note 48, at 273. For a similar view, see Virally, Review of P. -M. Dupuy, *La Responsabilité des Etats pour les dommages d'origine technologique-et industrielle*, 74 AJIL 218, 219 (1980).

<sup>120</sup> For example, Zourek strongly supported strict liability as an applicable standard of present international law. *Rapport provisoire présenté par Jean Salmon*, INSTITUT DE DROIT INTERNATIONAL, 58 ANN. 215 (1979 I).

<sup>121</sup> See text at notes 91-106 *supra*.

<sup>122</sup> From the very beginning of the ILC's work on state responsibility in 1969, an attempt was made to maintain a careful distinction between state liability resulting from a violation of an international obligation and liability originating in lawful activities. (For a criticism of Prof. Ago's first report, which failed to reflect the 2 different origins of state liability, see [1969] 1 Y.B. INT'L L. COMM'N 105-17.) The latter, so-called responsibility for risk, was defined by Ago as "the guarantee which States must give against possible injury from certain 'lawful' activities." [1973] 1 Y.B. INT'L L. COMM'N 14, para. 5. After the General Assembly urged it to take up consideration of the topic of "International liability for injurious consequences arising out of acts not prohibited by international law" (see GA Res. 3071 (XXVIII), 3315 (XXIX), 3495 (XXX) and 31/97), the Commission, in 1978, finally set up a working group. For further references, see Report of the Working Group on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, UN Doc. A/CN.4/L.284 and Corr. 1; and [1978] 1 Y.B. INT'L L. COMM'N 284-89, 1527th meeting. As to the persuasiveness of the Commission's work in this area as evidence of the existence of general international legal norms, see also Cahier, *Le Problème de la responsabilité pour risque en droit international*, in INTERNATIONAL RELATIONS IN A CHANGING WORLD 411 (1977).

<sup>123</sup> For a detailed survey, see instead, M. Arsanjani, No-Fault Liability from the Perspective of the General Principles of Law (unpublished paper, Codification Division, UN, 1979).

For a characterization of the principle that "absolute liability applies to fields of activities having in common a high degree of risk" as a general principle of law, see, *e.g.*, the claim by Canada against the USSR in connection with the crash in Canada of the Soviet satellite *Cosmos 954*, Annex A(b) to the diplomatic note of March 15, 1979, reproduced in 18 ILM 899, 907 (1979).

review is neither possible, given the present limitations of space, nor indeed necessary, in view of the contradictory evidence already adduced<sup>124</sup> and the substantial and growing support for extraconventional liability of states for ultrahazardous activities in the literature.<sup>125</sup> In any event, whether strict state liability for abnormally dangerous activities exists as a matter of general international law depends, above all, on whether one perceives adequately the need for an international community response to the increase in the incidence of significant transnational risks.<sup>126</sup> The question ultimately reduces itself to one's jurisprudential perspective on international law itself. This was aptly pointed out by the late Dr. Jenks in his seminal lectures at The Hague on liability of states for ultrahazardous activities:

The concept of a general liability for ultra-hazardous activities will, unless and until it is formulated by a generally accepted international convention, clearly be unacceptable to those for whom international law is still a limited body of specific rules deriving their authority from the

<sup>124</sup> Moreover, acceptance of the principle of strict liability for damage due to transnationally hazardous state activities is reflected in a number of international claims and counterclaims concerning such activities as nuclear weapons testing, military maneuvers in border areas, and the creation of transnational flood hazards.

<sup>125</sup> See, in particular, Jenks, *supra* note 56, at 105; Kelson, *State Responsibility and the Abnormally Dangerous Activity*, 13 HARV. INT'L L. J. 197, 243 (1972); Hardie, *Nuclear Liability: The General Principles of Law and further Proposals*, 36 BRIT. Y.B. INT'L L. 223, 237 (1960); G. TESAURO, *supra* note 56, at 179-80; Andrassy, *supra* note 106; Randelzhofer & Simma, *Das Kernkraftwerk an der Grenze*, in Festschrift F. FRIEDRICH BERBER 389, 428-30 (Blumenwitz & Randelzhofer eds., 1973); Wildhaber, *supra* note 89, at 117, citing Goldie, Jenks, & Kelson; and, of course, Goldie, *supra* note 47, at 70-74; Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189 (1965); J. SCHNEIDER, *supra* note 50; and Stein, *supra* note 50.

For a recent affirmative view, see L. FRÖHLER & F. ZEHETNER, 1 RECHTSSCHUTZPROBLEME BEI GRENZÜBERSCHREITENDEN UMWELTBEEINTRÄCHTIGUNGEN 125 (1979).

For somewhat more qualified support, see J. GOLDSCHMIDT, *supra* note 54, at 269-75; R. M'GONIGLE & M. ZACHER, *supra* note 39, at 152; Weiss, *International Liability for Weather Modification*, 1 CLIMATIC CHANGE 267, 287 (1973); Lang, *Haftung und Verantwortlichkeit im Internationalen Umweltschutz*, in IUS HUMANITATIS (Festschrift f. A. Verdross) 517, 527 (Miehsler, Mock, Simma, & Tammelo, eds., 1980); Teclaff, *International Law and the Protection of the Oceans from Pollution*, 40 FORDHAM L. REV. 529, 547 (1972); Burchi, *International Legal Aspects of Pollution of the Sea from Rivers*, 3 ITALIAN Y.B. INT'L L. 115, 122 (1977); Mazov, *Liability for the Harmful Consequences of Lawful Activities*, 8 SOVETSKOE GOSUDARSTVO I PRAVO 116 (1979); D. O'CONNELL, 1 INTERNATIONAL LAW 593 (2d ed. 1970); and Luzzatto, *Responsabilità e colpa in diritto internazionale*, 51 RIV. DIRITTO INTERN. 53, 102-04 (1968).

One of the more remarkable opposing views is that of P.-M. DUPUY, *supra* note 2, at 209-10. For a comment on one of his key objections, see *infra* note 140.

<sup>126</sup> Public perception of the existence of such a phenomenon should have been considerably strengthened in the wake of such spectacular incidents as the *Amoco Cadiz* disaster, the crash of *Skylab*, and the Ixtoc-I blowout in the Gulf of Mexico. So should have public perception of the need for corrective international action to minimize the risks and to optimize the transnational compensation mechanisms in the event the risk should materialize. Note in this respect a recent Austrian initiative within the framework of the IAEA; its aim is an international convention that would give a substantial say to the neighboring state with regard to the siting and operation of nuclear power plants in border areas. See 19 ÖSTERR. ZEITSCHRIFT F. AUSSENPOLITIK 114 (1979). See also a recent headline in *Le Monde*, Dec. 29, 1979, at 20: "L'Allemagne fédérale réclame à la France des garanties d'indemnisation en cas d'accident à Cattenom: [a French nuclear power plant located in an area close to the Franco-German-Luxembourg border]."

explicit consent of States. Pending any such convention, the concept presupposes the view that international law is not a limited body of specific rules, but a body of living principle and developing precedent growing with the needs of international society. Those who accept such a view of international law generally will find no difficulty in accepting the concept of a general liability in international law for ultrahazardous activities.<sup>127</sup>

Given these considerations, it should be permissible to proceed on the assumption that strict liability for abnormally dangerous activities exists as a principle of present general international law. The question that remains is: when the injurious activity is ex post facto termed "ultrahazardous," is the state liable internationally or transnationally<sup>128</sup> only if the activity can be attributed to the state itself, or can it also incur direct liability for private conduct? The initial task will be to identify the exceptional circumstances in which a state's direct liability might be incurred, and the second, to reexamine the persuasiveness of the policy considerations that can be adduced to support the imposition of strict liability for appropriate private activities. Incidentally, such an analysis should prove that sound policy reasons exist for recognizing a limited strict liability standard, and that its imposition in cases of transnational damage, even in the absence of specific treaty regimes, would thus be in response to strong community expectations.

#### V. DIRECT LIABILITY AND HAZARDOUS PRIVATE CONDUCT

As noted before, the realm of strict state liability for transnational environmental damage is limited to accidental transnational pollution and, at that, to accidents that do not involve in any way fault imputable to the state. If the loss is to be shifted from victim to polluting state within an international system generally based on fault, a special vehicle is required for the purpose. The concept that has been resorted to is the "abnormally dangerous" nature of the activity:<sup>129</sup> strict liability, a commentator

<sup>127</sup> Jenks, *supra* note 56, at 177.

An extreme example of an ultrapositivist view is provided by Vargas Silva who, by dismissing clear evidence of the international incidence of strict liability for ultrahazardous activities as a general principle of law and as an evolving customary legal standard, rejects any suggestion that Mexico might be internationally liable for oil pollution damage sustained in the United States as a result of the Ixtoc-I blowout. Vargas Silva, *La Contaminación de las aguas marítimas más allá de las fronteras nacionales y el Derecho*, in *LA CONTAMINACIÓN DE LAS AGUAS MARÍTIMAS MÁS ALLÁ DE LAS FRONTERAS NACIONALES Y EL DERECHO* 4, 38-45 (5 Cuadernos del Instituto Matías Romero de Estudios Diplomáticos, 1979). For a contrary position, see *Blowout of the Mexican Oil Well Ixtoc I: Hearings before the House Comm. on Merchant Marine & Fisheries and the Subcomm. on Water Resources of the Senate Comm. on Public Works & Transportation*, 96th Cong., 1st Sess. 258-63 (1979) (statement of Günther Handl).

<sup>128</sup> Liability in this sense would be not vis-à-vis the victim state but vis-à-vis the foreign individuals affected. A situation of this kind arises when state liability is considered to be subsidiary to the private polluter's primary responsibility for compensation. For details, see *infra* sec. VI.

<sup>129</sup> More generally speaking, it is probably true "that most strict liabilities now recognized are illustrations of a single basis of liability—a principle that each activity is accountable for the distinctive risk it creates." R. E. KEETON, *VENTURING TO DO JUSTICE* 162 (1969).

pertinently remarked, is "a most useful basis for restoring *accidental* damage caused by exceptionally dangerous substances or activities."<sup>130</sup>

If the creation of transnational risk is therefore the decisive criterion for a state's strict international liability in general, it must also be fundamental to a finding of direct liability, which by definition excludes failure by the controlling state to meet its international obligations. The cogency of this conclusion is not only borne out by the outer space and nuclear liability conventions, all of which deal with clearly abnormally dangerous activities.<sup>131</sup> It is also corroborated by the above examples of state practice; bulk ocean transportation of oil,<sup>132</sup> offshore drilling, particularly in the Arctic areas,<sup>133</sup> and the sudden release of large volumes of stored water<sup>134</sup> may represent activities either inherently dangerous or dangerous *sub modo* only. In either case, the respective claims for compensation clearly implied that the activities concerned either posed an exceptional risk of transnational pollution or that the actual damage sustained resulted from what amounted to an abnormally dangerous private activity. Recognition of "special danger" as the crucial prerequisite to a finding of direct liability would thus logically account for the references in the ICNT and the Council of Europe's 1974 draft convention to the controlling state's liability in "accordance with international law." The exceptional incidence of strict, that is, direct, liability for private ultrahazardous activities of transnational concern could under this formula be comfortably accommodated in a system that generally shifts transnational loss only upon proof of fault on the part of the controlling state itself.

Because incurrence by the controlling state of direct liability thus presupposes exceptional risk, the process used to ascertain *ad hoc* whether a given private activity falls into the abnormally dangerous category is brought into question. In addition, this process is directly related to the verification of the absence of fault on the part of the controlling state.<sup>135</sup>

"Ultrahazardous activity" or "abnormally dangerous activity" is not, of course, a term of art. In the absence of an *a priori* determination by agreement that an activity is transnationally hazardous, establishment of this characteristic may entail some difficulties. To be sure, it is to be understood as involving a significant or exceptional risk of severe transnational damage

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Obviously, the notion of special danger closely relates to the question of knowledge—actual or presumed—of the existence of this element. Knowledge is, in turn, crucial to the question who might be the better cost avoider, hence which party ought to bear the costs of the accident; see *supra* note 32. For a more detailed discussion of the relevance of the concept of abnormal risk, etc., in the transnational context, see Handl, *supra* note 124.

<sup>130</sup> Dupuy, *supra* note 48, at 365.

<sup>131</sup> See text at notes 17–19 and 28–30 *supra*.

<sup>132</sup> See the *Juliana* accident, text at notes 99–102 *supra*; the *Cherry Point* incident, text at notes 91–95 *supra*; and, of course, the international public and private agreements relating to oil pollution damage, all of which establish a regime of strict liability, *supra* note 4.

<sup>133</sup> See the Beaufort Sea *ad hoc* arrangement for liability in the event of transnational oil pollution from exploratory drilling, text at notes 103–06 *supra*.

<sup>134</sup> See the *Mura* case (Austria-Yugoslavia), text at notes 95–98 *supra*.

<sup>135</sup> See also *supra* note 129.



and a low probability that such damage will occur.<sup>136</sup> As "the essence of the matter lies in the relativity of danger,"<sup>137</sup> a contextual ex post facto analysis will necessarily form part of the process of determining a state's strict accountability under general international law.

It has been suggested that the accidental occurrence of "dommage d'une gravité telle qu'il dépasse les frontières d'un Etat est la preuve même d'un risque exceptionnel."<sup>138</sup> The attractiveness of this formula is obvious. An essential goal of every strict liability regime, namely, to ease the burden of proof incumbent on the pollution victims, would be readily realized. All-comprehensive as the suggested test is, it would apparently include accidental damage of even minor consequence. But it seems well established that until and unless an activity is clearly adjudged to be of an ultrahazardous nature, such transnational damage would not per se give rise to strict transnational liability. After all, *de minimis non curat praetor*.<sup>139</sup>

On the other hand, if the accidental damage is substantial or severe, this quality in itself is likely to amount to persuasive evidence of the incriminated private activity's exceptionally dangerous nature. Short of such proof concerning the magnitude of the damage sustained, other relevant factors might warrant the inference that the injurious conduct is abnormally dangerous.<sup>140</sup> Even minor accidental transnational damage intrinsically

<sup>136</sup> For a classic definition, see Jenks, *supra* note 56, at 107:

It does not imply that the activity is ultra-hazardous in the sense that there is a high degree of probability that the hazard will materialize, but rather that the consequences in the exceptional and perhaps quite improbable event of the hazard materializing may be so far-reaching that special rules concerning liability for such consequences are necessary if serious injuries and hardship are to be avoided.

And see (U.S.) RESTATEMENT (SECOND) OF TORTS §520, comment f (1976):

[I]t is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.

See further Handl, *supra* note 1, at 31-33.

<sup>137</sup> Stallybrass, *Dangerous Things and the Non-Natural User of the Land*, 3 CAMB. L.J. 376, 386 (1927-29).

<sup>138</sup> Cahier, *supra* note 122, at 431; see also Sohn & Baxter, *Convention on the International Responsibility of States for Injuries to Aliens, Final Draft with Explanatory Notes*, in F. GARCÍA AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 133, 170-71 (1974).

<sup>139</sup> As to the threshold concept, see *supra* note 87; and Jenks, *supra* note 136.

<sup>140</sup> There is no need here to review in detail the various possible factors that might be taken into consideration in evaluating a particular activity. Reference might instead be to the exemplary listing of such parameters to be found in section 56 of the *Restatement (Second) of Torts* (1976). In his excellent treatise, Prof. Dupuy appears to consider the difficulty in determining ex post facto the ultrahazardous nature of the injurious activity as the major stumbling block to the extraconventional existence of strict liability in international law. P.-M. DUPUY, *supra* note 2, at 206-09. However, and apart from his admission that some activities might prove to be so manifestly ultrahazardous as not to allow allegations to the contrary, the nature of the activity would more likely than not already have been subject to discussions between polluting and victim states on the occasion of the former's compliance with its (previously activated) duty of prior information and consultation. For this reason, the countries concerned may well have reached an informal understanding concerning strict liability in the

connected with the carrying on of such a private activity would then bring into play the controlling state's liability.

Such an analysis after the fact, which might have to be performed in the atmosphere of heightened national sensitivities often characteristic of transnational pollution accidents, might make the controlling state more likely to resist the extraconventional strict liability claim. However, irrespective of the specific legal basis of such a claim, experience shows that its merits would certainly be subject to critical review by and negotiation between the victim and the polluting state.<sup>141</sup> The absence of an a priori agreement specifically providing for strict liability may thus prove to be less of a significant drawback than anticipated because it would be offset in the present context by the fact that knowledge of the transnational risk, *i.e.*, foreseeability of the accident, is bound to be central to this bilateral examination.

Foreseeability is obviously always in issue in determining whether the controlling state may not itself have been negligent or otherwise at fault with regard to the occurrence of the transnational damage. In addition, foreseeability bears on the incidental question whether a duty of prior information and consultation might not have been activated for the controlling state.<sup>142</sup> Insofar as foreseeability of the realization of a transnational risk—in terms of both probability of occurrence and consequences—relates directly to the applicable standard of due diligence, it clearly is an element that determines liability: unless the modalities of the private conduct concerned can be termed reasonable, in particular, when assessed against the known and suspected transnational hazards, the state itself will be at fault. By contrast, insofar as it relates to the duty of prior information and, if necessary or requested, consultations, foreseeability should be considered as engaging strict liability. Of course, if a state fails to discharge its international obligation to inform those countries that must be, or may reasonably be deemed to be, exposed to a significant risk of transfrontier pollution prior to authorizing the hazardous activity, the controlling state is clearly at fault. However, insofar as the state's violation of its international obligation is not necessarily causally linked to the damage, but is still made the criterion for determining international liability, the controlling state is obviously deemed to incur strict liability for the transnational injury. Such a solution has been advocated by a number of writers.<sup>143</sup>

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event of transnational damage. The absence of an a priori formal agreement on a particular activity as "ultrahazardous" thus appears to represent less than the formidable obstacle suggested by Dupuy.

<sup>141</sup> As to the Canadian claim related to *Cosmos 954*, *supra* note 123, it should be noted that so far the USSR has not indicated a willingness to honor the Canadian claim for compensation. If settlement through negotiations between the two countries fails, compensation of the outstanding claim may have to be attempted through adjudication by a claims commission to be established pursuant to Articles XIV through XVI of the 1972 Space Liability Treaty, *supra* note 18.

<sup>142</sup> As to the international legal duty of prior information, see Handl, *supra* note 88, at 55–63.

<sup>143</sup> See, *e.g.*, Jenks, *supra* note 56, at 182; and Scott & Bramsen, *Draft Guiding Principles concerning Transfrontier Pollution*, in *PROBLEMS IN TRANSFRONTIER POLLUTION*, *supra* note 50, at 299, 304.

Though little or no guidance has been offered by state practice, this approach nevertheless recommends itself as theoretically sound, at the very least. Compliance with the duty of prior information and consultation has direct bearing on the minimization as between the countries concerned of the costs of the accident, *i.e.*, the sum of the costs of pollution prevention and pollution damage.<sup>144</sup> Such minimization must be considered a fundamental goal of international environmental law, which, differently stated, commands states to maximize the aggregate utility of the shared natural resources.<sup>145</sup> If the controlling state fails to comply with the procedural duties associated with maximization, an internationally inefficient allocation of resources may indeed result: there may be an imbalance between the costs actually incurred to prevent pollution and those threatened by the potential damage. After all, only on exchanging information and holding detailed international discussions will the controlling state be able to accord its decision with the above maxim by either denying authorization for, or imposing conditions on, the transnationally hazardous private activity. The state must strictly comply with its preliminary duties *vis-à-vis* potentially affected or interested nations if potentially conflicting uses of natural resources are to be accommodated efficiently.

Against this background, the controlling state's noncompliance with a duty of prior information can justifiably be considered to engage on its own the state's strict liability. The international community has been progressively "mapping" those activities whose pursuit, in areas subject to national control, automatically activates the duty of prior information and consultation,<sup>146</sup> which is a step towards a more efficient management of the internationally shared environment. It is also one that extends the realm of strict, hence direct, liability.

At this point, it may be useful to summarize briefly. Direct liability, like strict liability in general, presupposes an element of special danger identifiably connected with the transnationally injurious activity. In the absence of an *a priori* definition by treaty, ascertainment of this element will require an *ex post facto* contextual analysis in which severe transnational accidental damage will tend to amount to conclusive evidence of the presence of "special danger." Even in the absence of severe damage, the controlling state might incur strict liability provided, first, it fails to discharge its duty of prior information, and, second, the damage is at least "substantial" or "significant," and thus meets the basic threshold requirement for liability in general.

A fundamental final issue to be considered is the validity of the argument that the controlling state is not liable for private conduct, even when clearly established as an ultrahazardous activity, unless the latter is imputable to it.

<sup>144</sup> For a detailed exposition, see Handl, *supra* note 88.

<sup>145</sup> See generally, Ruff, *The Economic Sense of Pollution*, in *ECONOMICS OF THE ENVIRONMENT* 41 (R. Dorfman & N. Dorfman eds., 2d ed. 1977); G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 24-33 (1970).

<sup>146</sup> As evidenced in the recent OECD document identifying factors in determining activities calling for prior notification under a bilateral or multilateral agreement, Ann. II to OECD Doc. ENV/TFP/78.17, at 1-3; and see OECD Council Recommendation on the Assessment of Projects with Significant Impact on the Environment, OECD Doc. C(79) 116.

This view amounts to an outright rejection of direct state liability in general. It has most recently been advanced by Philippe Cahier.<sup>147</sup> Although he admits to inherent inequities in the application of what he terms the "classic international rule," he suggests that only a future international convention could remedy the unsatisfactory state of affairs.<sup>148</sup> This conclusion not only reflects an apparent disregard of existing extraconventional state practice to the contrary<sup>149</sup> but also is based on an extension of the rule of imputability—an essential element in the construction of liability for fault, the general standard—to activities clearly subject to liability without fault, the exceptional regime. Cahier's claim that "rien ne semble ici justifier une dérogation à cette règle"<sup>150</sup> is simply unpersuasive. Indeed, one must conclude with Jenks: "The other and, it is submitted, the better view is that ultra-hazardous activities on a scale involving international consequences directly engage the liability of the [controlling] State. . . ."<sup>151</sup> Similar views have been expressed by several international lawyers, and with regard to a broad range of transnationally hazardous private activities.<sup>152</sup>

The cogency of the argument that states are directly liable for transnational injury brought about by such activities is grounded in solid policy considerations regarding, in particular, the prevention of transnational pollution. A private activity that is exceptionally dangerous in the sense that it could entail significant accidental transnational damage is more likely than not to be subject to demanding domestic licensing requirements.<sup>153</sup> Consequently, if, in a majority of cases, state authorities must be judged to exercise control over the very permissibility of such activities, as well as their modalities, states are intimately identifiable with them. This fact alone would seem to implicate the controlling state enough to justify imposition of strict liability for any resulting transnational damage.

Without discussing in detail the policy reasons supporting a state's direct liability, some fundamental considerations might be reemphasized. The international liability of states in general derives from the presumption of state control over the transnationally injurious activity. As this control is directly in issue in cases involving abnormally dangerous activities, because it either is very specifically exercised or should so have been under the circumstances, states are directly implicated: private control over the activity concerned is subordinate to the controlling state's authorization and supervision. For this reason, state control bears directly on the realization of the risk, hence also on the state's liability for the transnational accidental

<sup>147</sup> *Supra* note 122.

<sup>148</sup> *Id.* at 432.

<sup>149</sup> See *supra* sec. IV, "International Claims Situations."

<sup>150</sup> Cahier, *supra* note 122, at 431.

<sup>151</sup> Jenks, *supra* note 56, at 178.

<sup>152</sup> See, e.g., Kelson, *supra* note 125, at 198; and Weiss, *supra* note 125, at 280–81. Compare Beesley, *supra* note 66; Kiss, 1973 HAGUE COLLOQUIUM, *supra* note 47, at 497; Andrassy, *supra* note 106; and Treves, *supra* note 35.

<sup>153</sup> This will be particularly so in the aftermath of such well-publicized industrial accidents as Seveso and Three Mile Island.

consequences.<sup>154</sup> Similarly, the state's direct liability can be justified as maintaining "a fair balance of rights and obligations among countries concerned by transfrontier pollution."<sup>155</sup> Making the creation of significant transnational risk internationally permissible would seem to imply as a precondition that the controlling state be strictly liable in the event of transnational injury.<sup>156</sup> After all, as the state must be presumed to benefit from the hazardous activity, it should also be directly accountable for any associated transnational costs.

In sum, the controlling state's direct liability for transnational damage due to a miscarriage of an ultrahazardous activity finds its justification in the fundamental goal that international environmental law purports to serve, namely, minimization of the costs of accidental transnational pollution.

<sup>154</sup> See also Treves, *supra* note 35, at 781: "Ce régime [of strict international liability] pourrait être appliqué non seulement aux dommages produits par les faits des Etats, et par les faits accomplis pour leur compte, mais aussi à ceux produits par des activités autorisées par les Etats."

<sup>155</sup> Title A of Principles Concerning Transfrontier Pollution, OECD Doc. C(74) 224. Or G. TESAURO, *supra* note 56, at 192: "Il fondamento della responsabilità [used in the sense of "strict liability"] . . . va identificato nella esigenza di ripristinare l'equilibrio e la stabilità almeno patrimoniale delle sfere giuridiche subbietive dei singoli consociati."

<sup>156</sup> See Handl, *supra* note 87, at 17. As to the irrelevance of a specific attributability of such private conduct to the controlling state, see the ILC's discussion of state responsibility for the conduct of persons not acting on behalf of the state. It was noted that if states were answerable for transnationally injurious acts,

irrespective of whether such acts, committed either by private persons or by organs, were attributable to the State or not, *something entirely foreign to the sphere of responsibility for internationally wrongful acts* would be involved. . . . What would be involved would be a *guarantee given by the State at the international level against the danger of actions committed in its territory, under certain conditions, by private persons.*

ILC Commentary on Art. 11 of the Draft Articles on State Responsibility, Report of the International Law Commission on the work of its twenty-seventh sess., [1975] 2 Y.B. INT'L L. COMM'N 73, para. 12 (emphasis added). Such a guarantee represents a direct, potential international legal obligation for the controlling state and is, of course, the very hallmark of a liability-for-risk, *i.e.*, liability without fault, regime. Note, in particular, Ago's characterization of such strict state liability as "the guarantee which States must give against possible injury from certain 'lawful' activities"; *supra* note 122. Thus, the argument is also unpersuasive that rejects the usefulness of the concept of direct state liability for private transnationally hazardous conduct on the ground that in most cases of transnational damage, the latter would be "attributable to conduct of the executive and so . . . capable of attracting consequential liability. . . ." In any event, so the argument runs, "an injured party . . . [would] still [be] adequately protected through *personal liability in civil law*, which exists independently of state liability." A. REST, INTERNATIONAL PROTECTION OF THE ENVIRONMENT AND LIABILITY—THE LEGAL RESPONSIBILITY OF STATE AND INDIVIDUALS IN CASES OF TRANSFRONTIER POLLUTION 123 (BEITRÄGE ZUR UMWELTGESTALTUNG, vol. A56, 1978) (footnote omitted). To begin with, attributability is not in issue, as it has been assumed that the controlling state has discharged its international legal duty of due care in respect of the injurious activity. The state's liability flows instead from that fundamental notion of guarantee owed the international community as the tit for tat for international recognition of the state's exclusive jurisdiction over its territory. Besides, it is increasingly obvious that the creation of certain kinds of transnational risk could result in liability well beyond the financial means of the private actor, so that the controlling state's liability might very definitely be crucial to the satisfaction of transnational claims for compensation.

## VI. SUBSIDIARY LIABILITY IN PRIVATE TRANSNATIONAL LITIGATION

An equally important general objective is the establishment of an international legal framework that will assure effective compensation to victims of transnational pollution.<sup>157</sup> The principle of direct state liability is again of immediate relevance to implementation of this goal. However, in contrast to the earlier discussion, which centered on the controlling state's liability vis-à-vis the victim state, this time direct state liability acquires crucial significance only in the context of transnational recovery efforts pursuant to private law. This suggested interrelationship between direct state liability and effective, particularly adequate, compensation raises a number of technical questions about the transnational compensation mechanism to be employed. A detailed review of these issues is clearly beyond the scope of this presentation.<sup>158</sup> What will be analyzed instead is the preliminary question of the ordering principle to be applied to concurrent liabilities of private polluter and controlling state.

In many instances of accidental transnational pollution, the private polluter's assets, as well as his insurance coverage, may stand in no relation to the damage caused. Such a situation might arise as a result of either catastrophic transnational damage or an inherent incapacity of the private polluter to defray any significant costs. The latter is all too frequently the case when accidents virtually put an end to the operations of single-ship or single-plant companies.<sup>159</sup> In situations of this kind, the state's ultimate control over the transnationally hazardous activity and the benefit it presumably derives from it must be seen as bringing its liability into play. This should be particularly evident when the state has authorized the activity, even though the private company is severely undercapitalized if its assets (including insurance policies) are compared to its potential liabilities.<sup>160</sup>

<sup>157</sup> Apart from the more obvious goal of restoring as closely as possible the victim's status quo ante, this may also be highly desirable on the grounds that only an internalization of the accident costs of a particular activity will make the choice among competing goods and services approximate a rational decision because the price of the items in contention will more truly reflect the costs of production.

<sup>158</sup> For some pertinent thoughts, see instead Dupuy & Smets, *supra* note 71; du Pontavice & Cordier, Compensation for "Indirect or Remote" Pollution Damage in Individual Countries and at International Level, OECD Doc. ENV/TFP/78.6; and Note by the Secretariat, Compensation for Nuclear Damage in OECD Member Countries, OECD Doc. ENV/TFP/77.23.

<sup>159</sup> Cases in point include such accidents as the wreck of the *Amoco Cadiz*, apparently the only asset of Amoco Transport Company, and—in some of its critical legal aspects analogous to transnational pollution—the dioxin pollution accident at Seveso involving the single-plant company Industrie Chimiche Meda, S.p.A. (ICMESA).

<sup>160</sup> This is clearly the rationale that underlies the subsidiary state liability provisions of the nuclear liability conventions, text at notes 23–30 *supra*. State authorization of private construction and operation of nuclear power facilities necessarily entails subsidiary state liability as well, given the fact that most private operators could not possibly meet the potential transnational claims for compensation in the event of a major aerial release of radioactivity from a power plant located, say, in a border area. For details, see Handl, *supra* note 1, at 39–42; and *Deutsche Risikostudie für Kernkraftwerke* (German reactor safety study), which suggests that accidents involving German plants—with regard to most of their consequences (one notable exception may be acute deaths)—would result in transnational damage similar in magnitude to that suffered within Germany itself. THE FEDERAL MINISTER OF RESEARCH AND TECHNOLOGY,

Traditionally, direct state liability, that is, the duty to compensate, could arise only on the international plane. Hence, it could not be invoked by the transnational pollution victim himself, and satisfaction of his claim for compensation would depend on the exercise of diplomatic protection by the victim's national state.<sup>161</sup> Recent trends, however, suggest that we may be bearing witness to an evolution towards general recognition of controlling states' direct liability—not to the other state—but exceptionally to the private victim himself. In exceptional circumstances, the victim might be able to rely directly on the financial resources of the controlling state as the ultimate guarantor of compensation rather than have to trust in the cumbersome international claims procedure, *i.e.*, espousal by, and presentation through the diplomatic channels of, his state.

Concurrent liability of the private polluter and the controlling state is highly desirable from the minimal policy perspective of assuring adequacy of transnational compensation. Because evidence exists that a state's direct liability towards the transnational victim might be gaining favor in the international community, the question of which "defendant" party ought to be held primarily liable and which only on a subsidiary basis obviously acquires some relevance.

Hans Blix has advocated "that the State should have the first responsibility and that the responsibility of the individual be a residuary one, which the State can invoke vis-à-vis the individual."<sup>162</sup> While a liability arrangement of this sort is theoretically conceivable, it surely runs counter to prevailing trends. Nonstate actors are increasingly in evidence in the transnational arena.<sup>163</sup> Their growing effectiveness must be met by insistence on the corollary principle of responsibility. Accordingly, it makes good sense to

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THE GERMAN RISK STUDY. SUMMARY 29–30 (1979). See also *Le Monde*, *supra* note 126. Compare further Rémond-Gouilloud, *Leçons d'un naufrage (à propos de l'indemnisation des victimes de l'Amoco-Cadiz)*, D. 1979, CHRON. 133.

<sup>161</sup> While nationality of the victim has been a traditional condition, it may no longer be an absolute requirement for the "espousal" by a state of a private person's claim for compensation for transnational pollution damage. Thus, it is entirely conceivable that the state in which the victim resides, and where he has suffered the injury, must nowadays be considered entitled to raise the issue of compensation internationally. For some interesting comments on this, see Dubois, *La Distinction entre le droit de l'Etat réclamant et le droit du ressortissant dans la protection diplomatique*, 67 REV. CRITIQUE DROIT INT'L PRIVÉ 615 (1978); and the ASIL debate on *Nationality of Claims—Individuals, Corporations, Stockholders*, in ASIL, 63 PROCEEDINGS 30 (1969).

<sup>162</sup> 1973 HAGUE COLLOQUIUM, *supra* note 47, at 507. "Responsibility," as used here, obviously refers to "liability."

<sup>163</sup> That the dominance of states in transnational relations is not only being challenged by such "traditional" transnational actors as multinational corporations, international cartels, churches, etc., is indicated by a sample of recent *New York Times* headlines: "A Boycott of Nicaragua is begun by U.S. Unions," March 18, 1979, at 18, col. 1; and "N.A.A.C.P. is Seeking Foreign Policy Role," Sept. 10, 1979, at A13, col. 1. As to the proliferation of actors and its implications for world public order, see McDougal, Lasswell, & Reisman, *Theories about International Law; Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 189–95 (1968); Lasswell, *Future Systems of Identity in the World Community*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 3 (Black & Falk eds., 1972); McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision* in 1 *id.*, at 73 (1969); Knorr, *Transnational Phenomena and the Future of the Nation State*, in THE SEARCH FOR WORLD PUBLIC ORDER 401 (Lepawsky, Buehring, & Lasswell, eds., 1971); and S. HOFFMANN, *PRIMACY OR WORLD ORDER* 105–95 (1978).

insist on allotting primary liability to the private polluter and to relegate the controlling state's direct liability to a subsidiary function.

Several instances of such subsidiary direct liability have already been encountered, as in the 1962 Convention on the Civil Liability of Operators of Nuclear Ships, the 1963 Vienna Convention on Civil Liability for Nuclear Damage,<sup>164</sup> and the Canadian Government's bond guarantee of offshore drilling in the Beaufort Sea.<sup>165</sup> In addition, the United States and Canada have agreed to apply on a reciprocal basis their respective national compensation schemes for damage from nuclear power activities.<sup>166</sup> Under the agreement, the U.S. Government has potentially assumed direct liability vis-à-vis private Canadian claimants by committing public funds for compensation if Canadian claims exceed the amount for which U.S. power plant operators are required to carry insurance.<sup>167</sup> The idea of direct and concurrent liability surfaces in the 1969 draft European Convention on the Protection of Freshwater Pollution,<sup>168</sup> whereas direct and clearly subsidiary liability provisions have found support in various draft documents of UNCLOS III<sup>169</sup> and, of course, in the international literature on the subject. For example:

The most obvious solution seems to be to impose residual liability on the State in question. This means that, if the polluter is unable to compensate adequately the victim for damage caused by pollution, the State under whose supervision the polluter is operating should pay supplementary compensation to a certain level.<sup>170</sup>

Subsidiary direct state liability is an eminently reasonable proposal. For apart from its relevance to the goal of comprehensive compensation, such a liability arrangement is warranted from the viewpoint of maximizing efforts to prevent accidental pollution. If states were allowed to deny incurrence of subsidiary liability vis-à-vis private claimants, despite their obvious implication in the conduct of the hazardous activity, a significant incentive

<sup>164</sup> *Supra* note 4.

<sup>165</sup> Text at note 105 *supra*.

<sup>166</sup> Referred to in 7 *INTERNAT'L CANADA* 276 (1976).

<sup>167</sup> At present, the private operators of nuclear power plants in the United States, for example, are required to carry liability insurance of up to \$160 million, with the federal Government's intervention limited to a total of \$560 million. However, under a deferred premium plan, each operator of a nuclear reactor exceeding a capacity of 100 MW (e) is required to contribute to defraying the cost of any nuclear incident to a maximum amount of \$5 million; 10 C.F.R. §140.11(4) (1980). Accordingly, with 69 nuclear power plants operating in the United States as of August 1979, deferred premiums would amount to \$345 million. With \$160 million from insurance, the federal Government's liability would be limited to \$55 million.

For a tabulation of the compulsory insurance coverage of nuclear plant operators and the ceiling of additional state interventions in OECD countries, see Note by the Secretariat, Compensation for Nuclear Damage in OECD Member Countries, OECD Doc. ENV/TFP/77.23, at 28 (1977). As to a clear affirmation of the principle of direct and subsidiary state liability, see Statement by the Canadian Delegation, *supra* note 50, at 7.

<sup>168</sup> See Art. 7, para. 3 and Art. 8 of the draft convention, *supra* note 107, at 248.

<sup>169</sup> See *supra* note 84.

<sup>170</sup> Bouchez, 1973 *HAGUE COLLOQUIUM*, *supra* note 47, at 499, 500.



for state efforts to minimize accidental transnational pollution might be lost.<sup>171</sup> A treaty regime providing for the admissibility of private claims against the controlling state poses a more realistic sanction: the private claimant is more likely to resort to private law proceedings than is the victim state to turn to the international claims procedure on behalf of its injured national. Few of the political considerations that tend to bar an international claim by the victim state will restrain the private victim. Thus, while direct state liability should assure a maximum of state interest in the safety of operations at private facilities, subsidiarity of liability would ensure that the private operators bear the brunt of any transnational compensation claims and thereby should maximize their accident prevention efforts in day-to-day operations.

In sum, the controlling state's direct and subsidiary liability to the transnational claimant would clearly help maximize pollution prevention efforts while guaranteeing adequate compensation to the victim. This private law liability scheme should be available in addition to what must remain a necessary fallback option, namely the international claims procedure. It could readily incorporate the concept of international insurance funds as a third potential addressee of private claims.<sup>172</sup> A regime of this kind would obviously have to be established through international conventions, which would spell out in detail the intricate parameters, both procedural and substantive, that bear on the controlling state's subsidiary but direct liability.<sup>173</sup>

If this can be posited as an ideal solution to most of the problems connected with accidental transnational pollution, it also must be noted that recent international legislative proposals do not augur well for rapid implementation of such a regime. Thus, for example, the Intergovernmental Maritime Consultative Organization's draft articles for a Convention on Liability and Compensation in connection with the Carriage of Noxious and Hazardous Substances by Sea so far have conspicuously omitted any reference to what must be recognized as an essential principle of such a convention, namely the flag state's subsidiary liability.<sup>174</sup> Surely, the 1962

<sup>171</sup> To this effect, Hambro, *id.* at 503. Another possible policy objective, namely, of providing a potential defendant in a situation of transnational pollution in which the individual polluter remains unidentified, would rarely be of relevance in the context of accidental pollution.

<sup>172</sup> Review of such a scheme, which obviously calls for a detailed analysis, has been reserved for a separate study.

<sup>173</sup> For some pertinent thoughts in this respect, see, *e.g.*, Hargrove, 1973 HAGUE COLLOQUIUM, *supra* note 47, at 510-13, and Hargrove, *Environment and the Third Conference on the Law of the Sea*, in WHO PROTECTS THE OCEAN? ENVIRONMENT AND THE DEVELOPMENT OF THE LAW OF THE SEA 191, 222-23 (Hargrove ed. 1975).

<sup>174</sup> Draft Articles for a Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea, Annex IV to Report of the Legal Committee on the Work of its Thirty-eighth Session, IMCO Doc. LEG XXXVIII/5 (1979); and Alternative IV, Annex II to Report of the Legal Committee on the Work of its Thirty-ninth Session, IMCO Doc. LEG XXXIX/5 (1979). See also the summary of the Legal Committee's discussions of the draft articles, Report of the Legal Committee on the Work of its Forty-first Session, IMCO Doc. LEG XLI/5, 3-19 (1979).

Nuclear Ship Convention ought to represent a ready precedent and one, it is hoped, that IMCO will ultimately follow in recognition of the fundamental policy issues at stake.

## VII. SUMMARY OF CONCLUSIONS

The incidence of a state's liability for transnationally injurious activities of private persons or entities (so-called direct liability) has been discussed from both an international (*vis-à-vis* the victim state) and a transnational (*vis-à-vis* the private transnational victim) viewpoint. Pertinent international practice and international literature seem to allow a number of firm conclusions, the major points of which can be summarized as follows:

First, the international liability of a state for transnational pollution caused by private individuals or entities is a function of the state's control over the activity concerned. In the event that two or more states might be deemed to exercise concurrent control over the transnationally injurious conduct, the state that has priority in exercising control may incur international liability.<sup>175</sup>

Second, while the general standard of international liability for transnational pollution damage is based on fault, a state may nevertheless incur strict liability. Such a derogation from the general norm may be provided for in special treaty regimes. In certain circumstances, however, imposition of extraconventional strict liability finds justification as a general principle of law. Thus, transnational damage due to an accident involving an abnormally dangerous activity of international concern will give rise to strict state liability.<sup>176</sup>

Third, the "transnationally hazardous" nature of a given activity is determined by way of a contextual multiple factor analysis. It centers in particular on ascertaining whether a significant risk of transnational damage exists, not in the sense of a high probability of minor damage, but of severe damage associated with a decidedly small, even minuscule, probability value. It is closely related to state compliance with any incumbent duty of prior information and consultation. Although noncompliance in and of itself renders the state at fault, in the absence of evidence clearly linking this breach of obligation to the transnational damage sustained, which will probably be the case most of the time, the proper view is that noncompliance represents a factual element that may engage the state's strict liability.<sup>177</sup>

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Note that, by contrast, the draft convention on deterioration of the marine environment as a result of exploration and exploitation of the seabed and its subsoil in maritime areas under the national jurisdiction of states, adopted by resolution by the European Council of Environmental Law on April 1, 1978, while focusing on the (civil) liability of the operator of the offshore installation, expressly stipulates that this regime is not to derogate from the applicable international rules of state liability. Art. 18 of the draft convention, *reproduced in* 4 ENVIRONMENTAL L. & POL'Y 137 (1978).

For critical comments on the absence of provisions on controlling states' liability in the 1969 CLC and the 1971 Fund Convention, see, e.g., R. M'GONIGLE & M. ZACHER, *supra* note 39, at 197.

<sup>175</sup> See text at notes 31-47 *supra*.

<sup>176</sup> See *supra* sec. IV.

<sup>177</sup> See text at notes 142-146 *supra*.

Fourth, the controlling state's international liability for private transnational pollution damage is by definition strict.<sup>178</sup> Accordingly, the state's direct international liability arises only with regard to hazardous private conduct, *i.e.*, activities that pose a significant risk of transnational harm.

Finally, a state's direct liability for such private activities cannot only be posited as a clear principle of general international law<sup>179</sup> in the sense of strict international accountability, *i.e.*, liability vis-à-vis the victim state(s). It also can be postulated—albeit in the form of a major policy objective yet to be implemented through international legislation—to arise vis-à-vis the private victim of transnational pollution. Such direct liability, provided it remains subsidiary to the private transnational polluter's primary liability, must be viewed as a fundamental construct of any transnational compensation scheme, to be added to rather than substituted for the international claims procedure. It would squarely meet the basic policy objectives of international environmental law, the prevention of significantly harmful transnational pollution and the restoration of, and compensation for, any such damage.<sup>180</sup> For this reason, the concept of subsidiary direct state liability towards the victim himself ought to be incorporated in any future international conventions dealing with liability for transnational pollution damage.

<sup>178</sup>Text at notes 88–89 *supra*.

<sup>179</sup>*Supra* sec. V. Implementation of this principle with regard to vessel-source pollution has been conspicuously lagging. Blix thus noted:

I wish it were possible to inflict . . . [strict liability] upon the flag State at least for ships which have a certain size, huge tankers and so forth. . . . [W]e all know that if the state allows space activities by private citizens, the state does carry a responsibility for it. In theory, I do not see any difference between the two cases. But in practice, I think the attitudes of governments would be different.

*Supra* note 162, at 507. As to the basic applicability of the "control-responsibility" function to flag state jurisdiction, see *supra* note 99. For the policy reasons discussed previously, it should thus be obvious that affirmation of the direct liability of flag states for transnational pollution due to, for example, a supertanker, is both consistent with existing international law and supportive of the fundamental goals of international environmental law.

<sup>180</sup>See text at notes 171–173 *supra*.

## VOTING IN INTERNATIONAL ECONOMIC ORGANIZATIONS

By Stephen Zamora\*

Since the 19th century, governments have joined to create specialized international organizations to control the effects of new technologies and to regulate increased economic ties between nations. The number of such organizations has increased dramatically since the Second World War, and it is likely that this approach to international problem solving through permanent, specialized agencies will continue. Yet for nations to act effectively in concert, the organization through which they act must command the respect of its members, and they must abide by the organization's decisions. Moreover, the way in which these decisions are made—the formal procedures and informal practices followed by the organization's members—will have a direct and immediate effect on the members' observance of them. Even the generally accepted substantive rules of an organization are not likely to be observed if they are perceived as arbitrarily applied without proper voting safeguards.<sup>1</sup>

The importance of decisionmaking procedures to successful international organization can be seen by the amount of attention paid by governments to the adoption of appropriate rules of voting procedure for new organizations. Ever since international organizations began taking decisions by majority vote, conflicts have arisen over decisionmaking controls. Such conflicts are especially apparent today, owing to a continuing campaign by developing countries to restructure world economic relations in order to provide a more equitable distribution of wealth between rich and poor countries. A key point in the restructuring is increased voting rights for developing countries in international economic organizations.<sup>2</sup>

As a result of this campaign, the creation of new international economic

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<sup>1</sup> Compare J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 788 (1969): "In the long run, it may well be the *machinery* that is most important (i.e., the procedures), rather than the existence of any one or another specific rule of trade conduct."

<sup>2</sup> At numerous intergovernmental conferences during the 1970's, representatives of developing countries have promoted the cause of increased voting rights for their countries in international economic organizations. At the conference on the establishment of IFAD (see text accompanying note 5 *infra*) the developing countries, having failed to adopt a one-nation, one-vote system for directing that organization, made a joint declaration stating that they would "continue to fight [for such a system] in all international fora." Report of the Meeting of International Countries on the Establishment of the International Fund for Agricultural Development to the Secretary-General, World Food Council Doc. IFAD/CRP.21, at 10 (February 16, 1976). The "Manila Declaration," made by the developing countries' Group of 77 prior to the convening of the UNCTAD IV Conference in Nairobi, included the following statement: "The system of voting in the IMF and World Bank should be reformed so as to accord developing countries greater representation and weight in decision-making in these institutions." Doc. 77/MM(III)/4a, at 23 (1976).

organizations has often been threatened by apparent impasses between developing and developed countries over questions of voting control of the new agency. Among the outstanding issues to be settled before concluding the United Nations-sponsored treaty on the law of the sea, there remains the question of voting procedures to be adopted for the International Seabed Authority, which will regulate deep seabed mining; predictably, the developing nations and the technologically advanced countries have been at odds over questions of voting control.<sup>3</sup> Similarly, the establishment of the "Common Fund," which is to finance the costs of maintaining buffer stocks under international commodity agreements, has been delayed in part because of the impasse over voting control.<sup>4</sup> The International Fund for Agricultural Development (IFAD) was established in 1976 to provide concessional lending for agricultural projects in developing nations; the level of contributions by members of the Organization of Petroleum Exporting Countries and the Organization for Economic Cooperation and Development and the distribution of voting power—issues that were clearly linked—were major obstacles to the final IFAD Agreement.<sup>5</sup>

Significantly, the question of voting control is not even a closed issue in established international organizations. In the mid-1970's, the developing countries succeeded in passing a number of UN-sponsored resolutions directed against the developed countries' control of decisionmaking in existing international economic organizations.<sup>6</sup> This control is a natural consequence of the weighted voting procedures that prevail in many of these organizations. While the resolutions have not been followed by significant reforms in existing agencies, they have strongly influenced the formulation of voting procedures in new organizations. Furthermore, the UN resolutions raise profound questions concerning the decisionmaking processes—and hence, the effectiveness—of international economic organizations.<sup>7</sup>

<sup>3</sup> See text accompanying notes 72–83 *infra*.

<sup>4</sup> See Reynolds, *A Common Fund to Finance International Commodity Agreements*, 10 L. & POL'Y IN INT'L BUS. 887, 893 (1978). See also text accompanying notes 69–71 *infra*.

<sup>5</sup> See generally T. WEISS & R. JORDAN, *THE WORLD FOOD CONFERENCE AND GLOBAL PROBLEM SOLVING* (1976). See also text accompanying notes 84–91 *infra*.

<sup>6</sup> See Programme of Action on the Establishment of a New International Economic Order, UN Doc. A/RES/3202 (S-VI) 1974, paras. II and IX, *reprinted in* 13 ILM 720, 726, 731 (1974) (calling for more equitable voting patterns in the World Bank and IMF); Art. 10, Charter of Economic Rights and Duties of States, UN Doc. A/RES/3281 (XXIX) 1975, *reprinted in* 14 *id.* at 251 (1975) (declaring that all states are "juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems, *inter alia*, through the appropriate international organizations in accordance with their existing and evolving rules . . ."); UN Doc. A/RES/3362 (X-VII) 1975, *reprinted in id.* at 1524 (calling for increased participation of developing countries in the decisionmaking processes of international finance and development institutions). See also the preparatory report for the latter resolution, *A New United Nations Structure for Global Economic Cooperation*, UN Doc. E/AC.62/9, at 56–57 (1975).

<sup>7</sup> As used in this article, the term *international economic organization* includes all organizations of an intergovernmental nature that deal with economic, financial, and monetary relations between nations, or with matters, such as international trade, that directly affect such relations.

Many decisions of international organizations are not made according to the formal voting procedures; informal understandings may be equally important. Indeed, in many international economic organizations (including the World Bank, the International Monetary Fund, and the regional development banks, all of which have carefully devised weighted voting procedures) a formal vote, either in the Board of Executive Directors or in the Board of Governors, is a relatively rare occurrence; most decisions are made by a form of consensus, or "sense of meeting."<sup>8</sup> The avoidance of confrontation through formal voting has become an important part of the operations of these and other economic agencies;<sup>9</sup> it is also a reason for their success, as measured by the number and scope of operations carried out by these agencies and their influence in world economic affairs.

This is not to say that formal voting procedures, or the general weighting of votes, are unimportant. To the contrary, the formal procedures may profoundly affect the *de facto* decisionmaking process. Even where decisions are often taken informally, the resort to formal voting procedures remains a possibility and may have a profound effect on the willingness of members to arrive at a consensus, as well as on the type of consensus or com-

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The emphasis in this article on international *economic* organizations is justified, even though the distinction between economic and political institutions is not always clear; indeed, many organizations are both economic and political. Nevertheless, by separating organizations into functional categories, we may analyze institutional responses to what are often similar constraints and pressures. See W. KOO, *VOTING PROCEDURES IN INTERNATIONAL POLITICAL ORGANIZATIONS* 23 (1947). It is no coincidence that the decisionmaking processes (including the formal voting structures) of institutions that serve an economic purpose have usually differed from the decisionmaking processes adopted by political (*e.g.*, security) organizations; each responds to distinct sets of forces. Yet, while the general literature on decisionmaking in international political organizations (especially the UN General Assembly) is abundant, there have been few detailed studies on the formal voting procedures of international economic organizations.

<sup>8</sup> See H. M. Chung, *Decision Making in the IBRD and the ILO: A Comparative Analysis of the Rules and Practices* 355 *et seq.* (Diss., U. Penn. 1970). See also Remarks of Lester Nurick, then Associate General Counsel of the World Bank, in *THE EFFECTIVENESS OF INTERNATIONAL DECISIONS* 366-67 (Schwebel ed. 1971); Gold, *The Structure of the Fund, Finance & Dev.*, June 1979, at 11 [hereinafter cited as Gold, *Structure*]; J. GOLD, *VOTING AND DECISIONS IN THE INTERNATIONAL MONETARY FUND* 215 (1972) [hereinafter cited as GOLD, *VOTING*]; J. WHITE, *REGIONAL DEVELOPMENT BANKS: A STUDY OF INSTITUTIONAL STYLE* 55, 154 (1970).

<sup>9</sup> See M'Bow, *The Practice of Consensus in International Organizations*, 30 INT'L SOC. SCI. J. 893, 895 (1978). The reluctance to rely on formal votes in weighted voting organizations is explained in McIntyre, *Weighted Voting in International Organizations*, 8 INT'L ORG. 484, 491 (1954):

The potent factor of "invisible weighting" which operates under any voting arrangement will always give the states with the major interest influence beyond the limits of their voting power. When this powerful influence fails to achieve substantial agreement, passage of a disputed measure by weighted vote is not very useful in agencies that must depend on governments for implementation of decisions and recommendations, and in organizations that have a greater degree of control [a formal vote] is not likely to seem desirable to the predominant states except as a last resort in the protection of vital interests.

promise reached. In the IMF, the avoidance of formal voting has in no way been accompanied by a lack of interest in relative voting power.<sup>10</sup>

Small changes in voting procedures, for example, increasing one member's weighted vote by several percentage points, will not drastically affect the decisionmaking patterns of an international organization, where formal votes may be relatively rare. However, larger changes in formal voting procedures, such as increasing the votes of a bloc of countries, or appreciably changing the majorities required for decision, may have profound effects on decisionmaking. Voting procedures constitute the most basic consensus upon which other, more informal, consensuses are based. An appreciable change in the formal procedures may affect the ability to decide issues according to informal understandings, since the possibility that a formal vote might overrule such a decision looms constantly in the background.<sup>11</sup>

This article compares the formal voting structures of the principal international economic organizations and assesses the adequacy of these rules in light of the demands that are being made on these organizations. It also identifies a connection between the formal voting procedures that prevail in these organizations and the types of decisions that they make. Decisions made by international organizations are not all of the same force or effect; they may be broadly categorized as belonging to three separate levels.<sup>12</sup> First, there are the nonbinding, hortatory resolutions that are commonly passed by *recommendatory* agencies,<sup>13</sup> usually for the purpose of persuading nations to recognize a new international norm, to reinforce an already accepted (but nonbinding) norm, or to apply an existing norm to a particular situation. Resolutions by the UN General Assembly and by the United Nations Conference on Trade and Development (UNCTAD) are commonly cited as examples of this level of decision. Second, there are the less general decisions of international agencies whose charters limit them to a specific, well-defined range of subject matter. Most of the economic agencies discussed in this article make at least some decisions on this level. These decisions are often binding on the organization itself; frequently, they establish parameters for later decisions that directly affect the organization's members. Finally, there are operational decisions that must be made by *task-oriented* agencies. These decisions are often taken by executive action and without great conflict, since the parameters of permissible action have already been fixed at the level just mentioned. It is at this level that decisions directly binding on members are most often taken.

This article is primarily concerned with the voting procedures that influence the first two levels of decisionmaking. Of course, many organizations make decisions on all three levels: they pass nonbinding, hortatory resolu-

<sup>10</sup> GOLD, VOTING *supra* note 8, at 216. See also Gold, *Weighted Voting Power: Some Limits and Some Problems*, 68 AJIL 687, 702-04 (1974).

<sup>11</sup> See H. SCHERMERS, 2 INTERNATIONAL INSTITUTIONAL LAW 328 (1972): "Consensus is strongly influenced by the legal rules on voting."

<sup>12</sup> O. SCHACHTER, SHARING THE WORLD'S RESOURCES 28-31 (1977).

<sup>13</sup> For an explanation of the distinction between recommendatory and task-oriented agencies, see the text accompanying note 95 *infra*.

tions; they establish the parameters for future action; and they make day-to-day operational decisions by executive action—often with the active participation of technical experts employed in the secretariat. Usually, however, one level or another predominates. In UNCTAD, most decisions are made on the first level; the only second- and third-level decisions have to do with internal matters (budgets, utilization of the Secretariat, etc.). At the other extreme, the international lending agencies (the World Bank and regional banks) are characterized by strong executive (third-level) decision-making, with some policy-setting decisions on the second level and virtually no general hortatory resolutions on the first level.

It is no coincidence that the two agencies just mentioned, UNCTAD and the World Bank, have formal voting structures as different as their levels of decisions. The one-nation, one-vote rule of UNCTAD complements its role as the principal forum for promoting greater equality in world economic affairs; the rule also lessens the likelihood that UNCTAD will achieve the consensus required to make binding decisions by majority vote. The weighted voting rules of the World Bank ensure the support of the capital-exporting countries that have greatly influenced the selection of parameters for the bank's lending programs; given these parameters, the World Bank's staff is able to carry out ambitious lending programs that have important effects for member countries.

Many of the demands on international organizations arise as part of the continuing conflict between developed and developing countries. The latter, having learned to achieve political force through group solidarity, continue to press for the type of international economic organization that will serve to advance their common economic interests. Needless to say, the economic interests of the developing countries do not always coincide, nor would all these countries agree on the ultimate shape to be given these organizations once they are created or reformed. However, there is common support for changes in what is perceived as developed country domination of the most important international economic organizations.<sup>14</sup>

This article takes as its primary theoretical base the functional analysis that has been developed by other writers on this general subject.<sup>15</sup> That is, this inquiry centers on the way in which voting arrangements have been structured, or have evolved, so as to meet the functional requirements of the particular organization. According to this theory, the only test of voting rules is whether they are conducive to the functioning of the organization. Questions of abstract justice or theoretical concepts of parliamentary rights

<sup>14</sup> Compare THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION (Cox & Jacobson eds., 1973). Professors Cox and Jacobson find a "common stratification of influence, with minor variations," in the organizations included in the study; the predominance of rich Western democracies is evident in all. *Id.* at 423.

<sup>15</sup> I. CLAUDE, SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 119 (4th ed. 1971); C. ALEXANDROWICZ, WORLD ECONOMIC AGENCIES: LAW AND PRACTICE 277 (1962); W. KOO, *supra* note 7, at 8, 285. Compare Newcombe, West, & Newcombe, *Comparison of Weighted Voting Formulas for the United Nations*, 23 WORLD POL. 452 (1971): "[T]he main criterion in evaluating a weighted-voting formula is *acceptability*, not either abstract justice or theoretical reasoning."



are irrelevant. Rather, one should evaluate each rule of voting procedure by the effects that it is likely to have on the organization's ability to accomplish its specific goals. (The goals themselves, of course, may involve important rights or elements of justice.) Such a pragmatic approach to evaluating voting procedures was foreign to 19th-century theorists, who analyzed the rights and duties of nations using more abstract theories borrowed from natural law (such as the theory of individual equality).

### I. DEVELOPMENT OF MAJORITY RULE

The idea that nations acting in concert could make decisions by majority vote was once alien to the conduct of international relations. But as democratic principles became firmly established in national political systems during the 19th century, majority rule, like other rules of voting that were transplanted from the domestic to the international sphere, began to erode the dogmatic belief that all international decisions had to be made unanimously.

The borrowing of international voting rules from domestic experience is characteristic, and probably logical, since the experience of most world leaders is first formed in their respective national arenas. At the same time, however, this tendency to look to other experience as a basis for designing a completely new form of government—the international organization, which is largely a product of the past one hundred years—has done much to confuse the voting issue:

[M]uch of the thinking about the international voting question has rested upon assumptions borrowed from outside, rather than upon principles developed with specific reference to the requirements of international organization. Thus, the equalitarianism of traditional international law, the majoritarianism of democratic philosophy, and the elitism of European great power diplomacy have been transferred to the sphere of international organization to serve as competing elements in shaping the approach to international decision-making.<sup>16</sup>

The above quote is a correct, if somewhat broad, statement of the genesis of the three basic types of voting in international organizations: equal voting on the basis of unanimity ("equalitarianism"), majority voting ("majoritarianism"), and weighted voting ("elitism").

Under traditional international law, as exemplified by early diplomatic conferences, two basic truths controlled the question of voting: every state had an equal voice in international proceedings (the doctrine of sovereign equality of states), and no state could be bound without its consent (the rule of unanimity). These rules were bound together, and were extensions of the general principle of the state's sovereign immunity from externally imposed legislation.<sup>17</sup>

<sup>16</sup> I. CLAUDE, *supra* note 15, at 118.

<sup>17</sup> *Id.* at 119; W. KOO, *supra* note 7, at 4; see also P. JACOB, A. ATHERTON, & A. WALLENSTEIN, *THE DYNAMICS OF INTERNATIONAL ORGANIZATION* 27 (rev. ed. 1972) [hereinafter cited as P. JACOB]; C. RICHES, *MAJORITY RULE IN INTERNATIONAL ORGANIZATION: A STUDY OF THE TREND FROM UNANIMITY TO MAJORITY DECISION* 12, 245 (1940).

The doctrine of sovereign equality was a direct, if not necessarily logical, extension of principles of natural law that had been developed to explain man's relationships with man; these principles, including the principle of individual equality, were simply transferred to explain states' relationships with other states.<sup>18</sup> If all men were created equal—a basic notion of the democratic revolutions of the 18th and 19th centuries—then all nations must be created equal. Such a conclusion followed from man's tendency to attribute personal characteristics to his political associations,<sup>19</sup> a tendency that continues even today.<sup>20</sup>

It is important to note, however, that the doctrine of sovereign equality became established at a time when states had limited relations with each other, and few international organizations existed. Indeed, there were relatively few recognizably "international" problems, especially of an economic nature. International relations were conducted in conferences, either bilateral or multilateral, and any state could block a decision—whether to adopt a treaty or to carry out any action—simply by refusing to vote in favor of it. Few immediate crises developed if no decision was made.<sup>21</sup>

Furthermore, when states did recognize that international solutions were required, sovereign equality usually succumbed to the opposite principle of international relations: great power diplomacy. As early as the Treaty of Paris, in 1814, the four nations victorious over Napoleon (Britain, Russia, Prussia, and Austria) established their superior decisionmaking authority over the smaller states and principalities invited to attend the Congress of Vienna, and these four essentially dictated the peace that followed and disposed of the conquered territories.<sup>22</sup>

Since the late 19th century, despite inroads on the doctrine that have coincided generally with the rise of international organizations, sovereign equality has been the generally applied rule of voting, especially in political organizations.<sup>23</sup> The drafters of the Covenant of the League of Nations adhered to the principle of sovereign equality by adopting a one-nation, one-vote system, but gave a nod to great power diplomacy by assigning permanent seats on the League's Council (a representative body smaller than the Assembly) to the major powers. While the small states could outvote

<sup>18</sup> R. KLEIN, *SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA* 1-4, 54 *et seq.* (1974); E. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 334 (1920).

<sup>19</sup> See R. KLEIN, *supra* note 18, at 1-4, 166.

<sup>20</sup> See, e.g., M'Bow, *supra* note 9, at 895:

[W]e regard it as only natural at the national level that, in accordance with the principle "one man, one vote," the richest individual should have the same entitlement to vote in elections as the poorest of the poor. . . . This fundamental principle of the equality of citizens before the law, which is basic to modern democracy, has its equivalent in the principle of the sovereign equality of States, on which the international community of today is based. Those who sometimes advocate a different system—for example a weighted vote—ignore this reality.

<sup>21</sup> See B. Broms, *The Doctrine of Equality of States as Applied in International Organizations* 19 (Diss., University of Helsinki, 1959).

<sup>22</sup> R. KLEIN, *supra* note 18, at 10 *et seq.*

<sup>23</sup> This is especially true in the inter-American system, according to Klein; *id.* at 39 *et seq.*, 102-08, and 140 *et seq.*

the powers on the Council, most decisions had to be unanimous, which rendered the majorities academic.<sup>24</sup> In the United Nations Charter, the rule of unanimity was practically abandoned, but the doctrine of sovereign equality remained central,<sup>25</sup> with the important exception of the unanimity requirement for the five permanent members of the Security Council. Aside from some specialized agencies, which are discussed below, the UN system operates generally on the basis of one nation, one vote, a rule that has been frequently criticized by commentators from large and powerful states.<sup>26</sup>

Legal scholars have pointed out the theoretical weaknesses of the doctrine of sovereign equality. Hans Kelsen stated even before the UN Charter was adopted that "equality does not mean equality of duties and rights, but rather equality of capacity for duties and rights. Equality is the principle that *under the same conditions* States have the same duties and the same rights."<sup>27</sup> To put it another way, one must distinguish between *equality before the law* (i.e., the law will be applied to all states, irrespective of their relative size or power, a notion consistent with unequal voting power, and *equality of participation and responsibilities* (all states participate equally in establishing the law, through equal voting, and share the benefits and burdens of that law, even though they are in fact unequal in size, wealth, etc.). The first principle is a basic element of a just international system; the second principle is not necessarily just or practical.<sup>28</sup>

Until the founding of the UN system, the doctrine of sovereign equality was applied in tandem with the principle that no international decision could be imposed against the will of any state, since to do so would violate that

<sup>24</sup> *Id.* at 69 *et. seq.*

<sup>25</sup> The preamble to the UN Charter recognizes the "equal rights of men and women and of nations large and small." Article 2(1) reads: "The Organization is based on the principle of the sovereign equality of all its Members."

<sup>26</sup> See G. CLARK & L. SOHN, *WORLD PEACE THROUGH WORLD LAW: TWO ALTERNATIVE PLANS* (3d ed. 1966); Barrett & Newcombe, *Weighted Voting in International Organizations*, PEACE RESEARCH REVIEWS, April 1968; Manno, *Selective Weighted Voting in the U.N. General Assembly: Rationale and Methods*, 20 INT'L ORG. 37 (1966); Newcombe, *et al.*, *supra* note 15, and works cited therein.

<sup>27</sup> Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 209 (1944). "Members of the society of nations may be presumed to be equal as a general principle; but when it appears that in certain aspects of legal equality they are organically unequal, it would seem that the law must either take cognizance of the facts or else admit its unreality." *Id.* at 211-12.

<sup>28</sup> In democratic societies, individual rights and duties, including human equality, rate highest priority, just as individuals form the basic decisionmaking units of society. In the international sphere, the basic decisionmaking unit, the nation, is a group of individuals, and to ensure human equality, one must accord more weight to a large group (populous nation) than to a small one. Thus, "the principle of human equality leads automatically and logically to the principle of state inequality." Barrett & Newcombe, *supra* note 26, at 5. Of course, this does not explain why states with similar populations should exercise different voting power because one is wealthier, or stronger, or more productive, or a greater consumer, than the other. The reason for such distinctions has nothing to do with philosophical values; rather, it lies in the gradual realization—a realization that coincided with the growth and increasing influence of international organizations—that such distinctions were necessary because without them world government would not function. Compare R. KLEIN, *supra* note 18, at p. 7; E. DICKINSON, *supra* note 18, at 334-35.

state's sovereignty. From this general principle, which we still recognize as a basic rule of international obligation, came the related rule that no international decision could be made without the unanimous assent of all states participating in the process: the rule of unanimity.

As with the rule of sovereign equality, the rule of unanimity was established prior to the growth of effective international organizations. The rule was still tenaciously defended by the time of the establishment of the League of Nations, which preserved the rule of unanimity for most decisions.<sup>29</sup> The United Nations Organization abandoned the rule of unanimity in most instances but retained in Article 27(3) of the Charter the controversial veto power that applies to nonprocedural matters before the Security Council.

The disadvantage of the rule of unanimity, of course, is that international agreement is impossible to obtain when any single participant can block a decision; to achieve unanimous consent, the strength of a decision must be diluted so as to please everyone. Either result is unsatisfactory for an effectively functioning international organization that is charged with making and implementing decisions to meet urgent, practical problems. Consequently, the rule of unanimity has gradually been abandoned in favor of majority rule in such organizations.<sup>30</sup> Indeed, the rule of unanimity is no longer applied as a voting procedure even in conferences for the codification of international law.<sup>31</sup>

The initial departures from the rules of unanimity and sovereign equality appeared in the international technical unions established during the 19th and early 20th centuries. Technological advances in communications and industry had forced states into increasing contact with each other, especially as they began to legislate on a broad range of issues such as health, sanitation, communications, and navigation. In response, these states established a

<sup>29</sup> Broms, *supra* note 21, at 80-81; C. RICHES, *supra* note 17, at 19 *et. seq.* In the course of drafting the Covenant of the League of Nations, the British delegate, Lord Robert Cecil, declared that "all international decisions must by the nature of things be unanimous." *Id.* at 11.

<sup>30</sup> The rule of unanimity is still applied, either exclusively or partially, in a number of organizations of limited membership, including the North Atlantic Treaty Organization (NATO) (North Atlantic Treaty, Art. 10); the League of Arab States (Pact of the League of Arab States, Arts. 6 and 7); the Council for Mutual Economic Assistance (COMECON) (COMECON Charter, Art. IV(3)); the European Free Trade Association (EFTA) (EFTA Convention, Art. 32(5)); the Council of Europe (Statute of the Council of Europe, Art. 20(a)); and the Organization for Economic Cooperation and Development (OECD) (OECD Convention, Art. 6). See also J. PLANO & R. RIGGS, *FORGING WORLD ORDER: THE POLITICS OF INTERNATIONAL ORGANIZATION* 138-39 (1967); H. SCHERMERS, *supra* note 11, at 328.

A vestige of the rule of unanimity remains in many economic organizations, where decisions are made by consensus, without resort to a formal vote. See text accompanying notes 95-100 *infra*. Consensus is a type of informal unanimity since, a single dissenter can force a showdown vote. However, in comparison with the formal rule of unanimity, consensus is not obstructive in international organizations because members agree on the general and/or specific goals of the organization, and the formal voting rules are structured so as to protect vital interests of members in case consensus breaks down and a formal vote is called for.

<sup>31</sup> See Sohn, *Voting Procedures in U.N. Conferences for the Codification of International Law*, 69 AJIL 310 (1975); Vignes, *Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?*, 69 AJIL 119 (1975).

number of international organizations with limited authority to deal with the problems that constantly arose in those narrow, technical areas.

These organizations found the rules of unanimity and sovereign equality seriously limited as norms for effective international action. Under the two rules, any country could block a decision, no matter how small that country was, or how unaffected it might be by the particular decision. The large, economically powerful states, who were often the most involved in the activities to be regulated, could demand (and justify their need for) greater voting power than other states. With the establishment of the International Telegraphic Union (ITU) in 1865, liberal voting procedures, including majority rule and inequality in voting, became increasingly common in task-oriented, technical agencies. By 1914, several organizations, including the ITU, the Universal Postal Union (UPU), the International Wine Office, the International Office of Chemistry, and the International Institute of Agriculture, had deviated from the strict one-nation, one-vote rule.<sup>32</sup>

There are several other reasons why the trend to majority rule began with administrative and technical unions. First, these early organizations were limited in authority and scope to narrow, technical matters that did not intrude into questions of high national policy. Thus, states felt less need to protect their interests through a veto power. Second, since the subject matter was usually technical, the representatives to such intergovernmental organizations were often technical experts rather than career diplomats. These experts were more willing to accept majority decisions based on relatively objective technical standards than were diplomats, who are schooled in political matters.<sup>33</sup> As a consequence, functional organizations embraced practical rules of voting that resulted in workable decisions, with little regard for the theories of natural law or justice that traditionally concerned diplomats.

After the First World War, majority rule and weighted voting spread slowly to other new technical unions.<sup>34</sup> In the economic and social spheres, however—matters of prime interest to governments—equality and unanimity were more reluctantly abandoned. The Covenant of the League of Nations retained a somewhat relaxed rule of unanimity,<sup>35</sup> although the

<sup>32</sup> McIntyre, *supra* note 9, at 485–86; C. RICHES, *supra* note 17, at 245–90; Broms, *supra* note 21, at 277–78. See also D. W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 357–58 (3d ed. 1975); Jenks, *Unanimity, The Veto, Weighted Voting, Special and Simple Majorities, and Consensus as Modes of Decision in International Organizations*, *CAMBRIDGE ESSAYS IN INTERNATIONAL LAW* 48, 52 (1965). The earliest international organization to employ weighted voting appears to have been the Central Commission for the Navigation of the Rhine (established in 1804), which used weighted voting in choosing its chief inspector. C. RICHES, *supra* note 17, at 167–70. Some of these organizations, such as the International Institute of Agriculture, divided members into several classes, according to financial contribution; states were at liberty to choose their class and level of contribution, and thus their level of voting power. *Id.* at 50–58; McIntyre, *supra* note 9, at 486.

<sup>33</sup> See C. RICHES, *supra* note 17, at 104–05, 234–35.

<sup>34</sup> *Id.* at 104–05, 228–29.

<sup>35</sup> As established, the League of Nations was to decide important questions according to unanimity. In practice, decisions were increasingly made according to procedures allowing majority rule. *Id.* at 19–21.

International Labor Organization (ILO), established at the same time, abandoned the rule in favor of majority voting on recommendations. The ILO did retain the one-nation, one-vote rule, but it recognized the need to accommodate inequalities in power, and offered automatic representation on its Council to the industrial states of chief importance.<sup>36</sup> However, the ILO was not given authority to make decisions binding on member states except for internal rules of procedure and management. Inter-American institutions generally retained the one-nation, one-vote principle, ignoring the reality of repeated intervention by the United States in the hemisphere. Weighted, majority voting was introduced in international commodity organizations (*e.g.*, the Permanent Sugar Council, established in 1902); like the technical unions, they carried out narrow functions and possessed easily definable criteria for the relative weighting of votes: volume of exports and imports.<sup>37</sup>

## II. THE BRETTON WOODS MODEL

The modern trend, dating largely since World War II, has been away from unanimity and equality in voting in international economic organizations, and toward weighted voting structures. After the war, the Western Allies were intent upon restoring international order by creating new institutions. Western leaders noted the absence of economic agencies in the League of Nations structure and they theorized that economic imbalances had contributed greatly to the climate of world conflict. It was time to experiment with new organizations and with new voting structures that would help ensure their success.

The earliest and most important discussion of weighted voting during this period occurred in 1944 at the negotiation of the Bretton Woods Agreements establishing the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank). These two economic organizations were central to Western plans for building a secure peace, and the drafters of the agreements entertained few thoughts about abstract principles of sovereign equality; they were more concerned with creating institutions in which the Allied powers could serve as monitors of the international economy.

The IMF and World Bank voting systems are virtually identical (except for the greater use of special majorities in the IMF agreement), and they have served as models for later international financial institutions. In both institutions, 250 votes<sup>38</sup> are allocated to each member country ("basic votes"), and each one of the remaining votes is distributed for each \$100,000 share

<sup>36</sup> ILO CONST., Art. 7.

<sup>37</sup> C. RICHES, *supra* note 17, at 149.

<sup>38</sup> By a resolution dated June 20, 1979, the Executive Directors of the World Bank voted, in conjunction with a general increase in the bank's capital, to increase to 500 the number of basic votes available to member states. None of the new shares distributed as basic shares will require newly paid-in capital.

(World Bank) or 100,000 SDR quota (IMF) in the organization.<sup>39</sup> At present, developed countries control approximately 63.8 percent of the voting power in the Bank, and 60.7 percent in the Fund.<sup>40</sup> Each institution has a Board of Governors, which meets annually, and a smaller Board of Executive Directors, which is continuously in session; the latter makes all operational, and many policy, decisions in both agencies. The same weighted vote applies in each organ.

The World Bank/IMF model strongly influenced the voting structures adopted for the three regional development banks: the Inter-American Development Bank (IDB) (established 1959), the Asian Development Bank (ADB) (established 1965), and the African Development Bank (AfDB) (established 1963). Although comparison of the three banks reveals several important differences (for instance, unlike the IDB and ADB, the AfDB has excluded developed countries from membership<sup>41</sup>), they all adopted

<sup>39</sup> International Bank for Reconstruction and Development [hereinafter cited as World Bank], Articles of Agreement, Art. V, sec. 3. IMF Articles of Agreement, Art. XIII, sec. 5.

The voting structures of World Bank affiliates, the International Finance Corporation (IFC) and the International Development Association (IDA), are similar to the World Bank structure. IFC Articles of Agreement, Art. IV, sec. 3; IDA Articles of Agreement, Art. VI, sec. 3 (500 basic votes plus one vote for each \$5,000 subscription).

In contrast to several early international organizations, which had allowed members to choose their levels of contributions and, thus, determine their relative voting power, the IMF and World Bank made relative voting power a function of relative economic strength. The IMF developed a mathematical formula based on several factors to determine relative economic strength, and then simply allocated quotas according to this formula. See McIntyre, *supra* note 9, at 484. The World Bank, whose members must belong to the IMF, uses the IMF weighting system to determine relative contributions to its capital and, thus, relative voting power.

<sup>40</sup> World Bank, 1979 Annual Report 160-61; IMF, Annual Report 1978, at 142-44.

<sup>41</sup> This exclusion was the result of a conscious decision by the African countries to escape the political influence and interference of the developed countries. J. WHITE, *supra* note 8, at 91-96, 140-50. The AfDB has recently begun negotiations to admit nonregional developed countries for the first time. *Foreign Assistance and Related Programs, Appropriations for 1980: Hearings before the Subcomm. on Foreign Operations and Related Programs of the House Comm. on Appropriations*, 96th Cong., 1st Sess., at 172 (1979).

The lack of developed country membership adversely affected the AfDB's ability to raise private capital, either through bond sales or private placements. As a result, the AfDB established in 1973 the African Development Fund with developed country membership, as a vehicle for increased developed country contributions to the AfDB aid program. According to the Fund Agreement, the AfDB members received 1,000 votes, or half of the total votes in the fund, and the developed countries ("State participants") receive the other 1,000 votes. Each group elects six members to the Board of Directors. The developed countries' votes are allocated in proportion to each country's contribution to the fund. However, in a departure from the common system of weighted voting in international financial institutions, the six African directors of the fund (elected from among the nine directors of the AfDB) share equal voting power (166 2/3 votes per director). African Development Fund, Articles of Agreement, 510 UNTS 3, Art. 29. See also U.S. SEN. REP. No. 673, 94th Cong., 2d Sess., at 22-23 (1976). The acceptance of such a system of voting, which tends to minimize the importance of relative financial contributions, may be attributed to two factors: the relatively minor contribution and interest of the developed countries in a fund that will not greatly affect their economies and aid programs, and the even more minor contribution of the African members, none of whom were called upon to contribute funds separate from their existing contributions to the AfDB.

TABLE 1

PERCENTAGE OF TOTAL VOTES HELD BY DEVELOPED AND DEVELOPING COUNTRIES

	IDB*	ADB**	AfDB	African Fund
Developed countries	46.5	53.6	—	50
Developing countries	53.5	46.5	100	50

SOURCE: Inter-American Development Bank, Asian Development Bank, Annual Reports (1978). The figures for the African Development Bank and the African Fund are established in their constitutions.

\* In 1976, the IDB began to admit nonregional developed country members (there are now 13 such members). In negotiations to admit nonregional members, the regional developing countries refused to accept anything less than majority voting power. Consequently, under Article VIII, section 4(b) of the amended IDB Agreement, the voting power of the regional developing country members can never be less than 53.5%. The voting power of the United States can never be less than 34.5%, a strong minority that gives the United States veto power over decisions concerning the soft loan Fund for Special Operations (Art. IV, sec. 9(b)), increases in authorized capital (Art. II, sec. 2(e)), and amendments to the articles (Art. XII). Since the Canadian share is fixed at 4% by Article VIII, a maximum of 8% of the voting power is reserved for nonregional members.

\*\* Article V, section 1 of the ADB Agreement states that regional members must hold at least 60% of the capital stock. Several important developed countries in the region, Japan, Australia, and New Zealand, hold a significant portion of the total capital stock: 29% as of February 1978.

the basic vote/weighted vote approach, with the latter being distributed according to subscriptions of shares.<sup>42</sup> The percentage of basic votes, however, differs greatly among the banks. In the AfDB, the most egalitarian, approximately 45 percent of the votes (625 votes per member) are distributed equally as basic votes (AfDB Agreement, Article 35(1)). By contrast, the IDB is the least egalitarian in this respect, according only 3.2 percent of the total votes as basic votes (135 votes per member).<sup>43</sup> The drafters of the ADB, facing such different precedents, chose a compromise figure of 20 percent of the total vote to be equally distributed.<sup>44</sup>

Differences also exist in the degree of developed country control. The approximate percentages of developed country voting power in the three banks, and in the African Development Fund,<sup>45</sup> are shown in table 1. These differences in developed country control coincide with common perceptions of the extent to which each bank has developed policies independent of those traditionally followed by multilateral financial institutions dominated by developed countries.<sup>46</sup>

<sup>42</sup> On the regional development banks generally, see J. WHITE, *supra* note 8, *passim*; J. SYZ, *INTERNATIONAL DEVELOPMENT BANKS* (1974); P.-W. HUANG, JR., *THE ASIAN DEVELOPMENT BANK: DIPLOMACY AND DEVELOPMENT IN ASIA* (1975).

<sup>43</sup> J. WHITE, *supra* note 8, at 54. See also J. SYZ, *supra* note 42, at 34.

<sup>44</sup> Unlike the other agreements, which accord a set number of basic votes to each member, the ADB Agreement refers to a percentage figure, 20%. 571 UNTS 123, Art. 33(1)(i). Thus, even as capital subscriptions increase, the basic vote will increase.

<sup>45</sup> See note 41 *supra*.

<sup>46</sup> Thus, the ADB most closely resembles the World Bank in its lending operations and policies. J. SYZ, *supra* note 42, at 27.



*International Trade Agencies*

*The General Agreement on Tariffs and Trade.* Also crucial to postwar plans for regulating the world economy was the creation of an agency to control restrictive and unfair trade practices, and to help bring about the reduction of high tariffs adjusted during the 1930's. The ill-fated International Trade Organization (ITO), which would have undertaken this task, succumbed to the refusal of the United States and other Western powers to subject national trade policies to the control of an organization whose voting structure was not weighted in their favor, as in the Bretton Woods Agreements.<sup>47</sup> However, an important substantive part of the ITO Charter, the General Agreement on Tariffs and Trade (GATT), did survive to become a unique international economic organization. The GATT was never intended to develop as an organization at all; it was drafted and applied as an interim measure, until the ITO Charter entered into force.<sup>48</sup> As a result, the drafters gave scant attention in the GATT articles to organizational structure, and the simple, very general rules for decision-making reflect this: each contracting party receives one vote, and, with certain exceptions, all decisions are made by a simple majority of the votes cast.<sup>49</sup> The rules for amendment are particularly unusual in comparison with those of modern economic organizations: unanimity is required to amend the basic GATT rules contained in part I of the Agreement;<sup>50</sup> and while a two-thirds majority may amend other articles, they only have effect in respect of the contracting parties that accept the amendments.<sup>51</sup>

In short, the GATT voting rules are clear throwbacks to the principles of sovereign equality and unanimity.<sup>52</sup> Yet there is little danger that these rules will lead to the imposition by the developing countries, through majority vote, of new restrictions unfavorable to developed country members. The GATT is less a regulatory body than a negotiating body. Nations carefully guard their independence; they even negotiate independently in the GATT-sponsored multilateral trade negotiations. Consequently, important trade concessions, and the threat of their retaliatory removal, are more important than votes, which explains why the industrialized states maintain superior influence in the organization.<sup>53</sup> Furthermore, withdrawal

<sup>47</sup> B. GOSOVIC, UNCTAD: CONFLICT AND COMPROMISE 53, 57 (1972). On the ITO generally, see J. JACKSON, *supra* note 1, at 35; K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 10 (1970).

<sup>48</sup> See generally J. JACKSON, *supra* note 1, at 49-53.

<sup>49</sup> General Agreement on Tariffs and Trade, Art. XXV(3) and (4). Most decisions are taken by the Contracting Parties, *i.e.*, the GATT members acting in general assembly. In 1959, the Contracting Parties established an executive body, the GATT Council, to deal with the increasing number of trade decisions without having to convene a meeting of all contracting parties. The voting procedures of the Council mirror those of the Contracting Parties: all votes are counted equally, and all decisions require the same majority required for action by the Contracting Parties. J. JACKSON, *supra* note 1, at 154 *et. seq.*

<sup>50</sup> These include *Article I* (most-favored-nation treatment); and *Article II* (and related tariff schedules), which embodies the GATT system of bound tariffs.

<sup>51</sup> Art. XXX.

<sup>52</sup> J. JACKSON, *supra* note 1, at 73, 81.

<sup>53</sup> *Id.* at 669.

from the GATT could be accomplished swiftly and easily if a country seriously objected to the trend of GATT decisions. Cooperative agreement, therefore, is generally recognized by the contracting parties as more important than confrontation.<sup>54</sup>

*The UN Conference on Trade and Development.* Despite its one-nation, one-vote system, the GATT remains an organization dominated by those developed countries that have sizable markets and efficient export industries, and thus carry the most bargaining power in the trade negotiation process. Recognizing this situation, the developing countries succeeded in establishing the United Nations Conference on Trade and Development in 1964. UNCTAD was to be an alternative to the existing world economic agencies, especially the GATT, which were seen as unresponsive to the problems of developing countries.<sup>55</sup>

UNCTAD, legally a subsidiary organ of the General Assembly of the United Nations, is perceived as a developing country institution. Its voting structure, based on sovereign equality, heavily favors the developing countries, which make up approximately 75 percent of the membership.<sup>56</sup> The highest deliberative body in UNCTAD is the Conference, which convenes every 4 years at a different location. Each member has one vote, and all substantive decisions require the same two-thirds majority of the representatives present and voting.<sup>57</sup>

Two outstanding features of its voting structure have helped to shape UNCTAD. The first of these, bloc voting, has had a profound effect on developing country attitudes toward voting in more recently established international organizations. UNCTAD was the first international economic organization to institutionalize the lobbying powers of the developing countries in a bloc voting system. Formal votes only take place after each bloc—the Group of 77 (LDC Groups A and C), the Group B (developed, market economy) countries, and the Group D (socialist) countries—has worked out an agreed, common position.<sup>58</sup> When a formal vote is finally taken, it is rare that a developing country will cast its vote against the agreed position of the Group of 77. Owing to their large majority in the UNCTAD Conference and in the Trade and Development Board, the developing countries, by voting together, can maintain significant pressure on the developed countries.

<sup>54</sup> *Id.* at 123, 126–28. See also J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 411 (1977).

<sup>55</sup> B. GOSOVIC, *supra* note 47, at 3–27.

<sup>56</sup> UNCTAD now has 154 members: 29 developed countries, 9 socialist countries, and 116 developing countries.

<sup>57</sup> Procedural matters are subject to a simple majority vote. See paragraph 24 of the UNCTAD Charter, contained in UN Doc. A/RES/1995 (XIX) 1964.

Day-to-day operations are conducted by an executive body, the Trade and Development Board, which consists of 68 members elected at each conference. A gentleman's agreement assures that the largest states are always represented on the board and on UNCTAD's substantive committees. Nye, *UNCTAD: Poor Nations' Pressure Group*, in Cox & Jacobson, *supra* note 14, at 340. All decisions of the board are by a simple majority.

<sup>58</sup> For a detailed description of bloc voting, see Nye, *supra* note 57, at 355–57.

The developing countries realized that UNCTAD could have little effect on world trade and economic matters without the support of the developed countries. Therefore, UNCTAD's drafters established formal conciliation procedures that were intended to soften the impact of a voting system that heavily favors the developing countries.<sup>59</sup> The procedures require the appointment of a conciliation committee that tries to arrive at an acceptable common position prior to a vote. In fact, these formal procedures have never been used. Instead, UNCTAD has adopted a more informal method of lengthy negotiations, or consultations, to achieve consensus before taking a vote on any issue. Each group meets to work out a common position, and then negotiates these positions with the other groups.<sup>60</sup>

Voting is relatively rare in UNCTAD. UNCTAD resolutions have no binding force even on the assenting states, so little concrete advantage is gained by adopting a resolution that has been rejected by the most economically powerful nations. Instead, the Group of 77 tries to resolve disputes by consensus<sup>61</sup> and is generally successful. Most UNCTAD resolutions have been adopted by consensus based on mutual concessions or artfully designed equivocation.

*International Commodity Agreements.* The major international commodity agreements also date from the post-World War II period, although sporadic attempts to organize international commodity trades can be found as early as the Permanent Sugar Commission, established by the Brussels Convention of March 5, 1902. The voting structures of the principal commodity agreements are very similar.<sup>62</sup> They attempt to unite consumer (importer) and producer (exporter) interests in order to control fluctuations in the price and supply of commodities. They are generally of limited duration (usually 3 to 5 years), at the end of which the agreement is renegotiated and renewed. The method of controlling price and supply differs from agreement to agreement: some authorize the use of buffer stocks (International Tin Agreement), others use export quotas (1976 International Coffee Agreement), and still others provide merely for consultation on matters of price and supply (International Wheat Agreement, International Sugar Agreement).

Each agreement provides for an institutional structure (a council, and in some cases, an executive board) that is in charge of administering the agreement. The voting structures of the agreements are strikingly similar,

<sup>59</sup> B. GOSOVIC, *supra* note 47, at 56. See also H. SCHERMERS, *supra* note 11, at 326-27; Nye, *supra* note 57, at 336.

<sup>60</sup> B. GOSOVIC, *supra* note 47, at 319, 324-26.

<sup>61</sup> *Id.* at 207. H. SCHERMERS, *supra* note 11, at 327.

<sup>62</sup> This article focuses on the four oldest, and most active, commodity schemes. The voting structures of other commodity organizations closely resemble those described in the text. International cartel agreements, such as OPEC, have only producing countries as members and are not considered in detail in this study. On international commodity agreements generally, see P. REYNOLDS, *INTERNATIONAL COMMODITY AGREEMENTS AND THE COMMON FUND* (1978); A. LAW, *INTERNATIONAL COMMODITY AGREEMENTS* (1975); J. ROWE, *PRIMARY COMMODITIES IN INTERNATIONAL TRADE* (1965); Comment, *United States and International Commodity Accords: Cocoa, Coffee, Tin, Sugar and Grain*, 9 L. & POL'Y IN INT'L BUS. 553 (1977).

all having been adapted from the first International Wheat Agreement. They are characterized by group voting: decisions require either a simple or special majority in *each group* (exporting and importing countries) before becoming effective. There is an equal distribution of votes to exporting and to importing countries (one thousand votes each), and a weighted distribution of votes, according to the pro rata share of exports or imports, within each group. Under all the agreements, this weighting of votes gives a few large producers or consumers substantial veto power over decisions. For example, under the International Coffee Agreement, a decision to change the quota of exports may be favored by all the importing countries and by a majority of exporting countries, but could be vetoed by one country—Brazil, with 336 votes—since a two-thirds majority in *each group* is required for such a decision.<sup>63</sup>

This kind of voting structure, which requires the cooperation of the largest importing and exporting countries, reflects the economic reality underlying these agreements: a major exporter or importer that disagrees with any decision can use its market power to force other countries to abandon the supply and demand restrictions in the agreements.<sup>64</sup>

#### *Customs Unions and Free Trade Areas*

Among international economic organizations, the highest form of supranational government, the closest to assuming direct power over national economic affairs, has been the customs union. The European Economic Community (EEC) is the most successful example of this type of organization; other customs unions and free trade areas (the Central American Common Market [CACM], the Caribbean Common Market [Caricom], the European Free Trade Association [EFTA], the Latin American Free Trade Association [LAFTA], and the Andean Group) have achieved more limited success in removing trade barriers and rationalizing investment within their respective regions. Because these organizations purport to deal with economic matters of importance to their members through joint decisionmaking processes, it is interesting to consider in broad outline their respective voting systems.

The European Economic Community, like the European Coal and Steel Community which predated it, employs a weighted voting system in its principal organ, the Council of Ministers, which is composed of one representative from each member state.<sup>65</sup> In the Council, votes are accorded to the members in the manner shown in table 2.

Unlike the Bretton Woods Agreements, the Treaty of Rome does not

<sup>63</sup> International Coffee Agreement of 1976, Art. 15(1).

<sup>64</sup> M. VAN MEERHAEGHE, *INTERNATIONAL ECONOMIC INSTITUTIONS* 161 (2d ed. 1971).

<sup>65</sup> EEC Treaty, 294 UNTS 23, Art. 148. The Secretariat of the European Communities is managed by the European Commission, consisting of 14 commissioners chosen by the Council. The Commission does not employ weighted voting; however, its powers are largely recommendatory or concerned with implementation. On EEC voting, see R. LAUWAARS, *LAWFULNESS AND LEGAL FORCE OF COMMUNITY DECISIONS* 127 (1973); D. GREIG, *INTERNATIONAL LAW* 557 (1970); D. W. BOWETT, *supra* note 32, at 361–62; McIntyre, *supra* note 9, at 488.

TABLE 2

## DISTRIBUTION OF VOTES IN THE EEC COUNCIL OF MINISTERS

	Number of votes for each member*
West Germany, France, Italy, the United Kingdom	10
Belgium, Netherlands, Greece	5
Denmark, Ireland	3
Luxembourg	2
Total number of votes	63

\* The figures take account of the accession of Greece, which has been approved but not yet fully ratified.

indicate the criteria by which the weighted votes are assigned to members. Rather, different numbers of votes are simply assigned to different countries. While the allocation seems to reflect the relative size of populations, it is clear that other factors enter into the determination, since West Germany and France both receive the maximum number of ten votes, but the population of the former is about 15 percent larger than that of the latter. Nor does relative economic power explain the allocation: West Germany and Italy certainly are not equal in this category, the gross national product of the former being two and one-half times that of the latter.<sup>66</sup> Rather, the allocation of votes appears to result from a combination of population, economic power, historical precedent, and political reality. In practice, the careful allocation of votes is academic since almost all decisions of the Council are, by a common understanding, taken unanimously.<sup>67</sup>

Other attempts to form customs unions and free trade areas have not reached the level of supranationality achieved by the European Communities. This fact is reflected in their voting structures, which use equal-voting procedures but contain important safeguards such as the requirement of unanimity for important decisions.<sup>68</sup>

#### *New and Proposed International Economic Agencies*

As was pointed out at the beginning of this article, major controversies over voting control of international economic organizations have arisen during negotiations to establish new agencies. The solutions adopted for the following four agencies, the first two of which have not yet been estab-

<sup>66</sup> 1977 figures, from 1978 WORLD BANK ATLAS at 29.

<sup>67</sup> R. LAUWAARS, *supra* note 65, at 127.

<sup>68</sup> See, e.g., Convention Establishing the European Free Trade Association, Jan. 4, 1960, Art. 32(5) (decisions and recommendations of the Council by unanimous vote); Montevideo Treaty establishing the Latin American Free Trade Association, Feb. 18, 1960, Art. 38 (decisions by affirmative votes of two-thirds of contracting parties, provided no negative vote is cast).

lished, give an indication of present pressures for voting reform and of trends for the future.

*The Common Fund.* In hopes of improving their terms of trade by stabilizing world commodity prices, the developing countries have promoted the establishment of a new type of international financial institution, the Common Fund, to finance the creation of buffer stocks and other operations of international commodity organizations.<sup>69</sup> The Common Fund is proposed as a separate entity from the commodity organizations, with its own membership, institutional structure, and decisionmaking apparatus.

The Common Fund has not yet been established, in part because of disagreement over its size and role, but also because of disagreement over the proposed voting structure. Not surprisingly, the developed countries, who would be major contributors to the fund, wish to see a weighted voting system similar to the World Bank's; the developing countries, tired of minority roles in other organizations and eager to have control over an agency that will deal with markets they consider vital, continue to press for a decisive role.<sup>70</sup>

At its March 1979 meeting, the Common Fund negotiating group reached a tentative, broad agreement on the relative percentage of votes to be given to several blocs of countries: developed, market economy countries (42 percent), the Group of 77 (47 percent), socialist countries (8 percent), and the People's Republic of China (3 percent). The participants also agreed to use both basic votes and financial contributions to determine the weighted vote of each member.<sup>71</sup> It is interesting to note that the participants have begun to resolve the voting issue by reference to blocs, with more emphasis on the voting power of blocs than on that of individual countries. This kind of arrangement presupposes that countries will not vote individually, and that one need only be concerned about the voting power of the bloc.

*The International Seabed Authority.* The Third United Nations Conference on the Law of the Sea (UNCLOS III) first convened in Caracas in 1973 for the purpose of negotiating a comprehensive international convention. Eight sessions and an equal number of years later, a number of issues remain to be resolved before the final text of a law of the sea convention is concluded. One of the most sensitive issues concerns the institutional structure of a new international economic organization to be created by the convention, the International Seabed Authority. The Authority will be charged with reserving the deep seas for peaceful purposes and ensuring that the wealth of the ocean floors will benefit all countries. The developing countries view UNCLOS III as an opportunity to conform the law of the sea to their concepts of a "new international economic order."<sup>72</sup> In that

<sup>69</sup> On the Common Fund generally, see P. REYNOLDS, *supra* note 62, at 109 *et seq.*

<sup>70</sup> See *id.* at 893. See also Erb & Fisher, *U.S. Commodity Policy: What Response to Third World Initiatives?*, 9 L. & POL'Y IN INT'L BUS. 479, 500 (1977).

<sup>71</sup> See, *The Common Fund: Development, Mechanics and Forecasts*, 11 L. & POL. IN INT'L BUS. 1193, 1203 (1979).

<sup>72</sup> See Note, *Procedure and Techniques of Multinational Negotiation: The LOS III Model*, 17 VA. J. INT'L L. 217, 226 (1977); Adede, *Law of the Sea—Developing Countries' Contributions to the Development of the Institutional Arrangements for the International Sea-Bed Authority*, 4 BROOKLYN J. INT'L L. 1 (1977).

order, the influence of the developing countries in international organizations would surpass their economic power.

The lack of agreement between the developing and developed countries on voting control of the Authority emerged at the first session of UNCLOS III.<sup>73</sup> The developing countries proposed an Assembly with plenary powers, and a smaller Council (composed solely on the basis of equitable geographical distribution) with limited powers of implementation. Both organs would be subject to a one-nation, one-vote system that would virtually assure the developing countries control. The developed countries favored weighted voting in the Assembly and Council, with the latter exercising control over certain specific policy matters.<sup>74</sup>

By the seventh session of UNCLOS III (held in Geneva from March to May 1978) the developed countries had accepted the broad guidelines for the Assembly, including one nation, one vote, laid down by the developing countries, although agreement on the majorities required for decisions was still in doubt.<sup>75</sup> The principal voting issue, which still remains, has centered on the composition and voting procedures of the Council. Having conceded the one-nation, one-vote procedure in the Assembly, the developed countries have placed special importance on the functions and procedures of the Council, which they see as a potential "counterbalance to the Assembly and as the vehicle for protection of the designated [special] interests."<sup>76</sup>

As currently set forth in the revised Informal Composite Negotiating Text (ICNT) of the treaty, the negotiating groups have agreed on a 36-member Council with balanced representation, both geographically and for countries in specific categories of interest groups.<sup>77</sup> The ICNT provides for equal voting in the Council, but also, as a form of compromise, sets a high majority requirement (three-fourths) for "questions of substance."<sup>78</sup> The United States negotiators have shifted their attention from the weighted voting question to efforts to assure "adequate protection to the major economic interests"<sup>79</sup> by inserting a majority requirement that would give these interests at least a blocking power in the Council. Thus, in addition to the

<sup>73</sup> Even the procedures to be used in voting on the final text of the treaty were sources of dispute. See Note, *supra* note 72, at 233 *et. seq.* According to the author, the negotiation of issues in blocs of special interest groups—a variation on the UNCTAD theme—has tended to solidify group positions and delay agreement. *Id.* at 227–31.

<sup>74</sup> Adede, *supra* note 72, at 11–12. See also Knight, *Issues before the Third United Nations Conference on the Law of the Sea*, 34 LA. L. REV. 155, 171 (1974).

<sup>75</sup> See Remarks of U.S. Ambassador Elliott Richardson, Special Representative of the President for the Law of the Sea Conference, in *Law of the Sea Conference Status Report: Summer 1978: Hearing before the House Comm. on International Relations*, 95th Cong., 2d Sess. 5 (1978) [hereinafter cited as 1978 House Hearing]. See also Adede, *supra* note 72, at 39–40.

<sup>76</sup> Report of the U.S. Delegation to the Seventh Session of UNCLOS III, in 1978 House Hearing, *supra* note 75, at 33.

<sup>77</sup> See ICNT/Rev.1 Art. 161(1), reprinted in 18 ILM 686, 746 (1979). The groups are, in broad terms: technologically advanced (4 members); major importers of minerals to be exploited (4 members); major exporters of the same (4 members); developing countries with special interests (6 members); and 18 members selected according to equitable geographical distribution.

<sup>78</sup> ICNT/Rev.1 Art. 161(6) and (7).

<sup>79</sup> Remarks of Ambassador Richardson in 1978 House Hearing, *supra* note 75, at 5.

three-fourths overall majority, the United States proposed that concurrent simple majorities be required within each one of three of the four special categories, (a)–(d) (or, four of the total of five categories).<sup>80</sup> Since the developed countries can be expected to place at least two out of four representatives in categories (a) and (b), they could effectively block decisions in the Council. For this reason, the U.S. proposal was not acceptable to the developing countries, who continue to insist "that the acceptance of representation of special interests in the Council must not be coupled with any voting formula which might effectively give any group a veto power."<sup>81</sup> At this writing, the impasse over veto, or "blocking," power remains.<sup>82</sup>

Even with the safeguard of a high majority requirement, the developed countries would be reluctant to accept equal voting in the Council if it were not for several factors that mitigate the importance of voting. First, deep seabed mining will not become economically important until the end of this century, and the developed countries therefore have little at stake. Second, the industrialized countries have succeeded in including in the draft treaty provision for a parallel system of exploitation of the deep seabed by private parties, rather than the sole exploitation by the Authority desired by the developing countries;<sup>83</sup> if the latter accept this provision, the developed countries can hope to play a part in deep seabed mining notwithstanding their weakened voting role in the Authority. Third, deep seabed mining, unlike other economic areas, is especially difficult for the developed countries to characterize as justifying a voting system weighted in their favor. It is a new activity, there are no major producers and consumers (in contrast to the commodity agreements), and any system of weighting, such as relative volume of trade, would not necessarily be acceptable or workable in this new economic sector.

*International Fund for Agricultural Development.* The plan to establish a special fund for agricultural development was first proposed in a preparatory report to the World Food Conference in Rome, in November 1974. In that report, the World Food Conference Secretariat advocated the creation of a new institution that, among other things, would provide concessional lending for agricultural projects in developing countries.<sup>84</sup>

The voting structure of IFAD clearly reflects the influence of the OPEC nations, which, together with the developing countries, promoted the idea for the fund. From the outset, it was understood that the OPEC countries,

<sup>80</sup> Report of the U.S. Delegation to the Seventh Session of UNCLOS III, in *id.* at 33, 55.

<sup>81</sup> Adede, *supra* note 72, at 38.

<sup>82</sup> The eighth session of UNCLOS III saw little progress on the question of blocking power. The discussion has shifted to consideration of a two-thirds majority requirement, with a possible veto if a certain number of Council members cast negative votes. Developed countries favor blocking by a small coalition of negative votes, while developing countries would weaken the blocking power by requiring a larger coalition. Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 AJIL 1, 16 (1980).

<sup>83</sup> ICNT/Rev.1 Art. 153.

<sup>84</sup> The World Food Problem: Proposals for National and International Action, UN Doc. E/CONF.65/4, at 225–31 (1974). For a full discussion of the World Food Conference and its background, see T. WEISS & R. JORDAN, *supra* note 5.



as major contributors to IFAD, would share equal voting power with the developed and developing countries.<sup>85</sup> The IFAD Agreement therefore divides the total of 1800 votes into equal blocs, as follows: 600 votes to Category I (developed countries), 600 votes to Category II (OPEC countries), and 600 votes to Category III (developing countries).<sup>86</sup> Significantly, this allocation totally ignored the relative levels of contributions to IFAD.<sup>87</sup>

The allocation of votes within each bloc was less easily solved. The developing countries strongly supported equality of voting within all blocs; the potential donor countries, with several exceptions, favored a weighted system according to each member's level of contributions. Thanks to the discreet support of certain OPEC countries, a compromise was finally adopted that allowed each category to decide on its own distribution.<sup>88</sup> Not surprisingly, the OPEC and developed countries chose weighted voting systems, while the developing countries (whose contributions to IFAD were insignificant) chose to distribute all votes equally.<sup>89</sup>

Their success in choosing a weighted voting system for their category did not give the developed countries any significant power to oppose decisions favored by the other two blocs, which together hold two-thirds of the total voting power. Consequently, the developed countries took pains to negotiate the addition of two safeguards.

The first is a strict quorum requirement in both the IFAD Council and the Executive Board. A quorum for any meeting requires the presence not only of members holding two-thirds of the total votes (which could be fulfilled by the Category II and III countries alone) but also of members exercising one-half of the total votes in each of the three categories.<sup>90</sup> While

<sup>85</sup> T. WEISS & R. JORDAN, *supra* note 5, at 26, 59–61.

<sup>86</sup> Agreement Establishing the International Fund for Agricultural Development, adopted June 13, 1976, UN Doc. IFAD/1, Art. 6, secs. (3) and (6) (1977).

<sup>87</sup> Total pledges to IFAD were as follows (in U.S. dollars): Category I, \$567,316,017; Category II, \$435,500,000; and Category III, \$8,960,000. IFAD, *THE INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT* (1977).

<sup>88</sup> Report of the Meeting of Interested Countries on the Establishment of the International Fund for Agricultural Development on the Work of its Second Session, World Food Council Doc. IFAD/CRP.11, at 2 (November 10, 1975).

<sup>89</sup> IFAD Agreement, Art. 6, sec. 3(a). The voting systems chosen by the three categories, as contained in Schedule II to the IFAD Agreement, are as follows:

*Category I* (developed countries): 17.5% of the votes are distributed equally, the remaining 82.5% in direct proportion to each member's contributions to IFAD. The United States holds approximately one-third of the Category I votes, or 12% of the IFAD total votes. The United States, Canada, West Germany, and Japan hold a majority of the voting power in Category I.

*Category II* (OPEC): 25% of the 600 votes are equally distributed to the members of Category II. The remaining 75% is distributed in proportion to the contributions of each member. This system gives Iran and Saudi Arabia each slightly less than 25% of the total Category II votes, the other votes being relatively equally distributed among the remaining 10 OPEC countries.

*Category III* (developing countries): The 600 votes are distributed equally among all members of this category.

<sup>90</sup> IFAD Agreement, Art. 6, secs. 2(a) and 5(f).

this requirement gives the larger developed countries some assurance of a vetolike power, it is doubtful that such a blunt power will be used with any frequency.

The second additional feature negotiated by the developed countries was that special majorities be required for many major decisions. In the Governing Council (IFAD's most important policy-setting organ), 11 issues have been designated as needing special majorities of two-thirds or more, including the most important ones, such as lending policies, criteria and regulations regarding financing, and approval of the budget.<sup>91</sup> Thus, unified opposition by the developed countries is likely to block any decision, since such opposition could well prompt some of the OPEC or developing countries to vote with the developed countries.

*OPEC Special Fund.* In January 1976, the 13 member countries of OPEC signed an agreement establishing a new financial facility, the OPEC Special Fund. Its purpose is to recycle petrodollars to non-oil-producing developing nations, both through direct loans (interest free and long term) and through international development agencies. The fund, which is headquartered in Vienna, began operations almost immediately in 1976. At the outset, 12 of the 13 OPEC states (all but Ecuador) contributed a total of \$826 million. The two largest contributors, Iran and Saudi Arabia, each contributed about 25 percent of the total; Venezuela, the third largest contributor, contributed 14 percent.<sup>92</sup> Subsequent contributions, in the same rough proportion by country, have increased the holdings to \$4 billion.

The OPEC Special Fund is governed by a Governing Committee, composed of one representative from each contributing party. The voting structure of the Governing Committee reflects the developing countries' reluctance to abandon weighted voting when they themselves are important contributors to the institution. Each representative on the Governing Committee has one vote; however, decisions of the committee require at least a two-thirds majority of the members, provided that they represent parties contributing at least 70 percent of the total amount of the fund.<sup>93</sup> Thus, what appears at first glance to be a one-nation, one-vote procedure in fact is weighted in direct proportion to financial contribution. Certain matters (amendment, termination, and ratification of the agreement) require even higher majorities and percentages of contributions.<sup>94</sup> Clearly, the interests of the major contributors are protected through a veto or near veto power.

### III. RECOGNIZING INEQUALITY IN VOTING RULES

The survey of voting procedures just completed reveals a tendency away from equal voting in task-oriented economic agencies, and a recognition of the inequality of states as decisionmakers in these organizations. There

<sup>91</sup> IFAD Agreement, Arts. 3(3), 4(3), 6(2)(f), 6(8), 6(9), 6(10), 7(1)(3), 8(1), 9(2), 9(4), and 12(b).

<sup>92</sup> OPEC, Annual Review and Record 1976, at 56.

<sup>93</sup> Agreement Establishing the OPEC Special Fund, Jan. 28, 1976, Art. 5, sec. 5.08.

<sup>94</sup> *Id.*, Arts. 5, 7, 8, and 10.

is an even stronger tendency, however, towards decisionmaking by consensus. The explanation for both the formal rules of inequality and the practice of consensus can be found by examining the functions of these organizations.

For our purposes, international organizations may be generally classified in two categories, *recommendatory* bodies and *task-oriented* agencies,<sup>95</sup> which exhibit separate tendencies and distinct requirements in their voting procedures. Although some organizations combine features of both categories, usually one or the other predominates.

Recommendatory bodies place a premium on the wide participation of members in the decisionmaking process. Formal votes, when taken, are often taken for a political purpose (*e.g.*, to organize world opinion in favor of an idea or against a particular practice); they may attempt to set norms for states to follow, but they do not legally bind the organization or its members to carry out specific activities. The voting procedures of these organizations complement this function; they tend to be relatively simple, and decisionmaking outside of the formal voting procedures is rare. The UN General Assembly is the clearest example of a recommendatory organization. In the economic field, UNCTAD is a similar example: it possesses a relatively simple one-nation, one-vote system.

In contrast, task-oriented organizations often are empowered to commit the organization or its members to take specific action; they perform practical functions and must be concerned with the realistic implementation of their decisions. Consequently, these organizations are concerned with two sometimes opposing pressures: ensuring the support needed to implement decisions, and making decisions quickly and efficiently. The first pressure calls for formal voting procedures with built-in safeguards, such as special majorities and weighted voting, to ensure the support of the most influential members. Where states are most likely to surrender some autonomy to the international organization, one finds the highest incidence of voting safeguards, short of unanimity, to protect their interests.<sup>96</sup>

Paradoxically, the second pressure (efficiency) may compel disregard of the formal voting procedures, which emphasize conflict and jeopardize the ability of the organization to reach a consensus on the action to be taken. Various methods of majority voting may apply to these agencies, but in the interest of efficiency, the *de facto* decisionmaking responsibility is informally delegated to a small group of actors comprised of high-level bureaucrats and officials of the most influential members. Thus, in the World Bank, one of the most active task-oriented agencies, the statutory decisionmaking

<sup>95</sup> Different authors use different terms for the two categories. *See, e.g.*, W. Koo, *supra* note 7, at 5, 7 ("consultative" v. "action" agencies); Cox & Jacobson, *supra* note 14, at 5-6 ("forum" v. "service" organizations); Chung, *supra* note 8, *passim* ("political" v. "functionally oriented" organizations).

<sup>96</sup> In one study of 80 governmental organizations (including national, regional, and international organizations), the author found that those organizations which dispose of issues vital to their members are the most likely to have stringent voting requirements, weighted voting, and a high incidence of special majorities with high majority requirements. L. RANDOLPH, *THE FUNDAMENTAL LAWS OF GOVERNMENTAL ORGANIZATIONS* 121 (1971).

groups actually operate as "decision-legitimizing" rather than decision-formulating bodies; most effective decisions are formulated by the high-level managers and representatives of a few members.<sup>97</sup> This bypassing of formal procedures in the interests of efficiency is only possible if there is a high degree of goal consensus among members, since in most organizations a single dissenting member can force the organization to make a decision by formal vote, rather than by a "sense of the meeting."<sup>98</sup>

Even in task-oriented agencies that use a stringent voting system to protect minority members, majority rule will not work unless there exist a community of interests among the members and a general agreement on objectives. This point has been emphasized in a study of the voting structures of the World Bank and the ILO. The author asserts that where there is a high degree of goal consensus, a task-oriented leadership, and a relatively independent source of funds, most decisions can be made at the bureaucratic level, or by a few experts, without resort to formal voting procedures (the case of the World Bank).<sup>99</sup> The more narrow and technical the scope of the organization's activities, the more likely one is to find a high degree of goal consensus, because individual members' vital interests are not apt to be threatened.<sup>100</sup>

There are three basic methods by which organizations give effect to the inequality of states in their voting procedures: weighted voting, the use of special majorities, and selective representation on executive organs.

### *Weighted Voting*

The present system of international organizations shows a balance between use of the one-nation, one-vote system of recommendatory organizations, with heavy developing country majorities (UN General Assembly, UNCTAD), and a greater, although not exclusive, use in the task-oriented economic agencies of weighted or other voting systems that take account of the power of particular members.

Although only two of the United Nations specialized agencies, the IMF and the World Bank Group, have weighted voting structures, most international lending institutions outside the UN system use weighted voting procedures modeled after those established for the Bretton Woods agencies: that is, votes are weighted according to levels of contributions. These institutions include the three regional development banks and the recently established International Fund for Agricultural Development. The OPEC Special Fund adopted a unique weighted voting system, in which each member receives one vote; but decisions can only be taken with the approval of a specified majority of the members, who have also contributed the bulk

<sup>97</sup> Chung, *supra* note 8, at 222, 351. On the lack of formal voting in the IMF, see GOLD, *VOTING*, *supra* note 8, at 215; and Gold, *Structure*, *supra* note 8, at 11.

<sup>98</sup> See, e.g., sec. 10, By-Laws of the International Bank for Reconstruction and Development (as amended through July 8, 1974).

<sup>99</sup> Chung, *supra* note 8, at 369-72, 404-05.

<sup>100</sup> J. PLANO & R. RIGGS, *supra* note 30, at 139. See also Schachter, *Towards a Theory of International Obligation*, in Schwebel, *supra* note 8, at 12.

of the fund's capital. The European Economic Community Development Fund also employs a weighted voting system, in accordance with the rules of the EEC.<sup>101</sup>

As was pointed out earlier, the principal international commodity organizations use weighted voting procedures in which votes are allocated equally between producing and consuming states, and within each group the votes are allocated according to relative volumes of exports and imports. The voting system of the EEC's principal decisionmaking body is weighted according to population and economic power, but it is also strongly influenced by the political history of the particular region.

Of the organizations surveyed, only the GATT, UNCTAD, and the International Seabed Authority do not provide for weighted voting systems. (Certain free trade associations use equal voting but require unanimity for important decisions, an important safeguard.) In the case of the first two organizations, the reason appears to be largely that in neither organization do decisions of the governing body result directly in enforceable, concrete measures. Rather, the GATT is a negotiating forum. It sponsors specific agreements that are entered into independently by the member states, not because of any common vote of the contracting parties; hence the lack of concern over safeguards for larger trading nations.<sup>102</sup>

UNCTAD's one-nation, one-vote system favors the developing countries, which make up a large majority; this fact, coupled with a bloc voting system that emphasizes political cohesiveness of the several interest groups, leads at times to confrontation as well as negotiation. Consequently, UNCTAD's value lies in its use as a forum for developing country pressures, rather than as an important system for the negotiation of binding agreements.

If one reflects on the decisionmaking procedures just reviewed, apparent paradoxes appear. The most efficient agencies are the least democratic,<sup>103</sup> yet they are also the organizations that operate with the highest degree of

<sup>101</sup> P. JACOB, *supra* note 17, at 366.

The United Nations Development Program (UNDP) does not employ a weighted voting system, but instead guarantees disproportionate, but nevertheless minority, representation on its Governing Council to developed country members of the United Nations. The failure to provide for weighted voting may be one of the reasons the UNDP has had difficulty gaining financial support from developed countries for capital investment projects. D. W. BOWETT, *supra* note 32, at 58; Moulton, *On Concealed Dimensions of Third World Involvement in International Economic Organizations*, 32 INT'L ORG. 1019, 1033 (1978).

<sup>102</sup> In 1976, a panel of trade experts recommended important institutional reforms to the international trade system. They proposed the creation of a World Trade Organization (WTO), an umbrella organization that would promote the development of binding, substantive "subcodes" to be separately adhered to by WTO members. The panel recommended that the organization abandon the GATT rule of equality in favor of a weighted voting structure, but one weighted according to "non-power characteristics" (population, geographical balance) as well as "economic contribution and importance." ASIL, *RE-MAKING THE SYSTEM OF WORLD TRADE: A PROPOSAL FOR INSTITUTIONAL REFORM* 27 (Studies in Transnational Legal Policy No. 12, 1976).

<sup>103</sup> See E. LUARD, *INTERNATIONAL AGENCIES: THE EMERGING FRAMEWORK OF INTERDEPENDENCE* 318 (1977).

consensus, rarely making decisions by formal vote. The paradox is in part explainable by the fact that the binding decisions of most of these organizations do not impinge upon the vital interests of the majority of the members. Rather, they function in well-defined, limited areas and only rarely affect individual members in a drastic way.<sup>104</sup> Within the defined areas, the international economic agencies have developed arguably objective economic criteria for making decisions, which helps to reduce the scope of possible conflict. Finally, many of these organizations are strongly influenced by highly competent secretariats, which, in collecting and transmitting information to the governing body for decision, succeed in limiting the scope of decision to options that the secretariat itself finds acceptable. Because the secretariat has studied the issue at hand more thoroughly than any of the individual decisionmakers, its assumption of this role is usually acceptable to the members.<sup>105</sup>

*Prerequisites to Weighted Voting.* Two predominant questions may be asked in determining whether weighted voting is "proper" for a particular organization: (1) Is weighted voting related to the functioning of the organization, and (2) do adequate and clear criteria exist for establishing the relative weights?

In general, weighted voting can be a workable procedure for organizations performing specific, well-defined functions that are accepted by their members and that require their continued support (financial, manpower, etc.).<sup>106</sup> Weighted voting facilitates the functioning of such organizations because the interests and responsibilities of the members are not shared equally; therefore, members with greater obligations have greater opportunities to protect their interests.<sup>107</sup>

This analysis, closely adhered to by proponents of weighted voting, ignores the fact that in many organizations the relative interest of each member may not be reflected in that state's financial contribution. For instance, a developing country member of one of the regional development banks may contribute far less to the bank's capital than the United States, yet the developing country's contribution may be larger than that of the United States when measured in relation to gross national product or per capita income. This consideration, coupled with the importance of the development bank as a lender to the developing country, may mean that the developing country has far greater interest in the organization than does

<sup>104</sup> The GATT is the exception that proves the rule: trade matters, too important to be left to majority voting, are negotiated by the members, as explained above.

The industrialized nations are relatively unaffected by the policies of international economic organizations. The organizations may fit into the overall foreign economic policies of these nations; but if faced with a serious economic problem, they tend to solve it unilaterally, or bilaterally through ad hoc negotiations with other developed countries. The developing countries, more dependent on these organizations for aid in solving economic problems, submit themselves to decisions arrived at by a consensus greatly influenced by the developed countries.

<sup>105</sup> See text accompanying notes 152-155 *infra*.

<sup>106</sup> See McIntyre, *supra* note 9, at 492.

<sup>107</sup> Randolph, *supra* note 96, at 43.

the United States. The problem, of course, is that the bank cannot survive without an influx of capital, which usually involves an exchange of votes for dollars (or francs, or marks). The problem of allocating votes according to interest is discussed in more detail below.<sup>108</sup>

Several authors have noted that weighted voting has only been adopted in organizations with acceptable criteria for allocating the votes.<sup>109</sup> This circumstance is most common in organizations with well-defined, circumscribed functions. If an organization has a wide range of responsibilities, one is less likely to find agreement on the factors to be used in defining the relative interest of the members.<sup>110</sup>

According to a study by Lillian Randolph, the more insecure the criteria for weighting, the greater the recourse to special majorities for important issues in order to placate the members with fewer votes.<sup>111</sup> Conversely, when the criteria for weighting are acceptable, the use of weighted voting may be extended.<sup>112</sup>

*Types of Weighted Voting.* Weighted voting structures differ according to the criteria selected for weighting and the degree of weighting based on those criteria. The criteria for weighting are usually related to the functions of the organization. The Bretton Woods agencies, and the agencies modeled after them, use financial contributions or subscriptions to capital as the basis for allocating votes. This practice is directly related to the function—to finance development—of multilateral aid agencies. The international commodity agreements, which attempt to control exports, allocate votes according to the relative volumes of exports and imports. The General Assembly of the International Union of Railways (a quasi-intergovernmental organization) allocates votes proportionally to the total kilometers of railway lines operated by each member administration, a criterion that roughly reflects the amount of each member's traffic regulated by the organization.<sup>113</sup>

The degree of weighting prescribed is as important as the criteria in assessing the workability of a weighted voting system. The same criteria can lead to differing allocations of votes to the various members. For instance, the disparity among members under the selected criterion—the volume of exports, for instance—may be softened by giving one member half the votes of another, even though its volume of exports is only one-fourth as large. In the financial agencies, the degree of weighting is most often affected by the custom of allocating basic votes—a certain number of votes distributed equally among all members—in addition to those

<sup>108</sup> See text accompanying notes 149–151 *infra*.

<sup>109</sup> See D. W. BOWETT, *supra* note 32, at 362. Compare Broms, *supra* note 21, at 284–85.

<sup>110</sup> Jenks, *supra* note 32, at 53. See also J. PLANO & R. RIGGS, *supra* note 30, at 133: “weighted voting is most common where the weighting principle can be tied to a single measurable criterion directly related to the primary function of the organization.”

<sup>111</sup> L. RANDOLPH, *supra* note 96, at 104.

<sup>112</sup> See, e.g., the extension of the IMF weighted voting formula to the Special Drawing Account created in 1964, discussed in Gold, *Weighted Voting Power*, *supra* note 10, at 688.

<sup>113</sup> P. JESSUP, A. LANDE, & O. LISSITZYN, *INTERNATIONAL REGULATION OF ECONOMIC AND SOCIAL QUESTIONS* 46 (1955).

TABLE 3

## DISTRIBUTION OF BASIC VOTES IN INTERNATIONAL DEVELOPMENT AGENCIES

	Number of basic votes distributed equally	Number of basic votes as percentage of total votes
World Bank	250 votes per member	11%
Inter-American Development Bank	135 votes per member	3.2%
African Development Bank	625 votes per member	45%
Asian Development Bank	20% of all votes distributed	20%
International Fund for Agricultural Development	17.5% of all developed country votes; 25% of all OPEC votes; developing country votes are distributed equally	47%
OPEC Special Fund	Voting power directly related to financial contribution	—

votes "purchased" by contributing members. The distribution of a basic vote is designed, to some extent, "to pay some homage to the traditional principle of the equality of states, to avoid too close an analogy to the private business corporation, and to guard against too great a concentration of voting power in the hands of one or two members."<sup>114</sup>

Table 3 shows the distribution of basic votes in the regional development banks and development funds and in the World Bank. The small number of basic votes in the Inter-American Development Bank contrasts with the fact that developing countries control a majority (53.5 percent) of the voting power in that agency. Table 3 also shows the unique distribution of weighted votes in the Asian Development Bank; the number of basic votes is increased so that it remains a constant percentage of the total vote. Such a rule avoids diluting the basic vote in an organization like a development bank that periodically increases its capital subscriptions, and thus its total number of votes.

In the World Bank, the ratio of basic votes to total votes has not declined appreciably only because of the large addition of newly independent members since the mid-1960's. However, when the bank's Executive Directors recently voted to increase (by almost double) its capital subscriptions, they also voted to double the number of basic votes in order to maintain the 11 percent proportion of basic to total votes.<sup>115</sup> With the World Bank's voting structure undergoing the scrutiny of developing country activists, the directors could hardly afford to reduce their countries' voting power by further diluting the basic vote.

<sup>114</sup> Gold, *Weighted Voting Power*, *supra* note 10, at 688.

<sup>115</sup> See note 38 *supra*.



*Majority Requirements*<sup>116</sup>

Majority requirements may also be established in such a way that they affect the voting power of individual members or groups of members. Just as weighted voting may give influential members a veto over certain operations of the organization, a sufficiently stringent majority requirement may protect certain members, and ensure consensus, by allowing a small minority to block a decision. Weighted voting and high majority requirements may either be used as alternative methods of obtaining the consensus of members,<sup>117</sup> or they may be used together (as in the IMF, where special majorities are required for many types of decisions) to ensure an especially high consensus on particular issues. In the latter case, the use of special or high majorities may also ensure that members with the least number of votes can block decisions, such as amendments to the articles, that are fundamental to their participation in the organization.<sup>118</sup>

*Normal Majority Requirements.* The normal majority requirement must be low enough to facilitate the taking of decisions while ensuring against minority rule. Thus, in the IMF, the basic rule requires a simple majority of the votes cast for many decisions; special, higher majorities—even unanimity, in some cases—are required when consensus is more important than the dispatch of business.<sup>119</sup>

Most organizations require a simple majority of the membership to establish a quorum and a simple majority of the votes cast to make most decisions.<sup>120</sup> However, the more important the purpose of the organization, the higher the normal majority requirement, with political and economic organizations generally having the highest normal majority requirements.<sup>121</sup>

*Special Majorities.* Provisions for special majorities are often included in the charters of organizations in order to ensure that the most important decisions receive the consensus necessary to carry them out or make them effective. For political reasons, the adoption of special majorities has been favored over weighted voting as a voting safeguard, especially in the UN specialized agencies.<sup>122</sup> The two are not mutually exclusive, of course,

<sup>116</sup> On majority requirements generally, see H. SCHERMERS, *supra* note 11, at 337–58.

<sup>117</sup> In the past, the United States Department of State has favored equal voting, with special (high) majority requirements, rather than complicated weighted voting for many recommendatory organizations. McIntyre, *supra* note 9, at 490–91.

<sup>118</sup> In analyzing majority requirements, one must also consider the quorum requirements for meetings in which decisions are made, since quorum requirements may affect the degree of stringency of the majority requirement. L. RANDOLPH, *supra* note 96, at 51–56. For example, a “strict” majority requirement of 80% of the members present and voting would in fact be a lenient requirement, if a relatively small proportion of the total membership could constitute a quorum. In general, quorum requirements serve to prevent decisions by a minority of the membership. In addition, in weighted voting organizations, the quorum requirement serves to ensure the presence of members with large votes. In fact, the Randolph study found that, in general, a greater stringency in quorum requirements existed in weighted than in nonweighted voting groups. *Id.* at 99–100.

<sup>119</sup> Gold, *Weighted Voting Power*, *supra* note 10, at 689–90.

<sup>120</sup> L. RANDOLPH, *supra* note 96, at 53, and table 6 at 150.

<sup>121</sup> *Id.* at 94–98.

<sup>122</sup> D. W. BOWETT, *supra* note 32, at 362.

and many international economic organizations employ both weighted voting and special majorities.

Issues for which special majorities are required tend to include questions of membership and finance, the adoption of constitutional amendments, the exercise of prelegislative and quasi-legislative powers, and certain elections.<sup>123</sup> The Randolph study found that, among weighted voting organizations, the most frequent subject involving a special majority is a decision through which the group fulfills a purpose of the organization, *i.e.*, a substantive decision.<sup>124</sup> For example, in the International Coffee Agreement all decisions of the Council under chapter VII ("Regulation of Exports and Imports") must be adopted by a two-thirds majority of the votes cast by both the exporting and the importing members.

Compared to unweighted voting groups, groups with weighted voting apparently employ a larger average number of special majorities, and the proportion of "special majority issues" relating to the external (or functional) affairs of the organization is larger. Moreover, the majorities required to settle these issues are disproportionately high.<sup>125</sup> The most pronounced example of the use of special majorities is the IMF Agreement, which requires special majorities of 70 or 85 percent, or unanimity, for 49 different issues.<sup>126</sup> Such a large number of special majorities may be explained in part by the need to make many different decisions of a relatively important nature in order to administer a complicated international monetary regime. However, the increase in the number of special majorities dictated by the recent Second Amendment of the Fund appears also to be a response to developing country pressure for at least a veto power over decisions taken by the developed country majority.<sup>127</sup>

Finally, a special type of majority requirement, concurrent majorities, has been used in recent years in connection with bloc voting.<sup>128</sup> Under this arrangement, the majority requirement must be fulfilled in each group or bloc within the organization, rather than among the membership as a whole. Thus, decisions under the IFAD Agreement require the relevant majority approval of each group (OPEC, developed, and developing countries); decisions under the commodity agreements require the relevant majority approval of both exporters and importers. One author has hailed this system of concurrent majorities as a means of assuring the maximum consensus while sacrificing the minimum in efficiency.<sup>129</sup> However, such a decision-making procedure may impede rather than promote effective decisions in organizations in which the blocs tend to harden their positions in the face of opposing positions.

<sup>123</sup> Jenks, *supra* note 32, at 54-55. See also D. GREIG, *supra* note 65, at 55.

<sup>124</sup> L. RANDOLPH, *supra* note 95, at 103.

<sup>125</sup> *Id.* at 102.

<sup>126</sup> Rarely have the unanimity requirements of the IMF, which apply to certain amendments and to the suspension of certain operations, been tested. See Gold, *Weighted Voting Power*, *supra* note 10, at 689-94.

<sup>127</sup> Gold, *Structure*, *supra* note 8, at 12.

<sup>128</sup> See the discussion of bloc voting at text accompanying notes 141-145 *infra*.

<sup>129</sup> Jenks, *supra* note 32, at 57-58.

*Representation on Executive Organs*

Most international economic agencies have more than one decision-making body. As a rule, there is a plenary body composed of all members that acts as the highest authority of the agency but delegates much of the practical decisionmaking authority to an executive body composed of representatives selected from the general membership. In practice, although certain decisions (e.g., on membership, amendment of articles) can only be made by the plenary body, it is not uncommon for the executive organ to exercise most of the decisionmaking authority. This is true in the IMF, where the continuous session of the Executive Directors has helped to establish their expertise.<sup>130</sup>

The creation of executive organs with limited representation raises the problem of establishing the method for selecting members, and (in weighted voting organizations) for assigning votes to executive board members. In most organizations, the method is stated in the constitutional document. In one study of decisionmaking in international agencies,<sup>131</sup> the authors found two principal objectives in selecting the executive board. These are not necessarily incompatible, and in some organizations both objectives are pursued.

*To insure that those states with resources important to the agency will be represented.* There are two basic ways to fulfill this objective. In weighted voting organizations, it is done simply by allowing the members to appoint or elect the directors in accordance with their weighted votes. Just as weighted voting may vary in degree, however, so the method for election of directors may vary in the extent to which it attempts to give smaller members effective representation on the executive board.

The largest members are assured of effective representation either through the appointment (the IMF, the World Bank, the Inter-American Development Bank) or election (the Asian and African Development Banks; the OPEC and developed country categories of IFAD) of directors. However, the election and voting procedures of directors may seriously affect the voting power of smaller states. For instance, under the World Bank model, which is generally followed by the regional development banks, an elected director may receive neither more nor less than a certain percentage of the total vote. This method reduces the disparity in voting power among the directors elected by the various groups, and thus limits the extent to which large shareholders may form a coalition to defeat smaller shareholders.

<sup>130</sup> GOLD, VOTING, *supra* note 8, at 213. The Second Amendment of the IMF Agreement added a provision (Art. XII, sec. 1) under which, by a majority vote of 85% of the total voting power, a third organ, the Council, could be established, with powers delegated by the Board of Governors. Placed in the IMF structure between the Executive Board and the Board of Governors, the Council is to combine the advantages of continuous session and detailed knowledge of the Fund, like the Executive Board, with the political power of the Board of Governors. The Council has not been formed, owing to a fear that its political nature would be misused; instead, an "Interim Committee" has taken its place. See Gold, *Structure*, *supra* note 8, at 13-15.

<sup>131</sup> Cox & Jacobson, *supra* note 14, at 375.

In assessing the degree of representation allowed to smaller states, it is also important to note whether a director's votes must be cast as a unit, or whether he may split his vote according to the wishes of smaller members. A coalition formed to elect a director may not be particularly cohesive; if votes must be cast as a unit, the voting preference of smaller members may be overshadowed by the larger members' interests. Using the World Bank as an example, one study shows how the unit-vote rule tends to operate to increase the power of middle-level stockholder-members, who tend to be reelected by smaller members. In effect, it means that the former are assured of a larger bloc of votes than they command individually. The effect is to increase stability in voting, and to make individual percentages of the vote less important.<sup>132</sup>

In organizations based on equal voting, differences of power are recognized by allowing certain members a right to permanent representation on the executive organ. This pattern was first established by the ILO Charter, which guarantees representation on its Governing Body to the ten states of "chief industrial importance."<sup>133</sup> Recognition of the "most important" members has since been used in numerous organizations in the economic and technical fields, including the ill-fated International Trade Organization, the International Civil Aviation Organization (ICAO) (importance in air transport), the Intergovernmental Maritime Consultative Organization (IMCO) (shipping tonnage), and the International Atomic Energy Agency (production of nuclear materials).<sup>134</sup> At the same time, the number of representatives selected from the members at random, or according to geographical distribution, always constitutes a majority in these organizations.

*To ensure a balancing of interests.* The charters of many agencies, although they do not specifically provide for representation on the basis of economic factors, provide for some method of distributing the limited number of seats in order to ensure that a balance of interests exists on the board or council. Some agencies organize members into fixed groups, each of which is entitled to a certain number of members on the board. Thus, the proposed International Seabed Authority would ensure representation on its Governing Council for certain special interest groups.<sup>135</sup> In other agencies, the charter may specify that representation shall take into account an equitable geographical distribution. The latter example applies to the World Health Organization, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Meteorological Organization, and the developing country category of directors in IFAD (where two of the six developing country directors must come from each of the three geographical regions, Asia, Africa, and Latin America). In some organizations, such as IMCO and ICAO, where larger members are auto-

<sup>132</sup> Chung, *supra* note 8, at 155, 356.

<sup>133</sup> ILO CONST. Art. 7. See Barrett & Newcombe, *supra* note 26, at 40, for a discussion of the factors used to determine chief industrial importance.

<sup>134</sup> D. W. BOWETT, *supra* note 32, at 116-121, 356-62; P. JACOB, *supra* note 17, at 25-26; C. ALEXANDROWICZ, *supra* note 15, at 285-86; I. CLAUDE, *supra* note 15, at 133.

<sup>135</sup> See note 77 *supra*, and accompanying text.

matically represented, the remaining members of the executive committee are chosen so that geographical regions are equitably represented.<sup>136</sup>

The charters of organizations that employ weighted voting—especially of those based on the Bretton Woods model—do not generally provide for any formula to balance interests, on either a geographical or some other basis. Instead, the formation of regional coalitions to elect directors serves in some way to ensure a minimally equitable geographical distribution.<sup>137</sup>

#### IV. TRENDS AND RECOMMENDATIONS

After having examined the voting systems of selected international economic organizations and their historical precedents, the most difficult task yet remains: to identify trends in the development of decisionmaking structures and to offer general conclusions concerning these trends.

At the risk of oversimplification, we may identify two major trends that will continue to affect decisionmaking procedures in the future. First, there is general pressure to reverse the post-World War II tendency towards the creation of organizations with weighted voting systems, and to restore relative equality in voting procedures. Second, there is an increasing tendency to adopt formal voting procedures that separate nations into blocs of interest groups. Both of these trends are directly related to, and demonstrate the power of, the 'developing countries' drive to increase their economic and political power within the world community.

##### *Return to Equality*

As described earlier, the doctrine of sovereign equality dominated early international relations and dictated the use of equal voting procedures. Rigid adherence to the doctrine gradually declined, beginning with the technical unions of the 19th century and culminating in the use of weighted voting in most international economic organizations after the Second World War.

However, when the former colonies and territories of Asia and Africa gained independence in the 1960's, they began to express their dissatisfaction with inequalities of wealth and power. International economic organizations—both existing and still to be established—were logical battlegrounds for this expression, and the developing countries' lack of influence on the important decisions taken by these organizations was an obvious point of attack. Fortunately for the developing countries, this campaign for a greater share in world economic affairs grew as the Cold War

<sup>136</sup> D. W. BOWETT, *supra* note 32, at 118–19.

<sup>137</sup> An exception formerly existed in the IMF Articles, which expressly provided for the election of 2 Executive Directors by the American republics not entitled to appoint directors. GOLD, VOTING, *supra* note 8, at 61. Under the Second Amendment to the IMF Articles, the specific reservation of directors to the American republics was stricken, although in practice these countries still elect 3 members to the 20-member Executive Board. IMF Articles of Agreement, Art. XII, sec. 3(b).

deepened, and even the smallest nations found that the United States and the Soviet Union were interested in gaining their favor. So encouraged, the developing nations began to revive the concept of sovereign equality, first with the creation of UNCTAD, and later through campaigns for greater influence in other international organizations.<sup>138</sup>

Yet one must judge the developing countries' protestations in favor of equality not just by their pronouncements, but also by their actions. While espousing the one-nation, one-vote principle, the developing countries as a group have nevertheless supported weighted voting in institutions in which they are vitally concerned; these include the African and Inter-American Development Banks. The former is composed exclusively of African members (although this may change), and the developing countries constitute a majority of the latter.<sup>139</sup> The OPEC Special Fund, controlled entirely by developing countries, uses a unique voting system weighted according to financial contribution. The recently established Arab Monetary Fund, a regional monetary agency patterned after the IMF and consisting of 21 members, employs an IMF-type weighted voting structure linked directly to contributions.<sup>140</sup> Developing country support for weighted voting can also be seen in the international commodity agreements, in which certain developing countries hold large voting percentages by virtue of their predominance as exporters. In fact, there have been few concrete proposals by developing countries directed towards abandoning the weighted voting system in the World Bank and the International Monetary Fund.

Rather than insistence on equality of voting between nations—a concept surely to be resisted by the more powerful developing countries—the real emphasis of the developing countries seems to be on relative equality among groups or blocs of nations. Thus, for instance, the developing countries were willing to establish IFAD without insisting on equal voting for all members, but they did insist on equality among the three voting blocs. In addition, by stressing greater voting power for themselves as a bloc, the developing countries can support the concept of equality (among groups), while also conceding the utility of weighted voting and inequality among individual states. However, this emphasis on bloc voting raises other serious questions.

### *Bloc Voting*

The current emphasis on bloc voting is directly related to the developing countries' demands for greater influence in the decisionmaking processes of international economic organizations.<sup>141</sup> Of course, throughout history governments have formed alliances and made decisions in groups whenever

<sup>138</sup> R. KLEIN, *supra* note 18, at 8–9.

<sup>139</sup> A few countries supported equal voting for the Asian and African Development Banks, but this was never seriously considered. J. WHITE, *supra* note 8, at 95.

<sup>140</sup> *Arab Monetary Fund Loan Operations begin with Payments Assistance for Five Members*, 8 IMF SURVEY 249–50 (Aug. 20, 1979). The two largest contributors, Saudi Arabia and Algeria, together hold 25% of the total votes.

<sup>141</sup> See P. JACOB, *supra* note 17, at 30–32.

their national interests coincided. What is new, and significant, about bloc voting in international organizations is its institutionalization, that is, making bloc voting a formal part of the voting procedure.

UNCTAD was the earliest example of an international economic organization that institutionalized bloc voting along political, rather than functional, lines.<sup>142</sup> The three blocs, the Group of 77, Group B (developed), and Group D (socialist), were not defined according to the relative importance of the trade or the state of development of each member, but rather according to the preconceived notion that the Latin American countries and former African and Asian colonies had common political and economic interests, as did the former colonial powers and the socialist states. Provisions in UNCTAD's Charter and procedural rules require positions to be established within each group, which then presents the position to other groups as a solid front. The importance of individual voting is minimized.

This procedure is to be contrasted with that of other economic organizations using bloc voting, but where the blocs are formed along functional lines. The clearest example is the international commodity agreements, which assign an equal number of votes to the exporting and importing countries and require a majority in each bloc to support a decision. Each country exercises a weighted vote according to its volume of exports or imports. This way of assigning blocs of votes is functional; the equal cooperation of importing and exporting members is needed to make the commodity scheme work. If a majority of the importing countries, plus a minority of the exporting countries, could make a decision on export quotas, the larger exporters could nullify it by refusing to act.<sup>143</sup>

The more recent emphasis on bloc voting is political and is designed to ensure certain voting proportions among like-minded groups. The actual division is often regional, although blocs are occasionally based on political or economic groupings. For instance, the regional development banks preserve blocs of voting power for the developing country members: the Asian and Inter-American Development Banks both guarantee a certain percentage of the capital stock and/or voting power (60 and 53.5 percent, respectively) to the regional members. The African Development Fund allocates a total of one thousand votes to African nations and a total of one thousand votes to contributing (developed) nations. However, unlike UNCTAD, the rules of these agencies do not emphasize confrontation of blocs (although behind-the-scenes consultation between regional and nonregional members takes place, of course). By the late 1960's, the UNCTAD Group of 77 had become an important negotiating group that cut across agency lines and, among other things, lobbied for voting reforms that would enhance the power of the developing country bloc, if not of its individual members.

<sup>142</sup> B. Gosovic, *supra* note 47, at 324.

<sup>143</sup> The assigning of seats on the Council of the International Seabed Authority to special interest groups is another example of a functional, rather than political, approach to decision-making. See note 77 *supra*, and accompanying text.

The most pronounced recent example of political-bloc voting may be found in the agreement establishing the International Fund for Agricultural Development. Equal blocs of votes are allocated to three groups: developed countries, OPEC members, and developing countries. A concurrent majority system, such as that used in the international commodity agreements (*i.e.*, majorities required in each group), is used for a quorum and decisionmaking.

Bloc voting may have important repercussions for international economic organizations. Even in organizations that do not use formal voting, such as the World Bank and the International Monetary Fund, emphasis on de facto bloc solidarity, if it increases, could have profound effects on decisionmaking processes. Emphasis on decisionmaking in blocs de-emphasizes individual, weighted voting; it is not the weight of each member's vote that counts (although the more powerful members of the bloc may have greater influence than smaller members), but rather the long-term political and economic objectives of the group as a whole. Bloc voting could have a profound effect on task-oriented agencies that operate under a broad consensus and rarely experience serious conflicts concerning overall policies or operational decisions.

One author has cited the extreme rigidity of the blocs' negotiating positions in UNCTAD, where "the maximum common denominator demands of the Group of 77 face the minimum common denominator concessions offered by the B Group,"<sup>144</sup> as a direct cause of the lack of concrete agreement on economic reforms sponsored by that agency. Of course, the value of UNCTAD may lie in its challenge to the traditional economic system through the solidarity of developing countries. Nevertheless, a relationship does appear to exist between political-bloc voting and consultative agencies, and such a voting system may not be well adapted to task-oriented agencies. "Bloc negotiation" has also been cited as a reason for the numerous stalemates in negotiating a UN treaty on the law of the sea.<sup>145</sup>

Organized confrontation may be valuable in modern international relations; the developed countries need to be pushed towards policies that will help to redistribute the world's wealth and the use of its resources. However, the question is whether task-oriented international agencies are the proper vehicles for this confrontation. By upsetting present consensus (admittedly, consensus that reflect traditional developed country philosophies), confrontation through bloc voting that reflects long-term political goals endangers the agencies' abilities to make operational decisions on the basis of agreed, objective criteria. Thus, the developing countries may succeed in adjusting the decisionmaking machinery, only to find the machine grinding to a halt.

International economic organizations are consequences of the world economic system; they are not determinants of that system. With few exceptions, these organizations react to, rather than initiate, economic

<sup>144</sup> Walter, *UNCTAD: Intervener between Poor and Rich States*, 7 J. WORLD TRADE L. 527, 546 (1973).

<sup>145</sup> Note, *supra* note 72, at 227-31.



changes. To achieve viable international economic regulation, these organizations must operate according to decisionmaking rules that reflect, even if imperfectly, the realities of economic power.

To reform the world economic system, the developing countries must alter economic realities, and then see to it that international organizations reflect those new realities. As a means of changing the economic system, developing country cooperation (or solidarity, or even confrontation) is a legitimate and potentially effective instrument. More monetary and trade "reform" has been achieved by the formation of the OPEC oil cartel than by the cumulative effect of all the resolutions sponsored by developing countries and passed by international organizations. The increased voting power the OPEC nations have gained in the World Bank and the IMF testifies to their increased importance in international economic decision-making.

Many developing countries now possess, or are on the verge of obtaining, sufficient resources to challenge the developed countries in many economic sectors, including raw materials and low-to-middle-technology manufacturing. Economic cooperation, through free trade agreements, producer cartels, regional investment schemes, energy-sharing agreements, and other cooperative schemes, can lead to shifts in economic power, which will have to be reflected in new alignments of decisionmaking power in the international economic organizations.

#### *Viable Voting Arrangements for the Future*

What are the principles that should guide voting arrangements in existing or new international economic agencies? The overall principle is easy to state but difficult to apply. The test of a voting structure is whether it "works." The structure works if it enables the members to make decisions, without undue delay, that are accepted and followed by the majority of members whose acceptance is crucial to accomplishing the agency's goals. This, in turn, requires adequate representation (voting power) or safeguards (such as veto power) for major interest groups and/or individually powerful members.

A clear example can be found in the experience of international lending agencies. These agencies provide grants and loans to developing countries for development projects. Clearly, the developing countries have a strong interest in such important sources of capital. So, however, do the developed countries, which is recognized in most instances by giving them considerable voting power. In the few instances where this interest has been ignored, the acceptance of developed country members, and thus the supply of capital, has not been forthcoming.<sup>146</sup> Where financial contribution is closely related to voting power (as in the World Bank and the

<sup>146</sup> For instance, in 1966 the UN General Assembly, by a majority vote of the developing countries, established a new lending facility, the UN Capital Development Fund, to be controlled by those countries. The fund failed, in part because developed countries withheld financial support because of the proposed voting structure. I. CLAUDE, *supra* note 15, at 133-34; Barrett & Newcombe, *supra* note 26, at 80-82.

regional development banks), the abuse of that power, through overly conservative restrictions on lending, has been held in check by several factors. First, there is the courtship of developing countries, as allies and as trading partners, by the developed countries; a heavy-handed attempt to control decisions would not aid this courtship. Second, there is the fact that several affluent countries—the Scandinavian countries, Canada, and the Netherlands, in particular—tend to take enlightened views in favor of the developing country.<sup>147</sup> Third, the developing countries, in addition to their minority voting power, exercise some power as clients (*i.e.*, borrowers) of the development agencies. These countries—especially the larger, more sophisticated ones—do exert some influence over the long-term lending programs that are adopted by each lending agency; after all, the country can refuse to borrow for the purposes set forth by the bank.<sup>148</sup>

Thus, in international lending agencies, acceptance by two major interest groups, capital-rich contributors and capital-hungry borrowers, is required to make the agency “work.” Yet the voting arrangements of these agencies are formally structured to protect only one of these groups; voting is weighted according to *financial contribution*, with relative contributions being determined by relative economic power. Although the economically powerful members do not tend to abuse their position, the lack of voting power or safeguards for the borrowing countries remains.

These observations introduce a second important principle for a viable voting structure: the voting structure should reflect a *balance of interests* of the members. On the one hand, economically powerful states will not yield authority to an international organization “without strong procedural protections for their interests in any decision-making process.”<sup>149</sup> On the other hand, failure to reflect the interests of weaker states breeds conflict and lack of acceptance by them (unless, as is sometimes the case in the IMF, there is no choice but to abide by the decisions of the majority) or results in the establishment of “splinter” developing country organizations.

Voting structures may strike a balance among political groups as, for example, in IFAD (equal weight to each group of countries) or in UNCTAD (consultation among political/economic groups). Alternatively, the voting structure may reflect a balance of the substantive interests of the membership; that is, there may be an attempt to accord special weight, or certain safeguards, to the members’ votes in accordance with their relative levels of interest. An example of this would be the proposed International Seabed Authority: although a one-nation, one-vote system would be used for both ISA organs, the executive body (ISA Council) would recognize

<sup>147</sup> See E. LUARD, *supra* note 103, at 234, 253–55, 293.

<sup>148</sup> A discussion of this point, using India’s experience with the World Bank, can be found in Moulton, *supra* note 101, at 1019. According to the author, “ostensibly Western-dominated international economic organizations have the potential to form symbiotic linkages with ‘dependent’ governments, either through shared values and orientations or through shared institutional interests.” *Id.* at 1035.

<sup>149</sup> Oxman, *Institutional Arrangements and the Law of the Sea*, 10 LAW. AMERICAS 687, 710 (1978).

special interest groups (technologically advanced, major importers, major exporters, etc.) by granting an assured number of seats on the Council to each group.

The latter method of allocating voting power, *i.e.*, in accordance with each member's (or each group's) relative level of interest in the substantive matter, is preferable for task-oriented international economic agencies. To be effective, these agencies must operate as much as possible on the basis of agreed economic criteria, free from narrow political pressure. If a group of countries wishes to inject a greater degree of political pressure into the process, it must be prepared to suffer the consequences: destruction of the consensus that has been the foundation of these agencies' success in the past.

Of course, this line of argument might be used as an apology for the status quo, an argument that powerful nations should maintain their overwhelming power in international economic matters. To avoid this conclusion, one must agree not only that substantive interests should be recognized by international economic organizations, and that voting structures should reflect a balance of these interests, but also that relative levels of interest, and thus of votes, should not be based solely on a single factor that is narrowly allied with economic power. For instance, one author has argued that the World Bank and IMF voting systems are proper, even though they are "at variance with" the doctrine of sovereign equality. These agencies, he notes, are comparable to private banks, and it therefore seems appropriate to use financial contributions to determine voting strength, "thus allowing the privileged voting position to depend upon the degree of interest, which . . . is clearly definable in terms of the individual quotas."<sup>150</sup> This reasoning is too simplistic. As early as 1940, in his study of majority rule in international organizations, Cromwell Riches rejected the idea that a single standard, such as financial contributions, was proper for all organizations. "Rather, for each international organization there should be developed a formula for representation *given in terms of the interest of the states in the activities of the particular international body*."<sup>151</sup> Voting power should not be awarded on the basis of a single factor, but rather upon consideration of all factors, including those nonpower factors that appear to have direct bearing upon the states' interests.

*Importance of the Secretariat.* One important element of decisionmaking has received little attention from scholars: the secretariat, or management, of international economic organizations. According to one study, most effective decisions in the World Bank are made not by the membership as a whole, but by a relatively small group of top-level management and experts from the capital-exporting countries, with staff members making the less important decisions on the basis of agreed rules.<sup>152</sup> The author at-

<sup>150</sup> Broms, *supra* note 21, at 279.

<sup>151</sup> C. RICHES, *supra* note 17, at 289 (emphasis added).

<sup>152</sup> As evidence of this, the author relates that the World Bank's general capital increase in 1959 was "rubber-stamped" by the general membership after management and a few major stockholders decided on the increase. Chung, *supra* note, 8, at 163-64.

tributes this type of decisionmaking, in which decisions can be made relatively quickly and efficiently, to three characteristics: high goal consensus among members, a strong task-oriented leadership, and a relatively independent source of funds.<sup>153</sup> The full decisionmaking bodies are less decision-formulating groups than "decision-legitimizing" bodies.<sup>154</sup>

The World Bank is not alone in this method of decisionmaking. In a study of the three largest regional development banks, John White observes that multilateral aid agencies are not truly multilateral, in the sense of reflecting a collective decisionmaking process in which all the members participate equally, but instead have become increasingly autonomous. In his opinion, the autonomy of these agencies is directly related to the efficient carrying out of their functions.<sup>155</sup>

Present patterns of influence cannot be altered merely by increasing the voting power of developing country members. Any drastic change in formal voting procedures will have an effect on the World Bank's capacity to fulfill its functions as a developmental lending agency that can mobilize private capital for technically sound public projects in developing countries. As with other economic organizations, the World Bank's past success in fulfilling this function is directly related to a unique balance: a consensus among its members regarding the general goals and specific activities of the institution. The exercise of formal voting is extraneous to this balance and to the effective decisionmaking process, except to the extent that the voting structure provides the basic understanding upon which this balance rests. Therefore, to provide greater decisionmaking influence for developing countries, it is not sufficient to increase these countries' voting power; such a change either would be inconsequential (if the change is small, decisions would continue to be made as before), or it would destroy the informal decisionmaking balance. In the latter case, it is unlikely that a new informal decisionmaking balance would result, with developing countries as effective participants; more likely, the result would be increased confrontation and resort to formal votes to decide issues. Such confrontation does not appear to be compatible with the efficient functioning of a task-oriented agency and could be counterproductive to developing country interests. This view is shared by John White in his study of regional development banks:

In any assessment of an institution's capacity to perform the functions of a multilateral agency, therefore, one feature which has to be given close attention is the way in which the interests of developing countries are represented. Clearly, it is insufficient that developing countries should have their interests represented through the power of a vote. Indeed, control through majority voting power may render an agency less effective in serving the developing countries' interests, by reducing its capacity to take clear decisions. *What is required is a mechanism, not for passing resolutions in which the interests of developing*

<sup>153</sup> *Id.* at 404-05.

<sup>154</sup> *Id.* at 222, 351. *Accord*, P. JACOB, *supra* note 17, at 391.

<sup>155</sup> J. WHITE, *supra* note 8, at 11-13.

*countries are declared, but for implementing a policy by which those interests may be served.*<sup>156</sup>

Formal control of an organization, through voting procedures, should only be a partial area of concern in creating such a mechanism. Other concerns may be equally important, including the composition of the agency's staff and the agency's means of access to financial resources. Providing for increased developing country influence should address each of these areas of concern.

*Increasing Developing Country Influence.* The developing countries should be assured of a group veto power over decisions in those international economic organizations that affect their vital interests. First, the basic vote in global organizations, such as the World Bank and the IMF, should be altered. Instead of providing a fixed number of 250 votes per member, with the rest allocated according to contributions, the basic vote should be allocated as a constant percentage of the total vote, as is done in the Asian Development Bank. This measure would prevent further erosion of the developing countries' voting power as the capital subscriptions (and thus the total votes) of the membership increase.<sup>157</sup> In the past, this erosion has only been avoided by the addition of former colonies as new members, a circumstance that will no longer be of consequence since few colonies still exist and most nations now belong to the World Bank and IMF. Additionally, more special majorities, which are already common in the IMF, might be required for policy decisions of special importance to developing countries. To ensure greater participation by these countries, the executive board could be enlarged to allow a greater number of their representatives to become directors, and perhaps, using the Inter-American Development Bank as an example, to provide for the election of a certain number of directors by the smallest developing countries. This would not alter control of the executive board in agencies that use weighted voting on the board, but it would allow the smaller members a greater voice in the board's deliberations, and thus greater participation in the discussion of issues.

Finally, without jeopardizing the technical quality of the staff, it should be possible to increase the number of developing country nationals holding senior management positions in important international economic organizations. As previously stated, in many of these organizations senior management exerts considerable influence over operational and, in some cases, policy decisions. Yet, of the 67 vice presidents and department directors of the World Bank, only 14 are from developing countries, a much lower percentage (20.9%) than these countries' voting power. Of course, the management-poor developing countries must also be willing to release highly qualified personnel to international agencies, despite the need for them to fill domestic positions.

<sup>156</sup> *Id.* at 18 (emphasis added).

<sup>157</sup> See Jeker, *Voting Rights of Less Developed Countries in the IMF*, 12 J. WORLD TRADE L. 218, 222-23 (1978).

## V. CONCLUSION

The developing countries increasingly view international economic organizations as vehicles for restructuring the world economic order. Thus, many of their spokesmen have argued for greater influence in the formal decisionmaking processes of these organizations, believing that it will lead to greater economic equality in fact. Such a conclusion is unwarranted. International economic organizations are reflections of the economic order, determined by—not determining—economic realities. An international economic organization that does not reflect actual economic forces, in its operations as well as in its decisionmaking processes, has little promise as an active, effective agency. Developing countries must continue to concentrate on attaining economic power, and then on exercising that power in international organizations, rather than the reverse.

Despite these reservations, international economic organizations present the most serious test of world government to date. Unlike recommendatory bodies, these organizations make decisions that often have immediate and direct effects in the world economy. And unlike those of the more narrow technical unions, the decisions of economic organizations may affect matters of important national policy. Thus, these organizations test nations' ability to limit their freedom of action in exchange for long-range economic advantages. Enlightened approaches to decisionmaking in these organizations, including safeguards for weaker states, will ensure the ultimate success of this experiment.

# PROTECTION OF DIPLOMATS UNDER ISLAMIC LAW

By M. Cherif Bassiouni\*

## I. SOURCES OF THE LEGAL PROTECTION OF DIPLOMATS

The International Court of Justice has examined the seizure and detention of United States diplomats and members of their staff by a group of militant "students" in Tehran from the point of view of international law.<sup>1</sup> But it is also of interest to inquire into the legal status of these acts under Islamic law, which the Islamic Republic of Iran adopted with its Constitution of 1979, and under Islamic international law, which is used here to mean that aspect of the *Shari'a*<sup>2</sup> and its practice by Islamic countries toward other countries.

The *Quran* (Koran) and the *Sunnah* (Sunna), the two principal sources of Islamic law,<sup>3</sup> and the consistent practice of Muslim heads of state (*Khalifas*), a secondary source, clearly establish the privileges and immunities of diplomats in Islamic law and practice. The Koran and the Sunna contain numerous references to the protection and immunity of diplomats (referred to in these sources, as well as in the writings of scholars, as emissaries, envoys, deputations, delegations, and embassies) their staff, and accompanying persons. Throughout these sources of Islamic law diplomats are entitled to

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<sup>1</sup> Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order of Dec. 15, 1979, [1979] ICJ REP. 7, *reprinted in* 74 AJIL 266 (1980); Judgment of May 24, 1980, *reprinted infra* at p. 746. For the U.S. position, see Memorial of the Government of the United States of America to the International Court of Justice, January 1980.

<sup>2</sup> This term is synonymous with Islamic law.

<sup>3</sup> Bassiouni, *Islam: Concept, Law and World Habeas Corpus*, 1 RUT.-CAM. L.J. 163 (1969) [hereinafter cited as Bassiouni, *Islam*]. References to the Sunna are not always cited because they appear in so many diverse sources. The most widely recognized source is AL-BUKHARI, but its many editions in Arabic make it difficult to give a useful cite to the reader. The cites from the Sunna are all certain or *Moahada*, and there is no dispute over its authoritativeness.

immunity from prosecution, freedom from arbitrary arrest and detention, and proper care and treatment.

In addition, Islamic law permits the head of state (the *Khalifā* or Imam) to enter into treaties binding the Islamic state. In this context, the 1961 Vienna Convention on Diplomatic Relations<sup>4</sup> and the 1963 Vienna Convention on Consular Relations<sup>5</sup> extend to diplomats absolute immunity from arrest, detention, and prosecution. Nothing under Islamic law precludes immunity by treaty, and Iran as a signatory to these conventions is bound by their terms not only under international law, but also under the *Shari'a*.

The Koran contains several references to the concept of *Aman*, or safe conduct, which is in part the basis of diplomatic immunity. The diplomat is the beneficiary of *Aman*, a legally binding privilege that obligates the state to protect the beneficiary until his departure from its territory. The state may revoke the *Aman* and expel the beneficiary, but may not violate it. The beneficiary who violates its terms may be prosecuted, but not if he is a diplomat, who in addition to benefiting from the *Aman* is also the beneficiary of other forms of legal protection and privileges. While, in the view of some commentators, there is an exception to the concept of the absolute immunity of diplomats for their commission of *Hudud* crimes,<sup>6</sup> there is no specific statement in the Koran or Sunna of that exception. In any event, *Hudud* crimes are not at issue in this case, and therefore the immunity of the detainees is, to the extent stated above, unqualified under the Koran and the Sunna.

The Koran in *Surat al-Naml* (27:23-44) supports that proposition in its description of the exchange of envoys between the prophet Sulaiman (Solomon) (992-952 B.C.) and Bilqis, Queen of Sheba. Bilqis is described as having sent a delegation bearing gifts to Sulaiman, who considered it an insult (an attempt to bribe him). Sulaiman rejected the gifts and sent the delegation back. In the same *Surat*, it is stated (by Bilqis):

But I am going to send him a present, and wait to see with what answer my ambassadors return. [27:35.]

[the response of Sulaiman]

Go back to them, and be sure we shall come to them with such haste as they will never be able to meet: we shall expel them from there in disgrace, and they will feel humiliated. [27:37.]

These verses clearly indicate that emissaries were contemplated as the ordinary means of diplomatic communications between Muslim and non-Muslim heads of state, and that the emissaries were immune from the wrath of the host state and were not held responsible for the acts or messages sent by their head of state. Thus, even when Sulaiman was offended, he did nothing against the emissaries but send them back whence they came.

There is therefore a dual Koranic mandate that no Muslim state may transgress: protection must be granted to envoys, and expulsion is the only

<sup>4</sup> 500 UNTS 95, 23 UST 3227, TIAS No. 7502 [hereinafter referred to as the 1961 Diplomatic Convention].

<sup>5</sup> 596 UNTS 261 [hereinafter referred to as the 1963 Consular Convention].

<sup>6</sup> See *infra* pp. 623-25, and A. OUDA, *infra* note 46, vol. 1, pp. 324-25.



sanction to be taken against them. These mandates also are clearly expressed in the Sunna, which will be discussed below.

The Treaty of Hudaibiya was signed between Prophet Muhammad and the Quraish tribe of Mecca in A.D. 628. In the course of the negotiations, the Prophet used two emissaries who went to Mecca on successive occasions to establish a basis for the treaty. One of them was Othman ibn Affan, who later became the third *Khalifa* (after the Prophet), succeeding Omar ibn al-Khattab. When word reached the Prophet that Othman had been killed, notwithstanding the fact that as an emissary he should have been secure in all respects, the negotiations were deemed broken and the Islamic forces readied to attack. It was deemed a *casus belli*. The Quraishis made it known that Othman was safe and that his person as an emissary was inviolate. This news resulted in the reopening of the negotiations. The Quraishis then sent to the Prophet their negotiator, Suhayl, who was treated as an inviolate ambassador. The Treaty of Hudaibiya was signed by the Prophet and Suhayl. It is noteworthy that Ali ibn Abi-Taleb, who was the scrivener of the treaty, also signed it as a witness. Ali became the fourth *Khalifa* after the Prophet and is the person the Shiite Muslims (who predominate in Iran) most revere and believe to be the legitimate heir to the Prophet.<sup>7</sup>

The Treaty of Hudaibiya and its negotiating history demonstrate the sanctity of emissaries, that a violation of an ambassador's immunity is a *casus belli*, and that no ambassador may be detained or harmed. That these events were witnessed by Ali ibn Abi-Taleb makes them of greater significance to the Shias. The treaty and its negotiated history also establish that in Islam the principle of *pacta sunt servanda* is recognized and has been faithfully adhered to in practice.<sup>8</sup>

Subsequent to the Treaty of Hudaibiya, when the Prophet went to war against the Quraishis in Mecca, the Islamic precedent of sanctuary, similar to that of modern embassies, was established. Before attacking Mecca, the Prophet announced:

O Quraish! This is Muhammad, who has come to you with a force you cannot resist. He who enters Abu-Sufyan's house is safe and he who locks himself up is safe and he who enters the Mosque is safe.

(The Prophet then declared amnesty for all Meccans who had fought and opposed him.)

After the taking of Mecca, many emissaries and deputations went to the city, and others were sent by the Prophet and his successors to non-Muslim rulers. The deputations received by the Prophet between A.D. 630 and 631 enjoyed not only immunity but preferred treatment, which applied to the

<sup>7</sup> See *infra* pp. 617-19.

<sup>8</sup> See also the earlier treaty of the Prophet with the Jewish tribes of Yathrib-Medina of A.D. 625, in IBN-KHALDUN, MUQUADDIMAT IBN KHALDUN (Prolegomenon) 125 (1858); and see IBN KHALDUN, KITAB AL-IBAR WA-DIWAN AL-MUBTADA WA-IKHBAR; AYYAM AL-ARAB, etc. (ed. Nasr al-Hurini, 7 vols., 1867). Ibn Khaldun's approach to the philosophy of law is discussed in M. MAHDI, IBN KHALDUN'S PHILOSOPHY OF HISTORY (1964). See further M. WATT, MUHAMMAD AT MEDINA 221-25 (1956).

envoys and to their staff and servants. They were not to be molested, mistreated, imprisoned, or killed.<sup>9</sup>

Envoys also enjoyed freedom of religion, as is demonstrated by the delegation of Christians of Najran who held their services in a mosque.<sup>10</sup> Tabari, in his encyclopedic study *History (Tarikh)*, recounts that only under extraordinary circumstances may envoys be detained and imprisoned, and that would be in the form of specific reprisals in kind. The case in point is the Prophet's detention, but without physical harm, of the envoys of Mecca during the negotiations on the Treaty of Hudaibiya because the Meccans had detained his emissaries. He did so only to secure the release of the detained emissaries, and when they were released, the Meccans were, too.<sup>11</sup> In fact, so great was the Prophet's belief in the immunity of envoys that during that period when Abu-Ra'fi, the emissary of Quraish, wanted to convert to Islam, the Prophet admonished him:

I do not go back on my word and I do not detain envoys [you are an ambassador]. You must, therefore, go back, and if you still feel in your heart as strongly about Islam as you do now, come back [as a Muslim].

These practices were followed by the Prophet at a time when inviolability of envoys was ill recognized in the Arabian Peninsula. The Prophet also followed these practices in the case of Wahshi, the Abyssinian ambassador who had previously killed one of the Prophet's uncles. When Wahshi presented his credentials, the Prophet made it known that non-Muslims would judge Islam by its treatment of foreign envoys, and consequently foreign envoys should be accorded the same treatment as Muslim envoys.

Diplomatic immunity also is exemplified by the Prophet's reception and treatment of the Taif delegation in A.D. 631. In earlier times, when he had gone there to propagate Islam, the Prophet had been ill treated by the people of Taif, but his treatment of their delegation was a further affirmation that envoys were to be received in accordance with their privileged status. Irrespective of the sending country or past relations with its people, envoys remained inviolate, even in the case of a people and its leaders who had earlier wronged Islam and the Prophet himself.

Other examples are the delegations from Bani-Saad, Bani-Tayyi, and Bani-Tamim. The latter, notwithstanding their paganism and frivolity during the negotiations, were treated with deference and courtesy, and remained inviolate.

The deputation from Bani-Hanifa is another landmark case. Its leader was Musailima bin Habib, a notorious liar nicknamed *al-Kadhab* (the Liar), but the Prophet ordered that he be treated as an equal. During the negotiations, Musailima sent the Prophet a message through two emissaries to the effect that he, Musailima, and not Muhammad, was the true Prophet of God.

<sup>9</sup> See further, discussion hereinafter at pp. 612-17, and for a history of the privileges of envoys, SHAMS-EL-DIN EL-SARAHSY, *AL-MABSUT* 320 (n.d.) and *SIRAT AL-RASUL* (The Annals of the Prophet) (n.d.); ABDUL-RAHMAN AL-TABARI, *TARIKH* (History or Annals) (n.d.) [hereinafter referred to as *TABARI*]; A. IQBAL, *DIPLOMACY IN ISLAM* (1965); and M. HAMIDULLAH, *CORPUS DES TRAITÉS ET LETTRES DIPLOMATIQUES D'ISLAM À L'ÉPOQUE DU PROPHÈTE ET DES CALIFES ORTHODOXES* (1935).

<sup>10</sup> KORAN 41:5.

<sup>11</sup> *TABARI, supra* note 9.

Upon its receipt, the Prophet asked the emissaries whether they agreed with the content. They replied that they did and the Prophet responded:

By God, were it not that messengers are not to be killed, I would behead the both of you.<sup>12</sup>

This response clearly establishes the inviolability of even those envoys who commit transgressions.

Two more deputations deserve note, that of the Kings of Himyar, who were polytheists, and that of Kinda, which is reported to have come with 80 armed riders to the Prophet while he was in the mosque in Mecca; they were treated with regard despite having come in such an offensive manner.

The Prophet's sayings and practices clearly establish the principle of diplomatic immunity and do not in any way place a limit on it, which is in keeping with the Koran.

Probably the most telling statement of the Prophet on the importance attached by Islamic law to the immunity of diplomats is one in which he characterized the seizure of a diplomat as a *casus belli*. In that *Hadith*, which contains the Prophet's message to the people of Asqof Aylah, he said:

If you want the land and the sea to believe, then obey God and His Prophets, and if you reject them [the emissaries sent] but do not return them, I will not accept anything from you until I fight you [emphasis added].<sup>13</sup>

The writings of many noted scholars indicate that envoys, ambassadors, deputations, delegations, and emissaries to and from the world of Islam have been numerous throughout its history. These diplomats enjoyed immunity for themselves, and for their families, staff, and servants. M. Hamidullah states: "Envoys, along with those who are in their company, enjoy full personal immunity: they must never be killed, nor be in any way molested or maltreated."<sup>14</sup>

That practice has been continued by Muslim states in their contemporary international relations and certainly without exception since their acceptance of the two Vienna Conventions of 1961 and 1963 on diplomatic and consular relations.

#### *The Extent of Aman and Immunity in Time of Peace*

The principle of diplomatic immunity, and its extent, is derived from the Koran and the Sunna. It is also implicit in the concept of *Aman* (safe conduct, which is guaranteed in the Koran for non-Muslims). While *Aman* contains limits on what the *Musta'min* may and may not do, there is nothing

<sup>12</sup> SIRAT AL-RASUL, *supra* note 9, at 649.

<sup>13</sup> AL RAWD AL-NADIR 301: For a contemporary position relying on traditional precedents, see G. ABDEL-SALAM in 2 AL-WASIT FI AL-QANUN AL-DAWLI AL-AM 18 (A Manual of Public International Law) (1979). See also, e.g., M. HAMIDULLAH, CORPUS, *supra* note 9, and CONDUCT, *infra* note 14.

<sup>14</sup> M. HAMIDULLAH, MUSLIM CONDUCT OF STATE 139 (4th ed. 1961) [hereinafter referred to as HAMIDULLAH, CONDUCT]. A major historical source is TABARI, *supra* note 9. See generally IBN AL-FARRA, KITAB RUSUL AL-MULUK (The Book of the Envoys of the Kings) (Salah el-din al-Munajjid ed., n.d.); ABOUL-FEDA'S HISTORY: TARIKH ABOUL-FEDA (I. Washington trans., 1965).

in the Koran or Sunna to indicate that diplomatic immunity is anything less than absolute. A distinction must therefore be drawn between the *Musta'min's* rights and the diplomat's immunity. The former is not immune from the criminal jurisdiction of the state, while the latter is.<sup>15</sup> The *Musta'min* may be prosecuted for all crimes, including *Taazir* offenses, but the diplomat may not, especially for *Taazir* offenses<sup>16</sup> (as is discussed below).

Specifically, the *Koran* states in *Surat al-Nissaa* 4:58:

*God commands you to render back your trusts to those to whom they are due, and to be just when you judge between man and man [emphasis added].*

*Aman* is a trust and it must not be breached. The duty is to return the person (or object) in question to the status quo ante. This position is also made clear in other Koranic mandates. Among these is *Surat al-Tawba* 9:6:

If a pagan asks you for asylum, grant it to him, so that he may hear the word of God, and then escort him to where he can be secure [emphasis added].

Thus, security must be given to the asker, and safe return must follow.

The Prophet also referred to this principle in many sayings (*Hadith*) in the Sunna, as well as through his deeds. In one such *Hadith* he stated:

If a man among you whether from the remotest or nearest place gives another man [who is not from among you, i.e., a Muslim] safe conduct [*Aman*], or waves to him by hand as meaning security, the man because of his signal is given security until he hears God's word. If he accepts it, he is your brother in religion but if he rejects it, then take him back to his secure place.

An even more affirmative position is taken by authoritative Shiite sources referring to the practice and sayings of Ali ibn Abi-Taleb that a non-Muslim who repudiates his treaty or pledge with Muslims should not be killed, but should be returned to where he can be secure. In addition, respect for the life, security, and property of non-Muslims who have *Aman* is binding on all Muslims, as is their safe return.<sup>17</sup>

### *The Islamic International Law of Diplomatic Immunity*

Islamic law recognizes the binding nature of treaties in accordance with the maxim *pacta sunt servanda*.<sup>18</sup> Nothing is clearer than the following words of the *Koran* in *Surat al-Israa* 17:34:

<sup>15</sup> See generally *Siyar al-Shaybani*, translated as *THE ISLAMIC LAW OF NATIONS* (Khadduri ed. & tr., 1966); M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955); *LAW IN THE MIDDLE EAST* 36 (Khadduri & Liebesny, eds., 1955); HAMIDULLAH, *supra* note 14. See also J. SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 130-31 (1965). But see A. OUDA, *infra* note 46, vol. 1, at 324-25.

<sup>16</sup> According to some scholars, the diplomat is immune from the jurisdiction of the state except for *Hudud* crimes. See *infra* pp. 623-25 and accompanying text. This category of offenses is irrelevant to the case of the American detainees since their alleged offense is "spying," which is a *Taazir* offense subject to diplomatic immunity. See also A. F. BAHNASI, *AL-JARAHIM FIL-FIQH AL-ISLAMI* (Crimes in the Jurisprudence of Islam) 245-55 (A.H. 1388, A.D. 1968).

<sup>17</sup> See the Jaafari jurisconsult, Sheikh Abul-Quasem Negm-el-din Jaafar ibn-al-Hassan el-Helli (d. A.H. 676) in *AL-MUHTASSAN AL-NAFEH* (The Approved and the Useful) 112 (n.d.), and his *SHARA'I AL-ISLAM*, 4 vols. (n.d., ed. Abdel-Husayn Ali, a noted Shiite authority).

<sup>18</sup> Among the many contemporary authorities, see generally T. AL-GHUNAIMI, *THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH* (1968); HAMIDULLAH,

And perform your Covenant [promises]; verily the Covenant shall be enquired of [you shall be responsible for it].

Also:

You who believe fulfill all obligations.

And *Surat al-Mazda* 5:1 states:

Fulfill the contracts you have made, . . . such are the people of truth who fear God.

*Surat al-Baqara* 3:177 denounces the breach of covenants and observes at 3:100:

Every time they make a Covenant, some party among them throws it aside. Why, most of them are faithless.

The Prophet also said in that respect in a *Hadith*:

The Muslims are bound by their obligations, except an obligation that renders the lawful unlawful, and the unlawful lawful.

The Prophet applied that principle in his international relations when he entered into the treaties discussed above.

While a treaty may not derogate from the *Shari'a*, it can and does have precedence over all laws except the Koran and the Sunna. Treaties concerning the protection of diplomats are therefore within the *Shari'a*, and a Muslim state like Iran, which is signatory to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, is bound by these treaties under Islamic international law. Thus, the *Shari'a* makes these treaties binding and they become applicable in themselves (self-executing).

The Vienna Conventions provide absolute immunity to diplomats and prohibit their arrest, detention, and prosecution. Iran is bound by these treaties under contemporary conventional international law as well as under Islamic international law, which requires fulfillment of treaty obligations as stated above.

The immunities provided in the 1961 Convention on Diplomatic Relations are, *inter alia*:

- (1) Article 29, the inviolability of diplomats, including their arrest and detention;
- (2) Article 31, immunity from criminal prosecution of the diplomats;
- (3) Article 37, immunity from criminal prosecution of the administrative and technical personnel of the mission; and
- (4) Articles 22, 24, and 27, on the inviolability of the diplomatic premises and the correspondence and archives.

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CONDUCT, *supra* note 14; N. ARMANAZI, L'ISLAM ET LE DROIT INTERNATIONAL (1929); Reshid, *L'Islam et le droit des gens*, 60 RECUEIL DES COURS 4-30 (1937 II); Draz, *Le Droit international public de l'Islam*, 5 REV. EGYPTIENNE DROIT INT'L 17 (1949); Majid, *The Moslem International Law*, 28 L. REV. Q. 89 (1912); Rabbath, *Pour une théorie du droit international musulman*, 6 REV. EGYPTIENNE DROIT INT'L 1 (1950).

The 1963 Convention on Consular Relations in Articles 41 and 43 grants immunity to consular officers and employees for acts performed within the course of their duties. To emphasize the importance of these immunities and protections, the 1961 Convention on Diplomatic Relations requires a signatory state under Article 29 to take "all appropriate steps" and to use "all practical means" to protect diplomats. These provisions of the conventions are compatible with Islamic law and binding upon Iran. Their violation constitutes a violation not only of conventional international law but also of Islamic international law. Other sources of binding international law are discussed below in section V.

*Permissible Sanctions Against Diplomats in Islamic Law*

A diplomat's immunity under Islamic law precludes his arrest or detention, except perhaps for *Hudud* crimes, a possibility acknowledged by some scholars but not specifically by the Koran and Sunna.<sup>19</sup> *Hudud* crimes, however, do not include spying or any related crimes allegedly committed by the detainees in Iran.

A diplomat's functions, as stated and practiced in the Sunna, are very much like those of today, except for differences brought about by modern technology. This similarity is evidenced by the Prophet's frequent practice of sending off diplomatic delegations during his 10 years as Islam's leader. His directives to his emissaries were "to work patiently, avoid harshness toward others, give good tidings to other people, [and] not to incite hostility toward themselves or their mission."<sup>20</sup> These directives are very much in keeping with traditional diplomacy throughout the world. It might be argued that activities outside that scope are not considered diplomatic, and the question therefore arises as to the appropriate sanctions. In such cases a diplomat's immunity is terminated and he is expelled.

In the cases described above, notwithstanding transgressions by the emissaries, no action was taken against them except expulsion. There are cases of detention of diplomats as reprisals against the seizure of Muslim diplomats by the sending state, but these are not analogous to the Iranian case. There is no known case in the records of the first four decades of the Islamic state concerning a spying diplomat.<sup>21</sup> This does not mean that they did not exist, but only that if caught they would have been expelled.

As stated above, the nondiplomat having *Aman* may be expelled, and thus restored to security or the status quo ante. If, however, there is an existing

<sup>19</sup> See *infra* pp. 623-25. *Musta'min*: Imam Abu-Hanifa held that a *Musta'min* could not be prosecuted for a crime involving the rights of God or society except for a *Had* crime, but only for transgressions against the rights of individuals for which *Diya* or compensation was the appropriate remedy. See IBN HUMAN, 4 SHARH FATH EL-QUADIRE 152-56 (1st ed. A.H. 1313) (an explanation of Islamic jurisprudence according to the Hanafi school on which the Shias rely heavily); and KASANI, *infra* note 42, vol. IV, at 131-33.

<sup>20</sup> See SIRAT AL-RASUL, *supra* note 9, at 647-48, 655-57.

<sup>21</sup> See Hamidullah's annotated compilation in *Corpus*, *supra* note 11, of the treaties and diplomatic correspondence at the time of the Prophet and the first four Caliphs, including the Caliphate of Ali ibn Ali-Tabi, whom the Shias consider the most authoritative source after the Prophet.

treaty between the state of nationality of the *Must'amin* and the Muslim state, the expulsion must be preceded by a renunciation of the treaty, and no treachery must be involved on the part of the Muslims. Thus, the Koran states in *Surat al-Anfal* 8:58:

If you fear treachery from any group, throw back their Covenants to them, so as to be on equal terms, for God does not like the treacherous.

Ali ibn Abi-Taleb repeatedly emphasized the odiousness of treachery and his unconditional adherence to the sanctity of obligation, especially *Aman* in keeping with the Koran and Sunna. He stressed that treacherous persons, particularly envoys, can only be expelled.

The sanction of expulsion is also the permissible sanction under the two Vienna Conventions. Because no other sanction is permissible under Islamic law, Islamic international law, or conventional international law, the continued holding of the detainees is clearly an impermissible and unlawful act.

## II. THE SHIITE DOCTRINE OF DIPLOMATIC IMMUNITY AND THE SHARI'A

The *Imamiyah Shi'a* is the majority sect in Iran.<sup>22</sup> Its philosophical views, though different from those of the Sunni and even other Shias, do not depart in any substantial respects from the *Shari'a* as interpreted by the Sunni.<sup>23</sup> These Shias are also sometimes called *al-Ithna-Ashariya* (the Twelvers) because they believe that twelve Imams, counting Ali as the first, appeared on earth and that the last, Muhammad ibn al-Hassan al-Askari, who is called *al-Mahdi* (the Guided), entered an underground chamber in a hill in the year A.H. 260 and disappeared. According to Shiite belief, he is to reappear at the end of time and will fill the earth with justice.<sup>24</sup> While the last Imam remains occulted, his agents, the *mujtahedeen*, are expected by their *ijtihad* (supreme effort and endeavor) to arrive at a complete knowledge of the Koran and the Sunna. (The Sunnis, however, have not relied on *ijtihad* since the ninth century.)

This sect of Islam is also known as *al-Shi'a al-Imamiyah* because it believes in the infallibility of the Imam and in the coming of *al-Mahdi*.

The essential distinction between the Shiite and Sunni doctrines lies in the claim to the *Khilafa* (the succession) and the powers of the Imam. The Shias claim that Ali ibn Abi-Taleb, cousin and son-in-law of the Prophet, had a more legitimate claim to the *Khilafa* than all the others and that it should have been inherited by the heirs of the Prophet, thus Ali and his descendants. Disagreement between Sunnis, who believe in an elective *Khalifa*, and

<sup>22</sup> A. MASSIGNON, *ANNUAIRE DU MONDE MUSULMAN* 24, 38 (1929).

<sup>23</sup> See generally H. CORBIN, *EN ISLAM IRANIEN* (1972). The sources of Islamic law presented in this discussion are the Koran and the Sunna, which are unquestionable sources in Shiite doctrine. As for the Sunna, reference is made only to the *Sunnah Moakada* (affirmed), related through descendants of the Prophet as *al-Akhbar* (The News or Annals), which is required by all schools of the Shiite sect. There is therefore nothing in the sources and authorities from the Koran and the Sunna cited in section I *supra* that is not accepted and binding on Iran's Shias.

<sup>24</sup> H. CORBIN, note 23 *supra*. For two noted Shiite authors, see MUHAMMAD JAWAD MAGHNIYAH, *FIQH AL-IMAM JAA'FAR AL-SADIQ* (1965) (The Legal Science of Imam Jaa'far al-Sadiq); and RUSHDI ALYAN, *AL-AQL IND AL-SHIA* (1973) (Legal Reasoning in Shia).

the Shias, who believe in succession, was therefore mainly political and has remained so throughout the history of Islam. Otherwise, there are basically few differences between the two schools as to the sources of Islamic law and the interpretation of the Koran.

The sources of law, according to the *Imamiyah Shi'a* school, are: (1) the Koran; (2) the Sunna (the tradition of the Prophet); (3) *Ijma* (consensus); and, to some, (4) *Ijtihad* (analogy).<sup>25</sup>

With respect to the Sunna, the Shias accept only those traditions whose source of authority can be traced to the family of the Prophet. They call such traditions *al-Akhbar* (the news or narratives).<sup>26</sup> The Shias only accept *Ijma* (consensus) if it emanates from the family of the Prophet or if the *Ulema* (learned theologians) who reached it received the approval of the infallible Shiite Imam. Consensus to them "is the consensus which embodies the views of the infallible *Imam* and not merely the agreement of the *Ulema* on an opinion."<sup>27</sup> As regards *Ijtihad* (analogy), it is forbidden according to the *Akhbariyan* sect but accepted by the *Usuliyun* sect.<sup>28</sup>

The *Imamiyah* school is attributed to the Imam Jaa'far al-Sadiq (A.H. 80 or 83–148) and thus is called *al-Madhab al-Jaa'fari*. It is the largest of the Shiite sects and most of its followers are in Iran. It has been the official school of the Iranian state since the beginning of the reign of the Safavid dynasty in A.H. 907 (A.D. 1501).<sup>29</sup> Its concept of diplomatic immunity is the same as the Sunni concept discussed above, because it is predicated on clear and repeated enunciations in the Koran and the Sunna.

As to the writings of scholars, one of the Shias' influential sources is the Sunni Imam Abu-Hanifa (who died in Baghdad in A.D. 766). His principal disciple in jurisprudence was Shaybani (d. A.D. 805), whose *Siyars* (case studies) clearly state that diplomats are entitled to immunity.<sup>30</sup> Another authoritative source supporting the same proposition is Mawardi, who compiled a record of Islamic rulings and practices and was an eminent judge and scholar in Baghdad. His major work is *Al-Ahkam al-Sultaniya* (A.D. 1058).<sup>31</sup> Mawardi also sets forth the principles and practices of diplomatic immunity adhered to by the Shias. In addition, a more contemporary author is Tusi, whose works are still studied in Iran's Shiite school of Islamic *Fiqh*. He holds the same position, *i.e.*, that *Aman* or safe conduct is a binding obligation and to break it is a sin.<sup>32</sup> Thus, the *Aman* given United States diplomats in Iran could not be broken, but since it was, a sin was committed, and sins are also crimes in Islam. In the *Al-Mabsut*, Tusi makes the same point:

<sup>25</sup> SHAHRASTANI, AL-MILAL WAL-NIHAL (The Sects and their Divisions) (printed on the margin of) 2 IBN HAZM'S AL-FISAL (The Principles of Judgment) (A.H. 1347–48).

<sup>26</sup> M. BAQUIR, HAL AL-'UQUL 44 (n.d.); M. M. AL-KAZIMI, 2 ANAWIN AL-USUL (The Headings of Principles) 7 (A.H. 1342).

<sup>27</sup> See A. Fyzee, *Shi'i Legal Theories* in Khadduri & Liebesny, eds., *supra* note 15, at 112.

<sup>28</sup> AL-HILLI, AL-MUHAQQIQ, 1 TADHKIRAT AL-FUQQAHA (Recollections of the Philosophers) (n.d.); and *supra* note 17.

<sup>29</sup> H. CORBIN, *supra* note 23.

<sup>30</sup> The *Siyars* were translated by M. Khadduri as *The Muslim Law of Nations* and published in 1966.

<sup>31</sup> This book was translated into French by Z. Fagnan in 1915.

<sup>32</sup> SHEIKH AL-TAYEFEH AL-TUSI, 1 AN-NIHAYA (The Ending or the Conclusion) 30 (A.H. 1342).



It is the tradition of followers of our [*i.e.*, the Shiite] school of law that if unbelievers seek the protection of Muslims and the Muslims say: "We do not grant you protection," and the unbelievers [mistakenly] presume that they have safe conduct, a Muslim will not place any obstacle in their way; on the contrary, they should be returned to places where they are secure. . . .<sup>33</sup>

The same principle applies in time of both war and peace, and even in cases of error or mistake. Tusi states:

If a Muslim has not intended to give a guarantee of safe conduct, [his words] do not constitute such a guarantee; except that, if unbelievers should have confidence that such statements have been made to them, and enter the territory of the Muslims, no obstacle will be placed in their way because it was an error based on a reasonable presumption. They will be returned to places where they are secure, becoming [again part of the] non-Muslim foe. The same principle applies if a Muslim should make to an unbeliever some sign that causes the unbeliever to imagine that he has been granted a safe conduct and the unbeliever has then relied on this [imagined sign] and entered the territory of Islam. In such a case, the principle discussed above is [also] applied.<sup>34</sup>

Additional support is given by Professor R. Mottahedeh, who states:

Shi'ite Islamic Law agrees with Roman and common law traditions on a significant number of points; and many Shi'ite jurists, in their treatment of one aspect of diplomatic immunity, are more generous to diplomatic personnel than are some Western jurists (and some jurists of non-Shi'ite Islamic legal traditions). All Islamic legal schools believe in the sanctity of *aman*, the guarantee of safe conduct which, given orally, or in writing, had been the basis of diplomatic relations between the Islamic and non-Islamic world since the time of the Prophet. Many Shi'ite jurists also argue that non-Muslims who have entered Islamic territory on the misunderstanding that safe conduct has been granted them should be given safe conduct back to places of security among their own people even in times of war between Muslims and non-Muslims.<sup>35</sup>

In summary, nothing in Shiite doctrine contradicts the Sunni doctrine on diplomatic immunity, as formulated by Ibn al-Hassan al-Tunsi in his books *An-Nihaya* and *Al-Mabsut*, which are among the most authoritative contemporary writings followed by Iran's Shias. In addition, diplomatic immunity, as interpreted and applied in Shiite doctrine, is recognized in the same manner as in Sunni doctrine, and the only sanction for the transgression of diplomatic immunity is expulsion of the transgressing diplomat. Thus, the seizure of the Embassy of the United States, and the arrest and detention of United States diplomats and personnel of the Embassy and Consulate, is in clear violation of Islamic law as established in the Koran, practiced by the Prophet, followed by the successive *Khalifas*, agreed upon in the writings of the most distinguished and recognized scholars throughout Islam's history, and practiced by contemporary Muslim states.

<sup>33</sup> SHEIKH AL-TAYEFEH AL-TUSI, 2 AL-MABSUT 14-15 (1967).

<sup>34</sup> *Id.* at 15.

<sup>35</sup> N.Y.L.J., January 14, 1980, Letters to the Editor, at 2, col. 6. See also Mottahedeh, *Iran's Foreign Devils*, 38 FOREIGN AFF. 19, 31-32 (1980).

## III. ISSUES RAISED BY THE SEIZURE UNDER THE SHARI'A

*The Theory of Reprisals*

While it is uncontroverted that under conventional international law, no theory of reprisals may justify a breach of diplomatic immunity, the issue must be dealt with in light of the allegation by the "students" who seized the U.S. hostages and other Iranian public officials that it is warranted under Islamic law.

The precedent discussed above of the Prophet's preventing the departure of Quraish's envoy because of the rumor that his envoy Othman had been killed, is a case in point.<sup>36</sup> If the prevention of an envoy's departure is ever warranted as reprisals in kind, it is because the envoy's counterpart has been treated likewise (or detained) in violation of diplomatic immunity. No action against a diplomat for any other reason finds support or precedent either in the Koran or the Sunna.

The allegation that the seizure of the Embassy and the arrest and detention of the hostages are a form of pressure to secure the return by the United States of the former Shah, Reza Pahlavi, is no justification. The use of diplomats as "hostages" to secure the return of a person wanted for prosecution finds no support in Islamic law. The protection of diplomats is unrelated to other events. As shown above, even when offending diplomats were concerned, according to the Sunna and thereafter Ali's practice, the most that was done was to expel them. Otherwise, they were held inviolate and not personally accountable for the acts of their governments. The very idea of holding diplomats "hostage" to accomplish a political objective is contrary to Islam.<sup>37</sup>

There are two additional arguments that reveal the impropriety and inapplicability of any "reprisals" theory, even if, *arguendo*, such a theory could be found. The first is that it would no longer be valid after the former Shah's departure from the United States in January 1980. The second is that, in accordance with valid international practice and in conformity with the Constitution and laws of the United States, the Government of the United States could not without a valid, lawful process and by force seize the former Shah and deliver him to whatever de facto Iranian authority would be willing to accept him. Under title 18 of the United States Code, section 3181, no extradition can take place without a treaty between the United States and the requesting state.<sup>38</sup> There can be no deviation from that requirement in a country where the rule of law prevails. Iran has no extradition treaty with the United States, has not requested that one be entered into, and has not even made a formal request to the United States Government for extradition of the former Shah.

<sup>36</sup> See text at notes 7-9 *supra* and notes 8 and 9.

<sup>37</sup> See HAMIDULLAH, CORPUS, *supra* note 9, on the history of Islamic diplomacy under the Prophet and the first 4 *Khalifas*, among which was Ali, the highest authority after the Prophet in Shiite doctrine.

<sup>38</sup> On these and other related questions of extradition, see generally M. C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974).

There is no basis under the Islamic law of diplomatic immunity for any reprisal theory applicable to the present case, nor is there any such basis under conventional international law. The very proposition of legitimate "reprisals" is spurious because it is legally impossible for the United States Government to have considered an extradition request (though none was made) in the absence of a treaty, or to request that United States courts, which are the competent authority to certify a person as extraditable, arrest and transfer the former Shah to Iran in this case.<sup>39</sup> Even if the Government of the United States had revoked the former Shah's entry visa for medical reasons, it could not have delivered him to any foreign authority without violating the U.S. Constitution and the Immigration and Naturalization Act of 1965 (8 U.S.C. §244) which permit him "voluntary departure" to a destination of his choice. In any event, the former Shah would have had the right to file a petition for a writ of habeas corpus in a federal district court, which would have barred any such unlawful attempt at his forcible delivery to anyone.

*The Nonretroactivity of Criminal Law and Punishment*

The principle in Islam that criminal laws and punishment shall not be applied retroactively is considered a "basic principle" or *Quaeda Usulia*, and finds express support in the Koran.

In *Surat al-Israa* (17:15) it is stated:

And nor shall we be punishing until we had sent them an Apostle.

This statement means that the accused must first be given the opportunity to know the law, and thus that no punishment shall be imposed without prior law. Similarly, in *Surat al-Qesas* (28:59) it is stated:

Nor was your Lord the one to destroy a population until we had sent to it an Apostle who shall divulge upon them our signs [commands].

In *Surat al-Nissaa* (4:165) one finds:

We have sent them . . . Apostles who gave good news as well as warnings, so that mankind after the coming of the Apostles should have no plea against God.

And in *Surat al-Maeda* (5:98):

God forgives what is past.

Seldom does one find more unequivocal texts in the Koran confirming the same principle so emphatically. There can be no retroactive application of penal laws in Islam.<sup>40</sup>

No Islamic tribunal may apply Islamic law to persons who by that very law are not subject to it because at the time of the alleged offense Islamic law was not declared applicable. There is specific application of this principle in

<sup>39</sup> *Id.* at 511-34.

<sup>40</sup> For the view of a contemporary author, see A. MAHDI, *SHARH AL-QUAWAED AL-AMALI-QUANUN AL-UQUBAT* (Explanation of the General Principles of Criminal Law) 37-40 (1979).

the Koran in connection with marriage. Men are prohibited from marrying certain women such as their mothers and sisters, and also from marrying two sisters (unrelated to them) at the same time. But since in the pagan pre-Islamic days marrying two sisters was permitted, the Koran held that this prohibition would not be retroactive. Thus, it is stated in *Surat al-Nissaa* (4:22):

*except for what was done in the past; for your Lord is forgiving and merciful [emphasis added].*

Nonretroactivity was also the subject of the Prophet's "Final Pilgrimage" *Hadith* (A.H. 9), in which he said:

[T]here is prescription for blood crimes spilled [committed] in the days of ignorance [before Islam was revealed]. . . .

Again the nonretroactivity of laws applicable to crimes and punishment before the promulgation of Islamic law is affirmed.

The Iranian Islamic revolution was proclaimed by the Ayatollah Khomeini in February 1979, but it was not until December 3, 1979, that Iran voted a Constitution declaring Iran to be an "Islamic state." The U.S. detainees were first seized on November 4, 1979, and may not be charged under Islamic law with any crimes whatsoever committed before December 3, 1979. For crimes committed prior to December 3, 1979, they would be subject to the secular Iranian criminal laws and procedures existing at that time, and other laws such as the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, both of which provide for absolute diplomatic immunity. No prosecution can therefore take place against these U.S. citizens for any alleged crimes or offenses against Islamic law or law promulgated by Iran for acts that were purportedly committed before December 3, 1979.<sup>41</sup> Consequently, no detention can be alleged to be valid pending a presumed trial. Since December 3, 1979, the detainees, of course, have been in no position to "spy."

### *The Presumption of Innocence*

The "presumption of innocence" is a basic principle of Islamic criminal justice.<sup>42</sup> The Prophet said, "avoid using circumstantial evidence in *Hudud*,"<sup>43</sup> which are the most serious of all crimes since they are specified in the Koran. Aicha, the wife of the Prophet, referring to the *Hadith* just quoted, reported that he also stated:

Avoid condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor of innocence [pardon] than in favor of guilt [punishment].

<sup>41</sup> See text at note 61 *infra*.

<sup>42</sup> See IMAM ALAA EL-DIN ABU-BABKR MAS'UD AL-KASANI, 7 BADAEE AL-SANAAE FI TARTIB AL-SHARI'A (The Brilliant Workings of the Shari'a's Structure) 67 (1st ed. A.H. 1327-1328). See also A. F. SOROUR, AL-WASIT FI QANUN AL-IGRAAT AL-GINAIA (A Manual of Criminal Procedure) 71-73 (1980).

<sup>43</sup> For *Hudud* crimes, see *infra* pp. 623-24.

These words speak for themselves. It is also a well-established principle in *Qesas* crimes<sup>44</sup> that circumstantial evidence favorable to the accused is to be relied upon, while if unfavorable to him it is to be disregarded (though considered only for purposes of *Diya* or victim compensation, subject, however, to other conditions of *Diya*).

The presumption of innocence applies to the lesser *Taazir* offenses (discussed below) as well. In his "Final Pilgrimage" *Hadith*, the Prophet said:

Your lives, your property, and your honor are a burden upon you until you meet your Lord on the Day of Resurrection.

This passage is interpreted to mean that the duty to protect life, property, and honor cannot be abridged without positive proof of a crime.<sup>45</sup>

Nothing can be found in the *Shari'a* to justify the indiscriminate arrest and detention of U.S. diplomats and embassy personnel on the post hoc alleged grounds of suspicion of espionage, since it violates the presumption of innocence. The presumption of innocence precludes their arrest and detention even if these individuals had no special status, which, however, they do by virtue of their diplomatic capacity and in accordance with applicable conventions and Islamic law.

Furthermore, the allegation that some of the diplomats engaged in espionage clearly admits on its face that others are not so accused, particularly nondiplomatic embassy staff and personnel. Thus, the continued detention of all the hostages is clearly in violation of the *Shari'a* on grounds of failure to apply the presumption of innocence. The Iranian authorities' failure to act to free the detainees is in violation of this basic tenet of Islamic criminal justice and of their duty under the *Shari'a* to do what is just.

### *The Crime of Espionage*

There are three categories of crimes in Islam: *Hudud*, *Qesas*, and *Taazir*.<sup>46</sup> There are no Koranic crimes and no punishment other than those specifically prescribed as *Hudud*.

The alleged offense of some U.S. diplomats held among other diplomats and embassy personnel is that of espionage. Espionage is a *Taazir* offense and not a *Hudud* or *Qesas* crime. That fact is crucial to the illegality of the detention.

*Hudud* crimes are punishable by a *Had*, which means that the penalty for them is established in accordance with "God's rights" and is prescribed by the Koran. Prosecution and punishment for such crimes are mandatory, as opposed to *Taazir* offenses for which they are discretionary. The seven *Hudud* crimes, none of which apply to the detainees, are: (1) adultery, (2) defamation (also referred to as slander), (3) alcoholism (which also refers to drinking alcoholic beverages), (4) theft, (5) brigandage (also re-

<sup>44</sup> For *Qesas* crimes, see *infra* pp. 624-25. <sup>45</sup> See, e.g., *supra* note 42.

<sup>46</sup> See A. OUDA, *AL-TASHRI AL-JINAI AL-ISLAMI* (Islamic Criminal Justice), 2 vols. (2d ed. 1969); and M. ABU-ZAHRA, *AL-GARIMA WAL-UQUBA FIL ISLAM* (Crimes and Punishment in Islam) (n.d.).

ferred to as highway robbery), (6) apostasy, and (7) rebellion and corruption of Islam (also referred to as transgression of Islam).

A *Had* crime must be complete, and acts deemed preparatory to it, or solicitation, attempt, and conspiracy, are not included in this category of crimes but are deemed *Taazir* offenses.<sup>47</sup>

A *Had* crime is not punishable unless it continues in fact and those who engage in it do not stop. If they stop, they are not to be punished. This is expressed in the *Surat al-Hujurat* (49:9) of the Koran:

If two groups among the believers fight each other, make peace between them; but if they are transgressors [commits aggression] against the other, then fight the transgressor until compliance with the command of God; *but if they comply, then make peace between them with justice and fairness for God loves those who are fair [and just]* [emphasis added].

It is relevant that this *Sura* was revealed in Medina in the so-called Year of Delegations (A.H. 9), when the Prophet received many foreign delegations seeking to find out about and eventually embrace Islam.

Considering the above, it follows a fortiori that individuals who are alleged to have committed a *Taazir* offense, i.e., espionage (which is subject to discretionary prosecution and thus waivable, and which in any event is deemed to be waived by diplomatic immunity), at most may be expelled and not detained. Without a basis for prosecution, there is none for detention.

*Qesas*, the second category, are not always given a specific and mandatory criminal definition or penalty in the Koran. They are: (1) murder, (2) voluntary homicide (manslaughter), (3) involuntary homicide (manslaughter), (4) intentional crimes against the person, and (5) unintentional crimes against the person. The latter two categories are equivalent to the crimes of assault, battery, mayhem, and other infringements of the person and bodily integrity of an individual that do not result in death. Since espionage is not included in this list of offenses, they are inapplicable to this case.

*Taazir* offenses are those that are not encompassed by any of the above two categories but that result in tangible individual or social harm and for which the penalty is to be rehabilitative (the meaning of *Taazir*). Such a penalty could be imprisonment, the infliction of physical punishment, or the imposition of compensation in accordance with the principle of rehabilitation. The penal action and penalty for those crimes are discretionary and are based on the social opportunities, meaning the social interest in prosecuting the case, rehabilitating the offender, and meeting the claims of the aggrieved party (i.e., victim compensation).<sup>48</sup>

Espionage is a *Taazir* offense. It is a *Haram*, or a less serious prohibition for which the Koran provides no penalty or mandatory prosecution as in the case of *Hudud* crimes, or even *Qesas*. The prohibition of engaging in espionage is stated in the *Surat al-Baqara* (2:188):

[A]nd do not spy.

<sup>47</sup> See A. OUDA, *supra* note 46, and A. AL-MAWARDI, *AL-AHKAM AL-SULTANIYA* (The Proclamations of the Sultans) 233-39 (A.D. 1058).

<sup>48</sup> See generally A. OUDA and M. ABU-ZAHRA, *supra* note 46.

The *Shari'a* relies on what today would be the state's legislative process to enact laws and penalties for *Taazir* on the basis of the principle of proportionality and the concept of rehabilitation (and not retribution as in the case of *Hudud* and *Qesas* crimes).

The principle of proportionality of crime and punishment is established in many Koranic verses.<sup>49</sup> In *Surat al-Maeda* (17:45), it is stated:

and to he who has committed aggression upon you, you may commit the same aggression upon him.

And in *Surat al-Baqara* (3:194):

and if you punish, punish equivalently to the punishment [harm] you have incurred.

*Taazir* offenses are discretionary and as such are waivable and de jure waived by diplomatic immunity. That immunity, whether under Islamic law in itself or under Islamic international law, which recognizes the binding effect of treaties, has the unequivocal effect of waiving prosecution for *Taazir* offenses. Thus, no arrest or detention can be justified on the alleged grounds that the offense in question has been committed, let alone on the grounds that it is under investigation, because a *Taazir* offense could not be the basis for prosecuting diplomats and embassy and consular staff and personnel benefiting from diplomatic immunity.

Some scholars believe diplomatic immunity does not apply under Islamic law with respect to *Hudud* crimes because they are the "right of God"<sup>50</sup> and cannot be waived by treaty (a treaty cannot render lawful that which under the law of God is unlawful). Therefore, to the extent that a diplomat has committed a *Had* crime, he or she may be subject to prosecution and punishment. But since none of the acts or crimes alleged (espionage or any derivative aspects of it) fall or can fall within the meaning of any of the *Had* crimes listed above, even that arguable and questionable exception does not apply to the present case.<sup>51</sup>

In addition, no *Taazir* offenses were enacted or declared before December 3, 1979, the date of promulgation of Iran's Islamic Constitution; because of the principle of nonretroactivity discussed above, their detention is unlawful on that basis. The only remedy or sanction available to Iran is expulsion.<sup>52</sup>

### *The Concept of Due Process*

The dignity of man is foremost in Islam. The Koran states in the *Surat al-Israa* (17:7):

Surely we have accorded dignity to the Sons of Adam.

That dignity applies without distinction to all humankind who are the descendants of Adam.

<sup>49</sup> *Surat al-Baqara* 3:179; *Surat al-Nahl* 16:126.

<sup>50</sup> See A. OUDA, *supra* note 46, at 81-82.

<sup>51</sup> See *id.* at 324-25 and A. F. BAHNASI, *supra* note 16.

<sup>52</sup> See *supra* pp. 613-17, and also *Surat al-Tawba* 9:118.

As for the concept of justice:

The Qurân and Sunnâ are full of words that oblige people to be just and to practise justice. The Qurân forbids persecution, and threatens to punish any one who contemplates using it. If we read the Qurân we find that the word "justice" and all its derivatives in that sense are mentioned more than twenty times. The word "persecution" and its derivatives are mentioned about 299 times. The word "aggression" is mentioned 8 times while the words "attack" or "violate" are mentioned twenty times.<sup>53</sup>

An illustration of the adherence of Muslim states (those who declare themselves to be Islamic) to these principles can be found in their constitutional provisions: they uphold the concept of the rule of law, require "due process" in criminal proceedings, and prohibit "arbitrary arrest and detention."<sup>54</sup> The concept of due process in criminal proceedings is found in early and recent writings of Muslim scholars and they are all in agreement on it.<sup>55</sup>

The rights of individuals in a Muslim state to the protection of life, liberty, honor, and property is embodied in the Prophet's "Final Pilgrimage" *Hadith*:

Your lives, your property, and your honor are a burden upon you until you meet your Lord on the Day of Resurrection.

The Prophet in this *Hadith* emphasized the need to uphold due process of law whenever the life, freedom, honor, and property of individuals

<sup>53</sup> M. MOUSSA, ISLAM AND HUMANITY'S NEED OF IT 236-37 (2d. rev. ed. 1960). See also Bassiouni, *Islam*, *supra* note 3. See generally HAMIDULLAH, CONDUCT, *supra* note 14; Nawaz, *The Concept of Human Rights in Islamic Law*, 11 HOW. L. REV. 325 (1965); Ahmad, *Islamic Civilization and Human Rights*, 12 REV. EGYPTIENNE DROIT INT'L 1 (1956).

<sup>54</sup> For the constitutional texts, see CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Blaustein & Flanz, eds., 1971- ); for a specific analysis of constitutional principles of "due process," see A. MAWDUDI, ISLAMIC LAW AND CONSTITUTION (3d ed. 1967); K. FARUKI, ISLAMIC CONSTITUTIONS (1953); and Hussain, *Due Process in Modern Constitutions and the Process of Sharia*, 7 KARACHI L.J. 57 (1971).

<sup>55</sup> See, e.g., A. OUDA, *supra* note 46; TUSI, *supra* notes 32 and 33; A. F. SOROUR, *supra* note 42; A. MAHDI, *supra* note 40; M. HAMIDULLAH, USUL AL-TASHRI AL-ISLAMI (The Principles of Islamic Jurisprudence) (1977); A. Gamal el-Din, *Al Shari'a wal-Ijraat al-Jinaiia* (The Shari'a and Criminal Procedure), 16 MEJALLAT AL-ULUM AL-QUANOUNIA WAL IQTISADIA (Review of Legal and Economic Studies) 359 (1974); S. RAMADAN, ISLAMIC LAW, ITS SCOPE AND EQUITY (1961); and the consensus of Muslim scholars in the 1976 Conference on Islamic Criminal Justice in Riyadh, in AL-NADWA AL-ILMIYA LI DERASAT TATBIK AL-TASHRII AL-JINAII AL-ISLAMI WA ATHAROHA FI MOKAFAHAT AL-GARIMA FIL-MAMLAKA AL-ARABIA AL-SAUDIA (The Scientific Conference on the Study of the Application of Islamic Criminal Justice and its Influence on Combating Crime in the Kingdom of Saudi Arabia) (2 vols. 1977). It was also the consensus of the participants in the First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System held at the International Institute for Higher Studies in Criminal Sciences in Siracusa, Sicily, in May 1979. For its final resolution, see p. 628 *ff. infra*; the resolution also appeared in Bassiouni, *Iran's Revolutionary Justice is not Islamic*, Christian Science Monitor, Oct. 16, 1979, at 26. Some of the papers presented were published in Arabic in AL-MEJALLA AL-ARABIA LIL-DIFAA AL-IJTIMII (The Arab Review of Social Defense), October 1979.



are at stake.<sup>56</sup> The Sunna is replete with examples in which personal freedom is upheld against the abuse of those who retain power.<sup>57</sup>

A. Mawdudi explains the Islamic concept of the right to justice as follows:

This is a very important and valuable right which Islam has given to man as a human being. The Holy *Quran* has laid down: "Do not let your hatred of a people incite you to aggression" (5:3). "And do not let ill-will towards any folk incite you so that you swerve from dealing justly. Be just; that is nearest to heedfulness" (5:8). Stressing this point the *Quran* again says: "You who believe stand steadfast before God as witness for [truth and] fairplay" (4:135). This makes the point clear the Muslims have to be just not only with ordinary human beings but even with their enemies. In other words, the justice to which Islam invites her followers is not limited only to the citizens of their own country, or the people of their tribe, nation or race, or the Muslim community as a whole, but it is meant for all the human beings of the world. Muslims, therefore, cannot be unjust to anyone. Their permanent habit and character should be such that no man should ever fear injustice at their hands, and they should treat every human being everywhere with justice and fairness.<sup>58</sup>

As to the security of personal freedom, Mawdudi states:

Islam has also laid down the principle that no citizen can be imprisoned unless his guilt has been proved in an open court. To arrest a man only on the basis of suspicion and to throw him into a prison without proper court proceedings and without providing him a reasonable opportunity to produce his defense is not permissible in Islam. It is related in the *Hadith* that once the Prophet was delivering a lecture in the Mosque, when a man rose during the lecture and said: "O Prophet of God, for what crime have my neighbours been arrested?" The Prophet heard the question and continued his speech. The man rose once again and repeated the same question. The Prophet again did not answer and continued his speech. The man rose for a third time and repeated the same question. Then the Prophet ordered that the man's neighbours be released. The reason why the Prophet had kept quiet when the question was repeated twice earlier was that the police officer was present in the Mosque and if there were proper reasons for the arrest of the neighbours of this man, he would have got up to explain his position. Since the police officer gave no reasons for these arrests the Prophet ordered that the arrested persons should be released. The police officer was aware of the Islamic law and therefore he did not get up to say: "the administration is aware of the charges against the arrested men, but they cannot be disclosed in public."

<sup>56</sup> See Bassiouni, *Islam*, *supra* note 3, at 23-24; A. MAWDUDI, *supra* note 54, at 339.

<sup>57</sup> See A. QUTB, *ISLAM: THE MISUNDERSTOOD RELIGION* 249 (6th ed. 1964), who quotes Imam Khattabi on the fact that there can be no detention without an order of a court of law, a position that is uniformly accepted among Muslim scholars as being in keeping with the *Shari'a*; and Bassiouni, *Islam*, *supra* note 3, at 36.

<sup>58</sup> A. MAWDUDI, *HUMAN RIGHTS IN ISLAM* 19 (1977) [hereinafter cited as MAWDUDI, *HUMAN RIGHTS*]. The taking and detention of the hostages and the failure by the Iranian Government to secure their release also threaten the right to security of life and property under Islamic law. This principle is made evident in the works of Tusi cited at notes 32 and 33.

If the Prophet would inquire about their guilt *in camera* I would enlighten him." If the police officer had made such a statement, he would have been dismissed then and there. The fact that the police officer did not give any reasons for the arrests in the open court was sufficient reason for the Prophet to give immediate orders for the release of the arrested men. The injunction of the Holy *Quran* is very clear on this point. "Whenever you judge between people, you should judge with (a sense of) justice" (4:58). And the Prophet has also been asked by God: "I have been ordered to dispense justice between you." This was the reason why the Caliph Umar said: "In Islam no one can be imprisoned except in pursuance of justice." The words used here clearly indicate that justice means due process of law. What has been prohibited and condemned is that a man be arrested and imprisoned without proof of his guilt in an open court and without providing him an opportunity to defend himself against those charges. If the Government suspects that a particular individual has committed a crime or he is likely to commit an offense in the near future then they should give reasons of their suspicion before a court of law and the culprit or the suspect should be allowed to produce his defense in an open court, so that the court may decide whether the suspicion against him is based on sound grounds or not and if there is good reason for suspicion, then he should be informed of how long he will be in preventive detention. This decision should be taken under all circumstances in an open court, so that the public may hear the charges brought by the Government, as well as the defense made by the accused and see that the due process of law is being applied to him and he is not being victimized.<sup>59</sup>

Ali ibn Abi-Taleb also adhered to this position in his dealings with the Kharijites who opposed him and even threatened to kill him. He held that they could not be arrested so long as they lived in peace.<sup>60</sup> The Koran in *Surat al-Maeda* (17:9) states:

You who believe stand out firmly for God as witnesses to fairness, and let not the hatred of others make you swerve to wrong and depart from justice. Be just, which is next to piety, and fear God, for God is well acquainted with all that you do.

These statements are clear in Islamic jurisprudence. They mean that a duty equal to that of piety and belief is to uphold "fairness" and fair dealing, and that injustice is one of the gravest wrongs against God, as well as man. Thus, the violation of due process, the arbitrary arrest and detention of the detainees, and the suffering imposed upon them and their families are an injustice, which is among Islam's gravest wrongs.

This conclusion was confirmed by the group of distinguished Muslim scholars and experts in criminal law at the First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System, which was held in Siracusa, Italy, from May 28 to 31, 1979. They unanimously adopted the following resolution:

<sup>59</sup> MAWDUDI, HUMAN RIGHTS *supra* note 58, at 25-26.

<sup>60</sup> See *supra* notes 17, 32, and 33.

WHEREAS it has been established to the satisfaction of all participants from both Islamic and non-Islamic nations that the letter and spirit of Islamic Law on the subject of the protection of the rights of the criminally accused are in harmony with the fundamental principles of human rights under international law as well as in harmony with the respect accorded to the equality and dignity of all persons under most constitutions and laws of Muslim and non-Muslim nations of the world;

WHEREAS the basic human rights reflected in the spirit and principles of Islamic Law include the following rights of the criminally accused, *inter alia*:

(1) the right of freedom from arbitrary arrest, detention, torture, or physical annihilation;

(2) the right to be presumed innocent until proven guilty by a competent and impartial tribunal in accordance with the Rule of Law;

(3) the application of the Principle of Legality which calls for the right of the accused to be tried for crimes specified in the Qu'ran or other crimes whose clear and well-established meaning and content are determined by Shariah Law (Islamic Law) or by a criminal code in conformity therewith;

(4) the right to appear before an appropriate tribunal previously established by law;

(5) the right to a fair and public trial;

(6) the right not to be compelled to testify against oneself;

(7) the right to present evidence and to call witnesses in one's defense;

(8) the right to counsel of one's own choosing;

(9) the right to a decision on the merits based upon legally admissible evidence;

(10) the right to have the decision in the case rendered in public;

(11) the right to benefit from the spirit of Mercy and the goals of rehabilitation and resocialization in the consideration of the penalty to be imposed; and

(12) the right of appeal;

WHEREAS the aforementioned rights of due process of law contained in Islamic Law are in complete harmony with the prescriptions of the International Covenant on Civil and Political Rights which has been signed or ratified by many nations including a significant number of Muslim and Islamic nations and which reflects generally accepted principles of international law contained in the Universal Declaration of Human Rights of 1948, and the U.N. Declaration on the Standard Minimum Rules for the Treatment of Offenders;

NOW THEREFORE the participants of the Conference in their individual capacities, desirous of upholding the aforementioned principles and the values they embody, and desirous of ensuring that the practices

and procedures of Islamic and Muslim nations conform thereto, solemnly declare that:

Any departure from the aforementioned principles would constitute a serious and grave violation of Shariah Law, international human rights law, and the generally accepted principles of international law reflected in the constitutions and laws of most nations of the world.<sup>61</sup>

#### IV. FURTHER OBLIGATIONS OF THE IRANIAN GOVERNMENT

##### *Provisions of the 1979 Constitution*

The Constitution of December 1979 stipulates in Articles 4 and 72 that the "laws and regulations" of Iran must be in conformity with Islam, and therefore requires Islamic due process of law. Article 169 recognizes the Islamic principle of nonretroactivity<sup>62</sup> by providing that no act shall be deemed a crime before a law is passed that prohibits it. Article 3(14) states that men and women are entitled to a "just judicial system . . . everyone is equal under law." Article 22 provides that "people's honor, life, property, rights, domicile and profession shall be immune from attack unless otherwise authorized by law." Article 33 states, "no one shall be arrested unless it is carried out in conformity with the law and in a manner prescribed therein."

Clearly, these constitutional mandates are relevant and applicable to the detention of the hostages, who were not detained by court order or under any lawful process and who have no access to justice or any lawful process as provided by the Constitution and Islamic due process.

##### *The Duty to Protect the Detainees*

The duties of Muslims and their rulers are defined by the Koran. They are bound by it and its observance. The Koran is replete with mandates and commands to act according to its dictates and observe its laws. In *Surat al-Maeda* (5:45), it is stated:

And those who so will not judge in accordance with the revelation of God, then those are the nonbelievers [transgressors].

*Surat al-Gathia* (45:18) says:

We have made you ruler by the *Shari'a* so follow it and do not follow the whims of those who do not know.

Thus, there is not only a duty to act, but also a clear duty to act against those "who do not know," namely, those who do not follow the mandates of the *Shari'a*. The Muslim rulers of Iran, its Government, and its public officials cannot claim to be powerless to act, nor is there any excuse for failing to act against the "students" who detained the hostages. They have repeatedly

<sup>61</sup> See note 55 *supra*.

<sup>62</sup> See *supra* note 42 and text accompanying notes 40-42.

stated that they would obey the Ayatollah Khomeini, at first the *de facto* Imam, and since the promulgation of the Constitution the *Faqih* with supreme authority, who therefore has the unquestionable duty to act or delegate others to act.

Furthermore, that duty is incumbent upon all Muslims, particularly those who have the power to act in their official capacity. *Surat al-Maeda* (5:1) requires all believers to abide by their obligations, whether or not they are rulers:

O Believers! Be faithful to your engagements.

In a *Hadith*, the Prophet said:

Those of you who see a wrong must redress it; with your hand [by action] if you can, if not then with your tongue [by words], if not then with your gaze, or within your heart, and this is the least of all faith.

Thus, the duty to redress the wrong of unlawful detention is unquestionable.

In addition, under Islamic international law, the Islamic Republic of Iran is bound by its treaty obligations under the two Vienna Conventions. These engagements are clear and unequivocal under both Islamic law as such and Islamic international law.<sup>63</sup> Furthermore, the duty to protect diplomats under Article 29 of the 1961 Vienna Convention on Diplomatic Relations is unequivocal; it has been breached in addition to Islamic law and the 1979 Iranian Islamic Constitution.

## V. CONCLUSIONS

The seizure and continued detention of the detainees are in violation of Islamic law, Islamic international law, and conventional international law. Their detention also constitutes a crime under Islamic criminal law because there is no legal justification for it, which makes it a *Qesas* crime.<sup>64</sup>

Moreover, the seizure constituted a crime under the then prevailing Iranian Criminal Code, which was presumably still applicable at the time of writing, as it had not been formally abrogated by the competent legislative authority. The seizure and detention of diplomats and persons entitled to diplomatic immunity constitute an international crime under the provisions of the 1972 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.<sup>65</sup> The detention violates the principles embodied in the 1978 draft Convention on the Prevention and Suppression of Torture.<sup>66</sup> The Iranian authorities have the duty to prevent and suppress such crimes, and their failure to do so

<sup>63</sup> See section I *supra*.

<sup>64</sup> See A. OUDA, *supra* note 46.

<sup>65</sup> GA Res. A/3166 (XXVIII), Feb. 5, 1974. See M. C. BASSIOUNI, *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 285-310 (1975).

<sup>66</sup> UN Doc. E/CN.4/NGO/213, Feb. 1, 1978. See also GA Res. 3452 (XXX) 1975; and Bassiouni, *An Appraisal of Torture in International Law and Practice: The Need For an International Convention for the Prevention and Suppression of Torture*, 48 REV. INT'L DROIT PENAL 17 (1977).

constitutes a violation of Islamic criminal law under the 1979 Constitution<sup>67</sup> and of international criminal law.<sup>68</sup>

Iran is a member of the international community, a member of the United Nations, and thus a signatory of its Charter, and a signatory of various international conventions on the protection of human rights, including the 1948 Universal Declaration of Human Rights<sup>69</sup> and the 1966 International Covenant on Civil and Political Rights.<sup>70</sup> These instruments prohibit states from committing "arbitrary arrest and detention," and require them to protect basic human rights. These and other obligations are binding on Iran under conventional international law, and under Islamic international law without distinction as to whether the state is engaging in commission or intentional omission.

Finally, mention should be made of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran,<sup>71</sup> which places upon the Iranian Government certain obligations that have been violated by the continued holding of the detainees.<sup>72</sup> Insofar as the Vienna Conventions and the Treaty of Amity between the United States and Iran are still in force, the United States and its citizens are deemed to be *Hulafaa*, which means allies. In that respect, the Prophet said:

whoever enters into a pact with a people should neither release its terms nor tighten them until it expires or it be returned to them on terms of equality.

The citizens of *Hulafaa* or allies are thus entitled to the fulfillment of the terms of any treaty in force and cannot be subjected to treatment contrary to it, even after the treaty's abrogation or renunciation so long as they have not been safely returned to their country of origin.<sup>73</sup>

Based on this discussion of the Islamic criminal justice system, which applies to Iran, and of Iran's obligations under international law and the law

<sup>67</sup> As discussed in the text at notes 53-63 *supra*.

<sup>68</sup> See, e.g., M. C. BASSIOUNI & V. P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW, 2 vols. (1973); Bassiouni, *An Appraisal of the Growth and Development of International Criminal Law*, 45 REV. INT'L DROIT PENAL 405 (1974); and M. C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980).

<sup>69</sup> Universal Declaration of Human Rights, GA Res. 217A (III), Dec. 10, 1948. For contemporary writers upholding the applicability of internationally protected human rights under Islam, see S. H. TABANDEH, A MUSLIM COMMENTARY ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (Gouldin trans. 1970); see also Ishaque, *Human Rights in Islamic Law*, INTERNATIONAL COMMISSION OF JURISTS, THE REVIEW, June 1974, at 30; M. Z. KHAN, ISLAM AND HUMAN RIGHTS (1970) and his *Foreword* to Bassiouni's *Islam*, *supra* note 3, at 160-61; Said, *Human Rights in Islamic Perspective* in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (eds. Pollis & Schwab, 1970); Nawaz, *The Concept of Human Rights in Islamic Law*, 11 HOW. L.J. 325 (1965); M. AL-GAZHALI, HUKUK AL-INSAN FI-TAALIM AL-ISLAM (Human Rights in the Teachings of Islam) (1962); Khalafallah, *Islamic Law, Civilization and Human Rights*, 12 REV. EGYPTIENNE DROIT INT'L 1 (1956); and A. KHALIFA, FUNDAMENTAL HUMAN RIGHTS IN ISLAM (1952). See also A. H. HAIRI, SHISM AND CONSTITUTIONALISM IN IRAN (1977).

<sup>70</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), Dec. 16, 1966.

<sup>71</sup> 284 UNTS 93, 8 UST 899, TIAS No. 3853.

<sup>72</sup> See *supra* note 1, Memorial of the United States of America to the International Court of Justice, at 45.

<sup>73</sup> AL-HINDI, 2 KANZ AL-ULAMAA FI SUNAN AL-AQWAL WA-AL AF'AL 299 (A.H. 1211).

of internationally protected human rights, the following conclusions may be made:

(1) Islamic law as such, based on the Koran and the Sunna, provides for diplomatic immunity.

(2) The alleged offense of which some of the detainees are accused, namely espionage, is a *Taazir* offense in Islamic criminal law, a discretionary crime whose prosecution is waivable; persons accused of espionage are subject to diplomatic immunity under Islamic law, Islamic international law, and conventional international law.

(3) Espionage in any of its possible meanings is a *Taazir* offense and does not fall within the purview of *Hudud* crimes, which some scholars consider subject to mandatory prosecution and punishment under Islamic criminal law.

(4) The detention of United States citizens enjoying the privileged status of diplomatic immunity is violative of Islamic law without relevant exception.

(5) The only sanction against diplomats, whether under Islamic law as such, Islamic international law, or conventional international law, is expulsion.

(6) Islamic law postulates a basic principle of nonretroactivity of criminal laws and punishment, but Iran became an Islamic state subject to the *Shari'a* in December 1979, after the detainees were in custody. Therefore, no aspect of Islamic law applied to them prior to that date, and allegations of prior acts of espionage are subject to the then prevailing Iranian laws and treaties, which provided for absolute diplomatic immunity. The 1979 Iranian Constitution states the same principle.

(7) The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, to which Iran is signatory, are binding under conventional international law and under Islamic international law. These instruments provide for diplomatic immunity.

(8) These conventions are in conformity with Islamic law, which also makes them binding on Iran under Islamic international law.

(9) The continued holding of the detainees is a crime under Islamic law, Iranian criminal law, and international criminal law. Iran's failure to protect the hostages by commission or omission constitutes a breach of its international obligation and a violation of international conventions on the protection of human rights to which it is signatory.

(10) Nothing in Shiite doctrine is contrary to any of the conclusions stated here or in the body of this discussion.

## EDITORIAL COMMENT

### THE CONSTITUTIONAL AND LEGAL POSITION OF THE NATIONAL SECURITY ADVISER AND DEPUTY ADVISER

In 1979, Senator Edward Zorinsky proposed an amendment to S. 586, the State Department Authorization, which, for the first time, would have established in law the specific offices of Assistant to the President for National Security Affairs and his deputy, and required that presidential nominees to these posts be confirmed by the Senate.

In 1979, the Zorinsky amendment was dropped in House-Senate conference; but it has been under consideration again in 1980, and there is a continuing unease about the growth of the National Security Adviser's functions and powers, together with those of the National Security Council staff, seemingly at the expense of the Secretary of State and his associates. The State Department perceives confusion at home and abroad when two foreign policy advisers reporting directly to the President are heard in public dissonance. Congress is also concerned for another reason: that the post of National Security Adviser is another of those ingenious sleights of nomenclature—some uses of executive agreements (at least until recent reforms in their deployment), the parallel unilateral policy declaration,<sup>1</sup> "personal rank" ambassadors,<sup>2</sup> are other suspects—by which the Executive, from time to time, seems to have tried to exclude the legislative branch from the partnership the Constitution intended. If the authors of the Constitution could have predicted this predilection, they might well have added a final article to their handiwork stating: "Nothing that cannot be done under the foregoing articles may be done by calling it something else."

Evidently, the purpose of the Zorinsky amendment is to make the National Security Adviser and his deputy more responsive to Congress and its oversight committees, both by subjecting the nominees to prior scrutiny—on which occasion they may be asked to indicate the general outlines of their conception of the office, with particular reference to relations with Congress—and by making clear that these officials are "Officers of the United States" within the meaning of Article II, section 2, clause 2 of the Constitution and so subject to the same duty to attend upon Congress as other policymaking officials of the executive branch.

<sup>1</sup> A parallel unilateral policy declaration is a statement to the effect that this country will abide by certain understandings so long as the other "party" does so. It is specifically termed not a treaty or agreement requiring the authorization of Congress or the advice and consent of the Senate. It was first used in connection with the extension of SALT I. See T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* 152–54 (1979).

<sup>2</sup> Personal rank ambassadors, like ambassadors plenipotentiary, may negotiate with foreign representatives, often, but not always, for a shorter, fixed period. Such "special" or "personal" ambassadorial appointments by the President are made without the advice and consent of the Senate despite the unambiguous language of Article II, section 2, clause 2 of the Constitution. See M. WHITEMAN, 7 *DIGEST OF INTERNATIONAL LAW* 33–35 (1970).



Article II, section 2, clause 2 of the Constitution provides the only three means by which federal officers may hold posts in the United States. First, they may be appointed to offices created by the Constitution in the manner set forth by that instrument. Second, they may be appointed to offices created by law after nomination by the President and confirmation by the Senate. Third, "inferior officers" may be appointed by the President acting alone if Congress, by law, has delegated such power to the Chief Executive.

It was established a century ago, in *United States v. Germaine*, that "all persons who can be said to hold an office under the government . . . were intended to be included within one or the other of these modes of appointment"<sup>3</sup> except ordinary employees or lesser functionaries carrying out established policy in an essentially administrative capacity.<sup>4</sup>

This distinction has recently been made very clear by the Supreme Court in *Buckley v. Valeo*. "We think," the opinion states, "that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by §2, cl. 2" of Article II.<sup>5</sup> In the concurring opinion of White, J., federal officers are distinguished from mere employees by "the breadth of their assigned duties and the nature and importance of their assigned functions."<sup>6</sup>

These tests inevitably do not eliminate all borderline cases, but it cannot seriously be contended that the posts of National Security Adviser and his deputy are within any conceivable gray area.

The position of National Security Adviser is not, however, established by law, although there is legislative fiat for the National Security Council<sup>7</sup> and for an executive secretary of the Council,<sup>8</sup> a post the National Security Advisers have refused to utilize. Instead, the President has made the National Security Adviser the effective head of the large and highly professional NSC staff,<sup>9</sup> and has appointed him and his deputy under an obscure statutory authorization allowing the President to appoint "employees in the White House Office."<sup>10</sup>

Historically, this was intended to allow the President to hire staff and a few administrative managers who would help accumulate information pertinent to his decisions and would see that they were carried out by the departments and agencies. In recommending the creation of such a small number of executive assistants' posts in the White House, the 1937 report of the President's Committee on Administrative Management said: "These assistants, probably not exceeding six in number . . . have no power to make decisions or issue instructions in their own right." Moreover, they "would not be interposed between the President and the heads of his depart-

<sup>3</sup> 99 U.S. 508, 509-10 (1879).

<sup>4</sup> *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

<sup>5</sup> 424 U.S. 1, 126 (1976).

<sup>6</sup> *Id.* at 269-70.

<sup>7</sup> 50 U.S.C. §402(a) and (c).

<sup>8</sup> *Id.*, §402(c).

<sup>9</sup> "The Assistant to the President shall be assisted by a National Security Council staff, as provided by law." Presidential Directive/NSC-2, January 20, 1977 (unclassified).

<sup>10</sup> 3 U.S.C. §105(a) (1) and (2). There is also provision for temporary appointment of experts or consultants in 5 U.S.C. §3109 (b).

ments. . . . They would remain in the background, issue no orders, make no decisions, emit no public statements."<sup>11</sup>

This does not sound like a word portrait of such National Security Advisers as Dr. Kissinger or Dr. Brzezinski.

Whatever may be the actual situation regarding other Presidential Assistants, the record is clear that, at least in the last 20 years—with the possible interregnum of Brent Scowcroft—the National Security Adviser has been a policymaker in his own right as much as, and in some instances more than, an administrative employee of the President. He has provided an independent perspective, and has not merely assembled and coordinated those of others. He has negotiated with foreign governments, and has often maintained a high policy profile. If he has been a presidential confidant, he has also given interviews to the media, engaged in policy struggles, developed his own style and policies in public, and interacted with foreign governments far more than would a presidential messenger. He has functioned as the foreign policy Pope in Avignon to the Secretary of State's Papacy in Rome. As such, his power, like that of the Secretary of State, must surely qualify him for the modest rank of federal officer. In *Myers v. United States* the Supreme Court accepted that a postmaster is such an officer.<sup>12</sup> Clearly, the National Security Adviser and his deputy do not regard their posts as less significant.

It is surely the duty of Congress to prescribe the Security Adviser's, and by inference, his deputy's, method of appointment in accordance with one of the procedures set out in Article II, section 2, clause 2 of the Constitution. It must choose the most appropriate method, and it may alter that choice by statute.

Assuming that Congress wishes to permit the post to continue, which of the methods of appointment sanctioned by Article II, section 2, clause 2 should it employ? This is the issue posed by the Zorinsky bill. Certainly, it is appropriate to clear up the statutory confusion currently existing because these key posts are nowhere specified. But should Congress go further, requiring that nominees be subject to the advice and consent of the Senate? There is something to be said for so providing, as in the case of comparable heads of large operational White House-based agencies such as of the Office of Management and Budget<sup>13</sup> and the Office of Science and Technology Policy.<sup>14</sup>

Another advantage of proceeding by advice and consent, as proposed in the Zorinsky bill, is that this procedure may, at least psychologically, condition the nominee to understand the importance of assisting Congress in performing its constitutionally ordained oversight task. In confirmation hearings, the nominee could be asked questions pertinent to his proposed relations with congressional committees. He could even be required to pledge, in writing, compliance with specific congressional policies. Cur-

<sup>11</sup> CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, EXECUTIVE PRIVILEGE: ISSUE BRIEF No. IB 75065, at 3 (1977).

<sup>12</sup> 272 U.S. 52 (1926).

<sup>13</sup> 31 U.S.C. §16.

<sup>14</sup> 42 U.S.C. §6612.

rently, for example, ambassadors and other high executive officers seeking senatorial confirmation are asked to sign an agreement to carry out the policy enunciated in the National Commitments Resolution adopted by the Senate in 1969.

However, such a pledge is not really an enforceable legal commitment but, rather, a psychological gain. Indeed, contrary to a widely held belief, the act of confirmation does not effect any change in the appointee's legal obligations to Congress, which are not controlled by his method of appointment.

It is an important purpose of the Zorinsky amendment to make the National Security Adviser and his deputy subject to being called for questioning before the foreign relations committees of Congress. This objective is perfectly understandable, in view of the major role the incumbents have come to play in the formulation of policies squarely within the committees' purview. But legislation requiring their senatorial confirmation is neither necessary nor legally helpful. Whether or not the Security Adviser and his deputy are confirmed by the Senate, they are equally under a constitutional obligation to assist Congress in the discharge of those lawmaking and oversight functions assigned to the legislature by Article I of the Constitution. That obligation is to respond to requests to appear before the empowered committees and to respond to questions, which assist the members in fulfilling their legislative and oversight functions.

Unfortunately, the administration itself has contributed to the legal misconception. In his response to an inquiry by Senator Frank Church, Chairman of the Senate Foreign Relations Committee, the President wrote:

By virtue of the proximity to, and association with, the President, the Assistant to the President for National Security Affairs, and his deputy, must not testify before Congressional committees except in extraordinary instances personally approved by the President. Therefore, I request your assistance in striking the specified sections [*i.e.*, the Zorinsky amendment] from the proposed legislation.<sup>15</sup>

The President, too, appears to believe that the legal obligation to testify is somehow altered when a presidential appointee is confirmed by the Senate. There is nothing in law to sustain that belief.

On the contrary, there is an obligation to testify in appropriate instances that applies equally to all federal officials and that derives specifically from the right of Congress to oversee the faithful execution of the laws by the President and his administration. Dissension concerning the extent of this presidential obligation to produce testimony has been a feature of our constitutional system since the days of President Washington and the congressional investigation of the disastrous St. Clair expedition. That dissension, however, turns not on the clear duty of federal officials—except, by convention, the person of the President in nonimpeachment proceedings—to answer the summons to the Hill, but only as to the disclosures they can be required to make.

<sup>15</sup> Letter of President Jimmy Carter to Senator Frank Church, June 4, 1979 (in the possession of the author).

This has most recently been the subject of the Supreme Court's decision in *Senate Select Committee on Presidential Campaign Activities v. Nixon*.<sup>16</sup> In that case it was held that taped records of presidential conversations with any officials or employees are presumptively protected from examination by Congress. But the presumption is rebuttable by a congressional showing "that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations. . . ." <sup>17</sup> The Congress's right to have its inquiries answered depends, in each case, not on the manner in which a federal officer (or even employee) has been appointed, but, to borrow the Court's formulation, "on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment."<sup>18</sup>

The President's refusal to allow an adviser to testify before Congress is unsanctioned either by the Constitution or historical practice. Under law, the failure of a summoned witness to appear is a criminal offense punishable by up to 1 year's imprisonment.<sup>19</sup> While executive privilege may shield an official from answering some or all congressional questions if they fail to meet the standard of "right to know," there is no basis for a constitutional doctrine that some officials need not even appear to hear the legislators' questions because they are entirely wrapped in privilege as to every aspect of their knowledge or activity. In a different context, even the President was held to have no such blanket immunity, and it is simply insupportable to argue that any of his subordinates enjoy a higher degree of inviolability than does he.<sup>20</sup>

The Security Adviser and his deputy are thus already under a constitutional and legal obligation to testify in an appropriate congressional inquiry and to answer questions when Congress has a "right to know." This position would not be altered by a change in the method by which Congress authorizes the appointment of these officials of government.

The Zorinsky bill is not needed to achieve its principal purpose. Moreover, it is too easily evaded. If the administration wished, it could simply leave the designated posts unfilled and assign similar functions to some other "Assistant to the President" for whose appointment the President is solely responsible under existing laws.

One unintended but unpleasant side effect of the Zorinsky bill is that it would make the Security Adviser and his deputy even more equal to the Secretary of State and his deputies, elevating the prominence of a position which may already have become too salient and which the Zorinsky bill intends to curb. Again, this is more a psychological than legal effect, but it should not be overlooked when dealing with a status-conscious bureaucracy.

In law, the Security Adviser and his deputy should be, and are, account-

<sup>16</sup> 498 F.2d 725 (1974). See also *U.S. v. Nixon*, 418 U.S. 683 (1974).

<sup>17</sup> 498 F.2d at 730.

<sup>18</sup> *Id.* at 731.

<sup>19</sup> 2 U.S.C. §192 (1977).

<sup>20</sup> *U.S. v. Nixon*, 418 U.S. 683 (1974).

able to Congress, no matter how the incumbents are selected. It is wholly unjustifiable for the Executive—and a violation of the grand scheme of the Constitution—to shield from accountability persons who evidently exercise a high measure of power. The two officials in question cannot be exceptions. When they are the principal architects of a foreign policy initiative, the appropriate committees of Congress should exercise their right to question them, if only to prevent the unchecked growth of a convention of unaccountability. If all else fails, Congress could exercise its contempt power, or its power of the purse, to make these officials respond to questions within those limits of propriety established by the courts.

The real issue is not the method by which Congress establishes the offices of National Security Adviser and Deputy Adviser, nor even the method approved by Congress for filling these posts. Rather, it is the diligence with which appropriate congressional committees oversee the activities of the NSC and its responsible officials, as well as the tenacity with which appropriate committees insist on their constitutional right to be the nation's continuing inquest into the uses and abuses of power.

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## NOTES AND COMMENTS

### LONG-ARM JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act<sup>1</sup> (the Act) combines in a single instrument substantive rules of sovereign immunity and rules of adjudicatory jurisdiction modeled after the long-arm statute of the District of Columbia.<sup>2</sup> So far the literature in point has focused primarily on the substantive aspects of the Act. Its jurisdictional implications are nevertheless equally important. In effect, an inventory of reported decisions shows that these are about evenly divided between questions of substance and jurisdictional issues. Whether this situation will be altered by the flow of Iranian litigations is an unknown fact. However, in view of the novelty of the Act as a long-arm statute, it may be useful to review briefly the types of situations that have already been adjudicated.

Most of the decisions involved concern long-arm jurisdiction based on the conduct by a foreign state of commercial activities within the United States (section 1605(a)(2)). A few decisions deal with the tortious activity of a foreign state in the United States (section 1605(a)(5)). These will be discussed in section I of this paper. In addition, section II will summarize attempts made by the legal profession to solve in appropriate jurisdictional clauses, coupled with waivers of immunity, some of the uncertainties that may arise from specific provisions of the Act.

#### I. ADJUDICATORY RULES OF JURISDICTION

##### *Commercial Activity*

According to section 1605(a)(2), a foreign state (including within that general term the political subdivisions, agencies, and instrumentalities of a foreign sovereign<sup>3</sup>) is not immune from the jurisdiction of courts in the United States in any case

<sup>1</sup> Pub. L. No. 94-583 (1976), 28 U.S.C. §§1330, 1332(a)(2), (5), and (4), 1391(f), 1441(d), 1602-1611, *reprinted in* 71 AJIL 595 (1977), 15 ILM 1388 (1976).

<sup>2</sup> Section-by-Section Analysis, 15 ILM 102, 103 (1976), comment under section 2.

In this respect, the Act differs from the State Immunity Act 1978 of the United Kingdom (*reprinted in* 17 ILM 1123 (1978)); Delaume, *The State Immunity Act of the United Kingdom*, 73 AJIL 185 (1979); White, *The State Immunity Act 1978*, [1979] J. Bus. L. 105; and from the European Convention on State Immunity (*reprinted in* 11 ILM 470 (1972)); G. DELAUME, *TRANSNATIONAL CONTRACTS*, para. 11.10 (1980 updating). The State Immunity Act deals only with substantive issues of immunity and leaves unchanged domestic rules of adjudicatory jurisdiction. Substantially, the same remark can be made in respect of the European Convention, except that the drafters of the convention listed in a Specific Annex a number of improper fora, which, as among contracting states, should be regarded as insufficient to found jurisdiction.

<sup>3</sup> §1603(a) and (b).

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

This provision is reminiscent of the language found in ordinary long-arm statutes. However, there is an important difference between the rules set forth in the Act and those found in other long-arm statutes. Under the Act, the court in which action is brought cannot entertain jurisdiction until it overcomes a threshold issue of characterization. As a matter of priority, the court in which action is brought must determine whether the defendant is engaged in a "commercial" or "sovereign" activity, since jurisdiction can be assumed only in regard to disputes arising out of the commercial activity of foreign states. What constitutes a commercial activity is a topic that would require separate treatment and is not made particularly clear by the provisions of the Act attempting to "define" that particular concept.<sup>4</sup> All that can be said is that the "definition" set forth in section 1603(d) and (e) of the Act falls short of providing the courts with the same precise guidance that is supplied in other legislative enactments, such as the State Immunity Act of the United Kingdom,<sup>5</sup> and that there is therefore no assurance that transactions similar in nature may not be characterized differently by American courts.<sup>6</sup>

*Commercial Activity Carried on in the United States.* The first basis of adjudicatory jurisdiction, clause 1 of section 1605(a)(2), concerns the "carry-

<sup>4</sup> §1603(d) and (e) reads:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

<sup>5</sup> The State Immunity Act 1978, in addition to listing a number of transactions considered as having a commercial character (sections 3 to 11), provides a comprehensive definition in section 3(3), according to which:

In this section "commercial transaction" means—

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority. . . .

See Delaume, *State Immunity Act*, *supra* note 2.

<sup>6</sup> See, e.g., *Gittler v. German Information Center*, 408 N.Y.S.2d 600 (Sup. Ct. 1978); *United Euram Corp. v. U.S.S.R.*, 461 F.Supp. 609 (S.D.N.Y. 1978), and more generally, G. DELAUME, *TRANSNATIONAL CONTRACTS*, *supra* note 2, para. 11.05.

ing on in the United States" of a commercial activity. As a result of the definition set forth in section 1603(d), that activity may include either a "regular course of commercial conduct" or "a particular commercial transaction or act." According to these provisions, and confirmed by the legislative history of the Act, the activity in question may thus encompass either the concept of doing business on a regular basis, such as that conducted by an airline or a state trading corporation, or the notion of "transacting business" perhaps on the basis of a single contract, such as sale of a service or product, the leasing of property,<sup>7</sup> the borrowing of money, an employment contract, or an investment in a security issued by an American corporation.<sup>8</sup>

Furthermore, it is not necessary that the transaction involved be "performed or executed in its entirety in the United States." It is sufficient that the activity involved, either initially or at some point during performance, has some "substantial" contact with the United States.<sup>9</sup>

In the absence of further precision in the Foreign Sovereign Immunities Act or its legislative history, it is to be feared that the Act may give rise to the same conflicting interpretations as have beset the implementation of other long-arm statutes.

If past experience is to serve as a precedent, about the only safe assumption that can be made is that the mere execution of a contract within the United States, or the stipulation that some American law would govern the relationship, is unlikely to be deemed sufficiently characteristic of the "substantial" contact required by the Act as a basis for the jurisdiction of courts in the United States.<sup>10</sup>

Beyond this, there is no uniformity of decision. Jurisdiction under long-arm statutes may be based on the presence of the defendant within the jurisdiction at some crucial moment of the negotiations.

Thus, in *Louis Marx & Co., Inc. v. Fuji Seiko Co., Ltd.*,<sup>11</sup> four visits to the United States by officers of a Japanese corporation to attend trade shows and discuss sales of juvenile typewriters with the plaintiff were held sufficient to found jurisdiction. In *Unidex Systems Corp. v. Butz Engineering Corp.*,<sup>12</sup> luncheon discussions, preceded and followed by a lengthy inspection of the plaintiff's facilities in the District of Columbia and meetings with United States Postal Service authorities, were held sufficient to constitute "transacting business" for the purposes of the District of Columbia long-arm statute.

While these decisions show certain restraints, others give the widest meaning to the provisions of long-arm statutes. An example is *Product Promotions, Inc. v. Cousteau*.<sup>13</sup> In that case, a Texas corporation sought out in

<sup>7</sup> Section-by-Section Analysis, *supra* note 2, at 105, comments under §1603(d). See also, in connection with the renting of an apartment building on a commercial basis, *County Board of Arlington County v. Government of the German Democratic Republic*, No. 78-293-A (D.C. Alex. Va.), reprinted in 17 ILM 1402 (1978).

<sup>8</sup> Section-by-Section Analysis, *supra* note 2, at 105.

<sup>9</sup> *Id.*, comment under §1603(e).

<sup>10</sup> G. DELAUME, *TRANSNATIONAL CONTRACTS*, *supra* note 2, para. 7.08, n.1.

<sup>11</sup> 453 F.Supp. 385 (S.D.N.Y. 1973).

<sup>12</sup> 406 F.Supp. 899 (D.D.C. 1976).

<sup>13</sup> 495 F.2d 483 (5th Cir. 1974).



France the services of Jacques Cousteau, the French marine explorer, to test certain acoustic devices in the Mediterranean Sea. The contract was concluded by correspondence, the offer being made from France and the acceptance mailed from Dallas, where final delivery of the report of the studies made by Cousteau took place, again by mail. In an action by the Texan corporation for breach of contract, the court held that although the defendant had no personal contact with Texas and his work was performed off the coast of France, the fact that the contract had been entered into in Texas, upon mailing of the acceptance, and that the report had been delivered in Dallas, justified upholding jurisdiction.

In all these cases, the "transacting" of business within the jurisdiction resulted from acts allegedly performed by the defendant within the jurisdiction. Other cases involve acts done by the defendant through the services of an agent within the jurisdiction. A typical example, which as shall be seen<sup>14</sup> was not used to its fullest potential in a decision rendered under the Foreign Sovereign Immunities Act, is *Frummer v. Hilton Hotels International, Inc.*<sup>15</sup> In that case, the plaintiff was injured by a fall in the Hilton Hotel in London, an English corporation that is part of the Hilton complex, which also includes the Hilton Credit Corporation, a New York corporation that either made reservations or confirmed them for the London hotel. In an action in the New York courts, it was held that Hilton New York was in effect the agent of Hilton London and that the court could assert jurisdiction over both corporations.

Another issue, likely to arise in the context of the Act, is that of the "borrowed immunity" of persons in the United States acting on behalf of foreign states. It is generally agreed that immunity from suit, when it exists, benefits not only the principal involved but persons acting under its instructions or on its behalf. *Frazier v. Hanover Bank*<sup>16</sup> illustrates this remark. In that case, plaintiff sought to compel the defendant, a New York corporation, to deliver to it and others of a class of bondholders, certain script certificates of the Republic of Peru, contrary to the instructions given to the defendant by Peru. The defendant moved to vacate service and dismiss the complaint on the ground that it was not subject to the jurisdiction of the court because it was a mere agent of Peru, and granting the relief sought would necessarily require an adjudication of a claim against a foreign sovereign. The motion was granted on the ground that

[d]efendant of course has no personal immunity of its own, and it of course cannot escape responsibility for its acts by asserting that it performs the acts at the direction of a foreign sovereign. Conversely, however, the fact that plaintiff names as sole party defendant an agent of Peru, instead of Peru itself, and is able to effect service of the summons upon that agent, does not enable plaintiff to obtain an

<sup>14</sup> See text and notes 45-46 *infra*.

<sup>15</sup> 19 N.Y.2d 533, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967), *cert. denied*, 88 S.Ct. 241, 389 U.S. 923 (1967).

<sup>16</sup> 119 N.Y.S.2d 319 (1953), *aff'd*, 119 N.Y.S.2d 918, 281 A.D. 861 (1953), *reargument and appeal denied*, 127 N.Y.S.2d 815, 283 A.D. 655 (1954).

adjudication of a claim against Peru in the face of Peru's assertion of its sovereign immunity.<sup>17</sup>

This decision was rendered some 25 years ago, at a time when the incurrence of a public debt by states was considered a "governmental" rather than a "commercial" act. Section 1606 of the earlier bills, which followed the same trend, was deleted from the final text of the Act.<sup>18</sup> Thus, *Frazier* is unlikely to be followed today since the agent can no longer rely on an immunity that its principal will no longer possess. Yet, the case is illustrative of a principle that in other areas, *i.e.*, those in which the foreign state can claim immunity, retains its persuasiveness.

These precedents, rendered within the context of ordinary long-arm statutes, may become relevant in implementing the Act. An example is found in *East Europe Domestic International Sales Co. v. Terra*,<sup>19</sup> which involved a dispute between a New York corporation and a Romanian state-owned entity. The plaintiff alleged that it had negotiated a contract with the defendant through the Romanian Economic Counselor's office in New York and that this principal-agent relationship was a sufficient contact to give the court in personam jurisdiction over the defendant. The court, referring to *Parke-Bernet Galleries, Inc. v. Franklyn*<sup>20</sup> and *Frummer v. Hilton Hotels International, Inc.*,<sup>21</sup> acknowledged that the activities of an agent may be attributed to the principal for jurisdictional purposes. However, in the instant case, the court found that the facts did not support the plaintiff's contention and that there was no agency relationship between the Counselor's office and the defendant.

*National American Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria*,<sup>22</sup> although it involves litigation initiated before the entry into force of the Foreign Sovereign Immunities Act, nevertheless deserves mention since it deals with concepts such as "minimum contacts" and "doing" or "transacting" business which retain permanent interest. In that case, two sellers of cement to Nigeria sought permission to intervene in the proceedings between the plaintiff, who had succeeded in attaching assets of the Central Bank of Nigeria,<sup>23</sup> and the defendants. The district court held that it was necessary for the applicants to establish an independent ground for in personam jurisdiction and that the application must be denied since the Central Bank did not have "minimum contacts" with the jurisdiction. The court found that the Central Bank was not "doing business" in New York; the isolated act of maintaining banking accounts within the jurisdic-

<sup>17</sup> 119 N.Y.S.2d at 322.

<sup>18</sup> Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 AJIL 399, 405 (1977).

<sup>19</sup> 467 F.Supp. 383 (S.D.N.Y. 1979), reprinted in 18 ILM 977 (1979).

<sup>20</sup> 308 N.Y.S.2d 337, 26 N.Y.2d 13 (1970).

<sup>21</sup> See note 15 *supra*.

<sup>22</sup> 425 F.Supp. 1365 (S.D.N.Y. 1977), reprinted in 16 ILM 505 (1977).

<sup>23</sup> *National American Corp. v. Federal Republic of Nigeria*, 420 F.Supp. 954 (S.D.N.Y. 1976), reprinted in 16 ILM 505 (1977).

Note that prejudgment attachment would now be barred by §1610(c) and (d) of the Foreign Sovereign Immunities Act.

tion did not, as such, constitute doing business. Moreover, the fact that the Central Bank had appointed an American bank as a correspondent in New York to make payment to holders of letters of credit issued by the Central Bank did not render the Central Bank subject to the jurisdiction because the relationship between the two banks was not such as to make the correspondent bank the "alter ego" agent of the defendant within the jurisdiction.<sup>24</sup> The court also held that the maintenance in New York of banking accounts, and, in the case of one of the applicants, the choice of a New York bank as the site of payment, did not constitute "transacting business" within the jurisdiction and was insufficient to support long-arm jurisdiction.<sup>25</sup> In addition, the court did not entertain the argument that the Central Bank's instructions to its correspondent bank in New York to refuse payment of its letter of credit amounted to the commission of a tortious interference with the contract.<sup>26</sup>

In a subsequent phase of the litigation,<sup>27</sup> the court maintained its earlier view as to lack of jurisdiction under New York law, but stated that its final decision might have been otherwise if the plaintiff had asserted jurisdiction on the basis of section 1605(a)(2) of the Foreign Sovereign Immunities Act, which, according to the court, would have applied retrospectively. The court observed:

The breach of the letter of credit having a New York beneficiary, advised by and payable through New York banks, would appear to satisfy the last criteria of 28 USC section 1605(a)(2) that jurisdiction exists over claims arising out of an act committed outside the United States . . . in the course of commercial activity having a "direct effect in the United States."<sup>28</sup>

<sup>24</sup> Said the court:

Few of the traditional criteria of doing business have been demonstrated. Concededly, CBN does not have an office here nor are its employees present within the state. The isolated act of maintaining bank accounts here has been held not to constitute doing business. *Fremay, Inc. v. Modern Plastic Mach. Corp.*, 15 A.D.2d 235, 222 N.Y.S.2d 694 (1st Dep't 1961). The applicants denominate Morgan Guaranty as CBN's agent. New York courts have recognized a foreign corporation's presence when its agent systematically performs services within the state which would have subjected the principal to jurisdiction had they been performed by it. *Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 537, 281 N.Y.S.2d 41, 44, 227 N.E.2d 851 (1967); McLaughlin, Practice Commentary C301:3 (McKinney 1972). Clearly, Morgan Guaranty is an entity independent of CBN. While the agency theory has been interpreted, in some instances, to include the acts of independent contractors, *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2d Cir. 1964), the nature of Morgan Guaranty's actions on behalf of CBN would not appear to have that symbiotic quality which would subject CBN to jurisdiction here under the traditional "doing business" standards. N.Y.C.P.L.R. §301 (McKinney 1972); *Frummer v. Hilton Hotels Int'l, Inc.*, *supra* [425 F.Supp. at 1369].

<sup>25</sup> 425 F.Supp. at 1370, referring in particular to *Wirth v. Prenyl*, 29 A.D.2d 373, 288 N.Y.S.2d 377 (1st Dep't 1968).

<sup>26</sup> 425 F.Supp. at 1372, relying on *Amigo Foods Corp. v. Marine Midland Bank*, 39 N.Y.2d 391, 384 N.Y.S.2d 124 (1976).

<sup>27</sup> 448 F.Supp. 622 (S.D.N.Y. 1978), *reprinted in* 17 ILM 1407 (1978). *International Ass'n of Machinists v. OPEC*, 477 F.Supp. 553 (C.D. Cal. 1979) is distinguishable since in that case the court held that the OPEC nations' price-fixing activities were sovereign acts.

<sup>28</sup> 448 F.Supp. at 639.

*Performance in the United States of an "Act in Connection with a Commercial Activity of a Foreign State Elsewhere."* The second basis of adjudicatory jurisdiction set forth in section 1605(a)(2) of the Foreign Sovereign Immunities Act refers to an action based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." While this formulation is not particularly illustrative of the type of situations that may be covered by clause 2, the legislative history of the Act makes it clear that such commercial activity may be "a regular course of commercial conduct elsewhere" or "a particular commercial transaction concluded or carried out in part elsewhere."<sup>29</sup> Thus, the concepts of "doing" or "transacting" business are reintroduced into a situation whose center of gravity is outside the United States, but which, through the performance of an "act" in the United States, may fall within the jurisdictional orbit of courts in the United States.

*East Europe Domestic International Sales Co. v. Terra*<sup>30</sup> is the only reported decision dealing with this issue. However, the decision is not conclusive, the court having held that the action should be dismissed because the defendant, a Romanian state-owned entity, had not performed an act in the United States sufficiently characteristic to found jurisdiction.

*Acts Committed Abroad in Connection with a Commercial Activity Abroad, but Causing a "Direct Effect" in the United States.* The third basis of jurisdiction is found in clause 3 of section 1605(a)(2). It concerns an act committed abroad in connection with a commercial activity abroad, but causing a "direct effect in the United States." The Act does not specify what is meant by this expression. However, it would appear from its legislative history that the assertion of jurisdiction under clause 3 should be consistent with both the "minimum contacts" requirements set forth in *International Shoe Co. v. Washington*<sup>31</sup> and the principles set forth in section 18 of the *Restatement (Second), Foreign Relations Law of the United States* (1965),<sup>32</sup> which lead to the conclusion that in order to found jurisdiction the conduct in question should have a "substantial" effect in the United States, and the effect should occur "as a direct and foreseeable result" of that particular conduct.<sup>33</sup>

Reported decisions show that the courts have been conscious of these requirements. Thus, in *Upton v. Empire of Iran*,<sup>34</sup> the plaintiffs, American citizens, brought action for wrongful death and personal injury due to the collapse of the roof of the terminal building in Tehran Airport. The action was brought against both Iran and Iran's Department of Civil Aviation, which owned and operated the terminal. The action was dismissed on the ground that the conduct of the defendants did not establish sufficient contacts with the United States to satisfy *International Shoe* and that there had been no attempt by the defendants to avail themselves of the pro-

<sup>29</sup> Section-by-Section Analysis, *supra* note 2, at 107.

<sup>30</sup> 467 F.Supp. 383 (S.D.N.Y. 1979), reprinted in 18 ILM 977 (1979).

<sup>31</sup> Section-by-Section Analysis, *supra* note 2, comment on section 1330(b), at 103, citing 326 U.S. 310, 90 L.Ed. 95 (1945).

<sup>32</sup> Section-by-Section Analysis, *supra* note 2, at 107.

<sup>33</sup> RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) §18(b)(ii) and (iii).

<sup>34</sup> 459 F.Supp. 264 (D.D.C. 1978).

tection or privileges afforded by the United States (referring to *Hanson v. Denkla*<sup>35</sup>). The court also held that causing injury to American citizens abroad was insufficient to satisfy the requirements of the District of Columbia long-arm statute, and consequently those of the Foreign Sovereign Immunities Act. The court went on to consider the meaning of "direct effect" and concluded that the "common sense interpretation of a 'direct effect' is one which has no intervening element, but rather flows in a straight line without deviation or interruption."<sup>36</sup>

*Upton* was followed in *Harris v. Vao Intourist, Moscow*.<sup>37</sup> In that case, suit was brought against two Soviet-owned tourist services and the USSR to recover damages for the alleged wrongful death of an American tourist in a fire in a Moscow hotel. The action was dismissed on the ground that, even though the negligent operation of the Moscow hotel had effects in the United States because it left aggrieved relatives in that country, the operation had no "direct effect" in the United States within the meaning of section 1605(a)(2). The court, referring to *Upton v. Empire of Iran*, stated:

Despite all this legislative history and statutory and case law, the concept of "direct effect" remains elusive. But, when traced through the more restrictive view applied to relevant long-arm provisions of the District of Columbia, Virginia, Maryland and the Uniform Act, it is reasonable to hold that Section 1605(a)(2) of title 28, adopted as part of the Immunities Act, was designed to restrict the exercise of the potential jurisdictional power of American courts to tortious activities outside this country which have a "substantial" impact in the United States.<sup>38</sup>

Similar reasoning was followed in *Carey v. National Oil Corporation*.<sup>39</sup> In that case, a Bahamian corporation (PETCO), which was the subsidiary of a New York corporation (CEPCO), had entered into crude oil sales contracts with the Libyan National Oil Corporation (NOC). The oil purchased from NOC was to be refined in the Bahamas and the refined oil was to be sold by PETCO to NEPCO for marketing in the United States. Following cancellation of the sales contracts by NOC, NEPCO and Carey (an assignee of PETCO) brought action in the Southern District of New York to recover damages for breach of contract to supply crude oil. The plaintiffs specifically relied on clause 3 of section 1605(a)(2). However, both the district court and the Court of Appeals for the Second Circuit held that this provision was not applicable because (1) the contracts had been wholly negotiated and executed in Libya, where they were also performed; (2) the cancellation of the contracts, although it might have had a "direct effect" on PETCO in the Bahamas, could only have an "indirect effect" on its American parent company,<sup>40</sup> all the more since the refined oil sold by PETCO to NEPCO was a different substance from the crude oil purchased from

<sup>35</sup> 357 U.S. 235, 2 L.Ed.2d 1283 (1958). <sup>36</sup> 459 F.Supp. at 266.

<sup>37</sup> 481 F.Supp. 1056 (E.D.N.Y. 1979). <sup>38</sup> *Id.* at 1065.

<sup>39</sup> 453 F.Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979).

<sup>40</sup> In this connection, it is interesting to note that the Second Circuit refused to "pierce the corporate veil" and give weight to the argument that NEPCO was the alter ego of PETCO: "PETCO is a Bahamian corporation. Though a subsidiary of NEPCO, it was a separate corporate entity, and we will not here pierce the corporate veil in favor of those who created that veil." 592 F.2d at 676.

NOC, so that "there was no real entering [by NOC] of the market flow in the United States";<sup>41</sup> and (3) the defendants at no time purposely availed themselves of the privilege of conducting business in the United States.

*East Europe Domestic International Sales Corp. v. Terra*<sup>42</sup> shows a similar restraint. An American corporation brought action for damages against a Romanian state-owned company for alleged interference by the defendant with contractual arrangements between the plaintiff and another Romanian state-owned company, Vitrocim. In March 1977, the plaintiff had entered into a contract with Vitrocim to purchase cement. The contract had been negotiated in Romania, where delivery of cement and payment therefor were to be made. A few weeks later, the defendant offered to take over the cement purchased by the plaintiff. A three-way deal was concluded by means of telex communications. However, due to some confusion, the deal fell through.

The defendant conceded that it was a "foreign state" and that the transaction was "commercial" in character. However, the defendant objected to jurisdiction on the ground that none of its alleged acts presented the necessary contacts with the United States required by section 1605(a)(2). Pointing out that the Foreign Sovereign Immunities Act is intended to be a long-arm statute modeled after the District of Columbia statute, the court held that it lacked jurisdiction because (1) the defendant had not carried on a commercial activity in the United States; (2) the defendant had not performed any act in the United States in connection with its commercial activity in Romania; and (3) the defendant's act had had no "direct effect" in the United States. In this last respect, and after referring to *Carey*, the court found that the defendant's sole contacts with the United States were the telexes that had been exchanged with the plaintiff. Although the defendant's initial telex had started the process of negotiations, the court refused to characterize that act alone as having had a "direct effect" in the United States sufficient to confer jurisdiction on the court, particularly when the center of gravity of the transaction had been in Romania.<sup>43</sup>

*Outboard Marine Corp. v. Pezetel*<sup>44</sup> also deserves mention, even though it skirted the issue of the applicability of clause 3 of section 1605(a)(2). An American manufacturer of electric golf carts brought antitrust claims against an instrumentality of the People's Republic of Poland that exported golf carts manufactured in Poland to the United States under the brand

<sup>41</sup> *Id.* at 677.

<sup>42</sup> 467 F.Supp. 383 (S.D.N.Y. 1979), *reprinted in* 18 ILM 977 (1979).

<sup>43</sup> *Compare* *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980). A California grain trader brought suit for breach of contract against an autonomous agency of the Republic of Costa Rica. The contract had been entered into in Costa Rica between the defendant and the local agent of the plaintiff, following an invitation to bid. The contract specified delivery in Costa Rica, payment to be made by letters of credit issued by a Costa Rican bank and confirmed by a Californian bank. The action was dismissed on the ground that the defendant carried on no business in California and that to assume jurisdiction would be violative of due process.

<sup>44</sup> 461 F.Supp. 384 (D.Del. 1978).

name "Melex," which was the name of a Delaware company wholly owned by the defendant. The defendant objected to jurisdiction on the ground, *inter alia*, that it operated only in Poland and that because title to the carts passed to Melex in Poland, the sale and distribution of the carts in the United States was of no concern to the defendant. In other words, the defendant argued that it conducted no business in the United States and that it could not be held responsible for the acts of Melex since there was no agency relationship between it and Melex. The court rejected this argumentation and held that the defendant, through sales and contracts mandating territorial restraints, had sufficient minimal contacts with Delaware to found jurisdiction. Probably because of this ruling, the court did not investigate whether Pezetel's commercial activities also satisfied the requirements of clause 3 of section 1605(a)(2). Yet, this is a case in which it would appear that these requirements would have been satisfied.<sup>45</sup>

### *Noncommercial Torts*

Pursuant to section 1605(a)(5), a foreign state is amenable to suit in regard to noncommercial torts committed in the United States. This provision was deliberately cast in general terms, although the legislative history shows that it was directed primarily at the problem of traffic accidents.<sup>46</sup>

Curiously, however, no decision involving tort actions for money damages resulting from traffic accidents in the ordinary sense of the term seems to have been reported. One unreported case dealt with the collision of a French warship with a pier while docking in New York harbor.<sup>47</sup> The action against the Republic of France was dismissed on the ground that

[t]he legislative history [of the Act] makes clear that it was intended to codify the restrictive definition of sovereign immunity heretofore adopted by the State Department which limited such immunity to foreign governments' public and governmental functions (*jure imperii*), while not allowing such immunity for private acts or commercial transactions (*jure gestionis*). . . .

This circuit has included among the acts entitled to such immunity those concerning the armed forces [citing *Victory Transport*]. The carrier Foch was in this country on a public mission; no commercial transaction was involved. Hence, under the facts of this case, this court is without jurisdiction over the Republic of France. . . .

No specific reference was made to section 1605(a)(5).

Of the two reported cases found by this writer, one deals with the curious claim by the plaintiff that an alleged tort (firing by a police boat on the plaintiff's vessel) in Bahamian territorial waters should nevertheless be

<sup>45</sup> *Id.* at 394 n.13. In this connection, it is also somewhat surprising that the court did not refer to *Frummer* and its progeny in order to consider whether Melex was not in effect the "alter ego" agent of the defendant in the United States, in which case jurisdiction could also have been ascertained on the basis of §1605(a)(2), clause 1.

<sup>46</sup> H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 21 (1976).

<sup>47</sup> Consolidated Edison Co. of New York v. Aircraft Carrier Foch, No. 76 Civ. 2446 (S.D.N.Y. Jan. 5, 1979).

regarded as committed within the 200-mile zone of United States waters, and therefore within the scope of section 1605(a)(2). The action was dismissed for lack of jurisdiction.<sup>48</sup>

The other case also involves an unusual situation, namely, an action for damages for tortious injury brought against the Republic of Chile, following the assassination of Ambassador Letelier in Washington, D.C.<sup>49</sup> The action was brought under section 1605(a)(2). The Republic contended that it was in no way involved in the event that resulted in the death of the Ambassador. Even if it was, it asserted, the court had no subject matter jurisdiction and the Republic was entitled to immunity since the Act did not cover political assassinations because of their public, governmental character. In view of the generality of section 1605(a)(5) and of its legislative history, the court found that jurisdiction should be sustained.

#### *A Factor of Uncertainty: Forum non Conveniens*

Unlike the District of Columbia long-arm statute, which authorizes a court to decline jurisdiction if it finds that it is an inconvenient forum,<sup>50</sup> the Foreign Sovereign Immunities Act is silent on the subject. About the only indication that the drafters of the Act may have considered the doctrine of *forum non conveniens* as applicable within its context is found in the legislative history of the Act: a comment on section 1603(e) states that the definition of commercial activity carried on in the United States "is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff."<sup>51</sup>

This comment is in accord with the latest judicial pronouncement on the subject of jurisdiction in general,<sup>52</sup> and also with the holdings in both *Upton* and *Carey*.<sup>53</sup> However, the question remains outstanding whether a court in the United States, having jurisdiction under the Foreign Sovereign Immunities Act on grounds other than the U.S. citizenship or residence of the plaintiff, still enjoys discretion to decline jurisdiction when to retain it would not be in the interest of the parties or the public. In the absence of an express provision to the contrary in the Act, the answer to that question should probably be in the affirmative.

## II. SELF-HELP IN CONTRACTUAL SITUATIONS

The preceding discussion makes it abundantly clear that the jurisdictional rules set forth in the Foreign Sovereign Immunities Act leave room for judicial interpretation and are not necessarily conducive to uniformity of results, which is to be regretted. However, the fact should not be overlooked that, in contractual situations, the parties may find considerable

<sup>48</sup> *Perez v. The Bahamas*, 482 F.Supp. 1208 (D.D.C. 1980).

<sup>49</sup> *Letelier v. Republic of Chile* (D.D.C. March 11, 1980), *reprinted in* 19 ILM 409 (1980).

<sup>50</sup> §13-425, D.C. Code, enacted by Pub. L. 913-58, sec. 132(a), 84 Stat. 473, 548, 549.

<sup>51</sup> Section-by-Section Analysis, *supra* note 2, at 106.

<sup>52</sup> G. DELAUME, *TRANSNATIONAL CONTRACTS*, *supra* note 2, para. 7.13.

<sup>53</sup> See *supra*, text and notes 34-42.



relief in the provisions of the Act giving the parties almost unlimited freedom to shape the transaction to their particular needs.<sup>54</sup> Current contractual practice bears testimony to this remark.

*Contractual Definition of the Nature of the Transaction*

Since the restrictive doctrine of immunity is limited to the "commercial" activity of foreign states, the prudent draftsman may be wise to supply his own answer to the basic problem of characterization. A possible stipulation might be the following:

"The [borrowings, sale, lease, supply of services, etc.] hereunder shall constitute private and commercial acts and shall not be regarded as governmental, sovereign or public acts of [name of the foreign state or public entity]."

Such a stipulation, which goes to the root of the matter, would make it difficult for the state party to reopen at the time of the proceedings the basic characterization to which it had agreed in the first place. It would also prevent a court from reconsidering the issue of definition, lest the court be exposed to the criticism of rewriting the contract for the parties.

Yet, this type of stipulation may not solve all problems and, in particular, that of the nexus between the transaction and the United States. In this respect, it might therefore be appropriate to go one step further and specify expressly that the transaction shall constitute a "commercial act" "carried on in the United States." Such provision would clearly bring the transaction within the scope of clause 1 of section 1605(a)(2), and possibly of clause 2, if it is known at the time of the contract that it will be performed in the United States, even though the contract is ancillary to a commercial activity of the foreign state elsewhere.

*Waivers of Immunity*

The most effective way to avoid the ambiguities of the Act is to stipulate in the contract an express waiver of immunity. Under section 1605(a)(2), such a waiver, once it is agreed to, has a binding character and cannot be revoked by the state contracting party. Such a waiver (usefully coupled, as an additional precaution, with the "commercial" definition of the nature of the transaction discussed above) may take the form of an express submission to the state or federal courts in a certain jurisdiction or that of an arbitration clause providing for the arbitral settlement in the United States of contractual disputes.

Typical examples are the following:

\_\_\_\_\_ hereby irrevocably waives to the full extent permitted by applicable law (including, without limitation, the Foreign Sovereign Immunities Act of 1976 of the United States of America) (the "Immunities Act") any present or future claim to any immunity, whether characterized as sovereign immunity or otherwise, from any legal proceed-

<sup>54</sup> §1605(a)(1), dealing with waivers of immunity.

ings, whether in the United States of America or elsewhere, to enforce or collect upon this Agreement or document issued under this Agreement (including, without limitation, immunity from service of process, immunity from jurisdiction of any court or tribunal, and immunity of any of its property from attachment prior to entry of judgment and from attachment in aid of execution, and from execution upon a judgment) in respect of itself or its property (whether held for its own account or otherwise) in any action or proceeding in respect of its obligations under this Agreement or any instrument or document issued under this Agreement.

*Consent to Jurisdiction; Waiver of Immunities.* (a) The Borrower hereby irrevocably submits to the jurisdiction of any New York State or Federal court sitting in New York City over any action or proceeding arising out of or relating to this Agreement and the Notes. The Borrower hereby irrevocably appoints the \_\_\_\_\_ Trading Corporation, a corporation organized and existing under the laws of the State of New York (the "Process Agent"), with an office on the date hereof at One World Trade Center, New York, New York 10048, United States, as its agent to receive on behalf of the Borrower and its property service of copies of the summons and complaint and any other process which may be served in any such action or proceeding. Such service may be made by mailing or delivering a copy of such process to the Borrower in care of the Process Agent at the Process Agent's above address, and the Borrower hereby irrevocably authorizes and directs the Process Agent to accept such service on its behalf. As an alternative method of service, the Borrower also irrevocably consents to the service of any and all process in any such action or proceeding by the mailing of copies of such process to the Borrower at its address specified in Section 8.02. The Borrower agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

(b) Nothing in this Section 8.06 shall affect the right of any Bank or the Agent to serve legal process in any other manner permitted by law or affect the right of any Bank or the Agent to bring any action or proceeding against the Borrower or its property in the courts of any other jurisdiction.

(c) To the extent that the Borrower has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise) with respect to itself or its property, the Borrower hereby irrevocably waives such immunity in respect of its obligations under this Agreement and the Notes.

For jurisdictional purposes, the choice between judicial and arbitral submission is largely one of taste, since in both cases submission is irrevocable. However, and to the extent that it is perceived at the time of the negotiations that an American judgment or award may require enforcement not only in the United States but possibly elsewhere, the choice between the two options may be influenced by other considerations.

As pointed out elsewhere by this writer,<sup>55</sup> it is a fact that at the present time, there is no treaty arrangement in force between the United States and any other country, providing for the universal recognition and enforcement of judgments. In order to enforce an American judgment abroad, the judgment creditor must therefore comply with all relevant procedures and be exposed to such defenses as reciprocity and public policy, which might prevent recognition and enforcement.

By contrast, the United States is a party to a number of treaties, including Friendship, Commerce and Navigation Treaties and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which provide effective means of enforcing abroad arbitral awards rendered in the United States. Under the circumstances, recourse to arbitration, to the extent that it is not barred by foreign rules regarding the nonarbitrability of state contracts,<sup>56</sup> may be more advantageous than straightforward submission to the jurisdiction of an American court.

An interesting illustration of this remark is found in *Ipitrade International, S.A. v. Federal Republic of Nigeria*.<sup>57</sup> In 1975, Nigeria and Ipitrade, a French company, entered into a contract for the purchase and sale of cement. The contract provided that it would be governed by Swiss law and that disputes would be submitted to arbitration by the International Chamber of Commerce. Various disputes arose, and in 1976, Ipitrade instituted arbitration proceedings. Nigeria refused to participate, relying on sovereign immunity as a defense. An award was rendered in Switzerland, granting some of Ipitrade's claims and rejecting others. Under Swiss law, the award was final and binding upon Nigeria, but Nigeria refused to make any payment due under the award.

Ipitrade sought to enforce the award in the District Court of the District of Columbia in accordance with the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, to which the United States, France, Switzerland, and Nigeria are signatories.

In addition to contending that the award was enforceable under the New York Convention, Ipitrade relied on the Foreign Sovereign Immunities Act, claiming that submission to arbitration constituted a waiver of Nigeria's immunity within the meaning of section 1605(a)(1) of the Act. The claim succeeded. Relying on the legislative history of the Act,<sup>58</sup> the court held that submission to arbitration in "another" country, as distinguished from the United States, constituted an implicit waiver of immunity and that the waiver was binding upon, and could not be revoked by, Nigeria. This solution, which prevailed in another case,<sup>59</sup> and proved unacceptable in

<sup>55</sup> Delaume, *supra* note 18, at pp. 417-21.

<sup>56</sup> G. DELAUME, *TRANSNATIONAL CONTRACTS*, *supra* note 2, para. 13.05.

<sup>57</sup> 465 F.Supp. 824 (D.D.C. 1978), *reprinted in* 17 ILM 1395 (1978).

<sup>58</sup> Section-by-Section Analysis, *supra* note 2, at 106.

<sup>59</sup> *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F.Supp. 1175 (D.D.C. 1980). In that case, the court held that by agreeing to arbitrate in Switzerland disputes with an oil concessionaire, Libya had waived its immunity and that the court had jurisdiction to recognize and enforce the award. However, the court also held that it could not exercise

yet another,<sup>60</sup> clearly gives an unexpected dimension to the provisions of section 1605(a)(1) of the Act. It is not, however, without precedent in other countries, such as France.<sup>61</sup> It is thus conceivable that, *mutatis mutandis*, an American award rendered on the basis of submission to arbitration in the United States might be easier to enforce abroad, *e.g.*, in France or in any other country party to the New York Convention of 1958, than an American judgment between the same parties.

### *Forum Non Conveniens*

Awareness of the court's discretion in the implementation of the doctrine of *forum non conveniens* is responsible for the type of stipulation that has recently made its appearance in Euro-dollar credit agreements. After providing for waivers of immunity, these agreements stipulate that the borrower also waives any objection to the jurisdiction of the courts agreed upon, on the ground of *forum non conveniens*. Typical examples are the following:

In addition, the Borrower hereby irrevocably waives, to the fullest extent permitted by law, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or any Note brought in the Supreme Court of the State of New York, County of New York or the United States District Court for the Southern District of New York, and hereby further irrevocably waives any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

The Borrower hereby expressly acknowledges that the foregoing waiver is intended to be irrevocable (without limitation) under English, New York and United States law and, in addition, hereby expressly waives any objection to the institution of proceedings in England or New York on the ground of *forum non conveniens*.

### III. CONCLUSION

Until the Iranian crisis and contrary to expectation, the Foreign Sovereign Immunities Act had not opened the gates to a flood of litigation. Barely two dozen cases have been reported thus far, and conclusions based on these must not only be tentative but to a large extent speculative. All that can be said at the present time is that the courts in their initial implementation of the Act have shown a restraint that contrasts favorably with some far-reaching decisions rendered pursuant to ordinary long-arm statutes. However, as in the case of ordinary long-arm jurisdiction,

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jurisdiction under the act of state doctrine, since this would imply ruling on the validity of the Libyan nationalization law.

<sup>60</sup> *Verlinden B.V. v. Central Bank of Nigeria*, No. 79 Civ. 1150 (S.D.N.Y., April 21, 1980), 3 West's Fed. Case News 36 (1980).

<sup>61</sup> Trib. gr. inst., Paris, July 8, 1970, *République Socialiste Fédérale Yougoslave v. S.E.E.E.*, [1971] *Clunet* 131, [1971] *J.C.P.* II 16810 (submission to arbitration in Switzerland).

it is to be feared that the determination of jurisdictional issues is likely to be made on a case-by-case basis. The delineation of judicial trends may therefore be difficult for quite some time to come, unless, of course, the volume of Iranian litigation is such that it speeds up the analytic and comparative process of judicial decisions. Until then, many uncertainties will remain unresolved.

This last remark applies to all types of situations, whether contractual or noncontractual, in which courts in the United States may assert jurisdiction over foreign states. In the contractual field, however, much will depend upon whether or not the parties had provided prior to the Act, or have since it took effect, for waivers of immunity coupled with (1) a clear definition of the commercial nature of the relationship; and (2) submission to the jurisdiction of a judicial or arbitral forum in the United States. Only in the affirmative can the parties have the reasonable assurance that planning ahead of litigation, in sovereign immunity as in other fields, may have its own rewards.

GEORGES R. DELAUME\*

## CORRESPONDENCE

TO THE EDITORS-IN-CHIEF:

June 20, 1980

Professor Falk's editorial comment on the Iran hostage crisis, which appeared in the April issue of the *Journal*, is puzzling. No doubt Professor Falk is well intentioned and morally upright, but he has written a moralistic tract, lacking precision of language, logic, rigorous analysis, or any other characteristic that might qualify it to appear in a legal journal.

What are "crimes of state," "tyrants," "a framework of minimum morality"? Do these words have internationally recognized meaning? Do they evoke the same reaction in Moscow, Tehran, Beijing, Pretoria, and Princeton? I submit that they do not, and that the use of such vocabulary in the context of a professional critique of international law is nonsense.

The basic weakness of international law is the lack of an underlying consensus. Without such a consensus there can be no enforceable law, no matter how many citizens form voluntary organizations to regulate the behavior of governments.

It is precisely for this reason that there is so little effective substantive international law. On the other hand, there is a worldwide consensus to the effect that nations must have the means to communicate with each other, and that the procedures necessary to effect such communications must be safeguarded. Consequently, international law governing diplomatic immunity, which is procedural in essence, is on much firmer footing than international law attempting to deal with ill-understood substantive issues.

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It is this distinction between the procedural and the substantive, and not a "proimperial and a progovernmental bias built into modern international law," that explains the relative strength of the concept of diplomatic immunity and the weakness of the alleged "laws" to which the Iranian revolutionaries are trying to appeal. In fact, diplomatic immunity is a neutral concept, equally useful to the weak and the strong. It protected a Swedish diplomat engaged in desperate humanitarian efforts in Nazi-occupied Hungary, and it even protects the unusual envoys Colonel Qaddafi has lately sent to Britain and the United States.

Nothing that has happened in Iran can give rise to the conclusion that "the content and impact of [the law of diplomatic immunity] are arbitrary and one-sided." In fact, it is a neutral, procedural law, without which diplomatic intercourse between nations would not be possible. Neither irrational Iranian revolutionary outrage nor the most profound guilt feelings among Western intellectuals can lend substance to Professor Falk's theories about the inequities of the Vienna Conventions on Diplomatic and Consular Relations, and the need to redraft them to achieve a better balance of rights.

There is no imbalance, and no need for redrafting. There is a need for observance of what is clearly established international law. Such observance will not bring about the millenium, nor will it satisfy Iran's just grievances, but it will make it possible for governments to communicate with each other. That is the only purpose for which this international law was adopted, and the reason for its general observance by rational governments.

PETER M. SUSSMAN

# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN L. NASH\*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

## TERMINATION OF RELATIONS

(U.S. *Digest*, Ch. 2, §3)

### *Iran*

In view of the Iranian Government's failure, or refusal, to take custody from the militants in Tehran of the 50 members of the American Embassy whom they had held in captivity since November 4, 1979, President Carter announced on April 7, 1980, that the United States was breaking off diplomatic relations with the Government of Iran.

The President stated that he had ordered the following steps to be taken:<sup>1</sup> (1) that the Secretary of State inform the Iranian Government that its Embassy and consulates in the United States were to be closed immediately, and that all its diplomatic and consular officials had been declared *persona non grata* and were ordered to leave the country by midnight of the following day;<sup>2</sup> (2) that the Secretary of the Treasury put into effect official sanctions prohibiting exports from the United States to Iran, in accordance with those approved by ten members of the UN Security Council on January 13, in a resolution vetoed by the Soviet Union (exports of food and medicine were expected to be minimal or nonexistent); (3) that the Secretary of the Treasury inventory the frozen assets of the Iranian Government and also the outstanding claims of American citizens and corporations against Iran, with a view to preparing a claims program against Iran for the hostages, the hostages' families, and other U.S. claimants (regarding which, draft legislation was being prepared for introduction in the Congress); and (4) that the Secretary of State and the Attorney General invalidate all visas issued to Iranian citizens for future entry into the United States, effective April 7 (and, in regard to visas, none would be issued or reissued, except for compelling and proven humanitarian reasons, or if the national interest of the United States so required).

\* Office of the Legal Adviser, Department of State.

<sup>1</sup> 16 WEEKLY COMP. OF PRES. DOC. 611-12 (Apr. 14, 1980).

<sup>2</sup> For the Department of State's notification to the Embassy of the Islamic Republic of Iran, see ch. 4, §1 *infra*.

## PASSPORTS, VISAS, AND TRAVEL

(U.S. *Digest*, Ch. 3, §2)*Restrictions—Iran*

On April 20, 1980, Secretary of State Cyrus R. Vance, acting under the authority conferred by Executive Orders 11295<sup>1</sup> and 12211,<sup>2</sup> and in accordance with 22 C.F.R. §51.72 (a) (3), issued a Public Notice, effective April 23, 1980, restricting the use of United States passports for travel to, in, or through Iran, unless specifically validated for such travel under the authority of the Secretary of State.

The notice stated in part:

This action is required by the increasingly unstable situation in Iran and the concomitant increase in the threat of hostile acts against Americans. The governing authorities in Iran have repeatedly demonstrated their unwillingness to maintain public order and to protect United States nationals from hostile and uncontrolled mob action. The Government of Iran has approved the holding in unlawful captivity of 51 United States diplomatic and consular personnel and two additional United States nationals who are not employees of the United States Government; both the governmental authorities and militant groups express extreme hostility to the United States in their public statements.

In these circumstances, where the governing authorities have approved attacks upon United States nationals and where protection against such attacks is unavailable, there is an imminent danger to the physical safety of United States nationals in Iran.

Accordingly, United States passports shall cease to be valid for travel to, in, or through Iran unless specifically validated for such travel under the authority of the Secretary of State.<sup>3</sup>

<sup>1</sup> Executive Order 11295, dated Aug. 5, 1966, is a delegation from the President to the Secretary of State of his authority under the act of July 3, 1926 (22 U.S.C. §211a) to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports. 3 C.F.R., 1966-70 Comp. 570 (1971).

<sup>2</sup> Executive Order 12211 provides in section 1-106:

1-106. The Secretary of State is delegated, and authorized to exercise in furtherance of the purposes of this Order, the powers vested in the President by Section 2001 of the Revised Statutes (22 U.S.C. 1732), Section 1 of the Act of July 3, 1926 (22 U.S.C. 211a), and Section 215 of the Immigration and Nationality Act (8 U.S.C. 1185), with respect to:

(a) the restriction of the use of United States passports for travel to, in or through Iran; and  
(b) the regulation of departures from and entry into the United States in connection with travel to Iran by citizens and permanent residents of the United States.

45 Fed. Reg. 26,685, 26,686 (Apr. 21, 1980).

<sup>3</sup> 45 Fed. Reg. 27,600 (Apr. 23, 1980). The notice is to expire at the end of 1 year unless extended or sooner revoked by Public Notice.



*Visas to Iranians*

By Executive Order 12206, issued April 7, 1980, President Carter amended his earlier delegation of authority to the Secretary of State and to the Attorney General<sup>4</sup> to conform its language to the President's decision to invalidate all Iranian visas, including nonimmigrant visas.<sup>5</sup>

On the same day, Secretary of State Cyrus R. Vance issued, with the concurrence of Attorney General Benjamin R. Civiletti, the following regulation (22 C.F.R. §46.8) to implement the President's decision to invalidate all Iranian visas for future entry into the United States (except those issued under section 101(a)(15)(G) of the Immigration and Nationality Act of 1952 to "international organization aliens," a description that includes representatives, etc., to international organizations, as well as officials and employees of such organizations):

§46.8 Documentation of certain Iranian nationals seeking entry into the United States.

(a) An immigrant or nonimmigrant visa, other than one issued pursuant to section 101(a)(15)(G), of the Act, issued prior to April 7, 1980, to a national of Iran, shall not be valid within the meaning of section 212(a)(20) or (26)(B), as applicable, of the Immigration and Nationality Act unless such visa shall have been presented to a consular officer on or after April 7, 1980, and the consular officer shall have endorsed the visa in the manner prescribed by the Department of State.

(b) The issuance of immigrant and nonimmigrant visas to nationals of Iran, on or after April 7, 1980, other than those issued pursuant to section 101(a)(15)(G), shall be subject to the same conditions as those affecting endorsement of previously-issued visas.<sup>6</sup>

Consistent with President Carter's decision to invalidate all visas issued to Iranian nationals for future entry into the United States, the Immigration and Naturalization Service amended its regulations on April 15, 1980, effective April 11, to provide for review of all requests by nonimmigrant Iranian nationals for extension of stay, change of nonimmigrant classification, and adjustment of status to that of persons admitted for

<sup>4</sup> Under Executive Order 12172, Nov. 26, 1979, 44 Fed. Reg. 67,947 (Nov. 28, 1979). The authority in question, established by section 215(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185, empowers the President to prescribe limitations and exceptions to the rules and regulations governing the entry of aliens into the United States.

<sup>5</sup> 45 Fed. Reg. 24,101 (Apr. 9, 1980).

The President's decision to invalidate all visas issued to Iranian citizens for future entry into the United States was announced in connection with his announcement of the break-off of diplomatic relations between the United States and Iran.

<sup>6</sup> 45 Fed. Reg. 24,436 (Apr. 9, 1980).

In a separate Public Notice issued on April 7, the Assistant Secretary of State for Consular Affairs, Barbara M. Watson, announced that the Secretary of State, acting under the authority conferred by section 221(i) of the Immigration and Nationality Act, 8 U.S.C. 1201(i), had revoked all nonimmigrant visas issued to nationals of Iran pursuant to section 101(a)(15)(A) of the act. 45 Fed. Reg. 24,437 (Apr. 9, 1980).

permanent residence, and to place restrictions on the conditions under which Iranian nationals would be permitted to remain in the United States.

Title 8, *Code of Federal Regulations*, §214.1(c) was amended to provide that a nonimmigrant Iranian national would be ineligible for an extension of stay, unless the individual was in immediate need of urgent medical treatment available only in the United States, or had a relationship to a U.S. citizen or lawful permanent resident alien within the categories specified in section 201(b) or section 203(a)(1), (2), (4), or (5) of the Immigration and Nationality Act.

Title 8, C.F.R. §248.2 was amended to render nationals of Iran ineligible for any change of nonimmigrant classification, except to classification under section 101(a)(15)(G) of the act.

Title 8, §245.1 was amended to make a nonimmigrant Iranian national ineligible for adjustment of status under section 245 of the Immigration and Nationality Act, unless the individual claims immediate relative status under section 201(b) or preference status under section 203(a)(1), (2), (4), or (5) of the act and is also the beneficiary of a valid unexpired visa petition filed in accordance with 8 C.F.R. §204 and approved to accord the individual such status, or unless the individual has been *granted* asylum in the United States (emphasis added).<sup>7</sup>

#### *Permanent Resident Aliens—Iran*

On April 20, 1980, Secretary of State Cyrus R. Vance, acting under the authority conferred by Executive Order 12211,<sup>8</sup> issued a Public Notice, effective April 23, that prohibits travel from the United States of permanent resident aliens to, in, or through Iran, unless an exception to the prohibition is granted under the authority of the Secretary of State (by the Assistant Secretary of State for Consular Affairs).

Applications for exceptions are to be considered on the basis of whether the proposed travel is in the national interest or is justified by compelling humanitarian considerations.<sup>9</sup>

### PROTECTION OF HUMAN RIGHTS

(U.S. *Digest*, Ch. 3, §6)

#### *Interpretation of Covenants*

On March 27, 1980, Senator Frank Church, Chairman of the Senate Committee on Foreign Relations, asked the Department of State to reply to the letter of a constituent, who had expressed concerns about possible

<sup>7</sup> 45 Fed. Reg. 26,015 (Apr. 16, 1980).

Subsequently, on April 17, 1980, 8 C.F.R. §245.1 was further amended, effective April 11, to include within the exception to ineligibility for adjustment of status a nonimmigrant Iranian national who has *applied for* asylum (emphasis added). 45 Fed. Reg. 26,947 (Apr. 22, 1980).

<sup>8</sup> In regard to the Secretary's authority under Exec. Order 12211, see text at note 2 *supra*.

<sup>9</sup> 45 Fed. Reg. 27,600 (Apr. 23, 1980). The notice is to expire at the end of one year unless extended or revoked sooner by Public Notice.

conflicts between the human rights Covenants<sup>1</sup> and the Constitution, given the language of Article VI of the latter, and also about the effect of the Covenants upon the right to own property.

Arthur W. Rovine, Assistant Legal Adviser for Treaty Affairs, wrote to the Senator's constituent on April 16, 1980, in part as follows:

The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were signed by President Carter on behalf of the United States on October 5, 1977 and were submitted to the Senate, with recommended reservations and understandings, on February 23, 1978. While the Senate Committee on Foreign Relations held public hearings on the Covenants (and on two other human rights treaties) in November 1979, the Committee has not reported the treaties to the Senate. The Covenants are therefore not yet before the full Senate, but are still pending in Committee.

You have expressed concern about the possibility that Article VI of the Constitution might make treaties superior to the Constitution. It has always been the law of the United States that treaties must comply with the Constitution. The Supreme Court has so held on a number of occasions. Article VI of the Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

In the 1957 case of *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148, the Supreme Court of the United States, in an opinion written by Justice Black, quoted Article VI and said:

"There is nothing in this language [Article VI of the Constitution] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. . . . There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." (354 U.S. 1, at 16-17).

<sup>1</sup> For the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, see S. EXEC. DOCS. D and E, 95th Cong., 2d Sess. (1978). The two Covenants were submitted to the Senate, together with the International Convention on the Elimination of All Forms of Racial Discrimination and the American Convention on Human Rights as S. EXEC. DOCS. C, D, E, and F, 95th Cong., 2d Sess. (1978). For a report on the Senate hearings of November 1979 on the 4 human rights treaties, see 74 AJIL 453 (1980).

The Supreme Court concluded that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." (354 U.S. 1, at 16.)

The primary purpose of the treaty clause of Article VI of the Constitution, as noted by Professor Louis Henkin of Columbia University Law School, was "to assure the supremacy of treaties to state law." (*Foreign Affairs and the Constitution*, p. 156.) Under Article VI federal statutes are also supreme over state law. But both statutes and treaties must be consistent with the Constitution.

The Supreme Court has also held that a treaty may be overridden in U.S. law by a subsequent inconsistent federal statute, *Whitney v. Robertson*, 124 U.S. 190 (1888). As Justice Black pointed out on behalf of the Supreme Court in *Reid v. Covert*, "It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." (354 U.S. 1, at 18.)

In sum, it is settled law in the United States that treaties must be consistent with the Constitution.

You have also expressed concern about the effect of the Covenants on the right to own private property.

The Universal Declaration of Human Rights, adopted by the United Nations in 1948, provides in Article 17 that "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property." Neither of the two Covenants contains this provision. The drafting history of the Covenants shows that while none of the negotiators, including the Soviet representative, objected to the inclusion of this clause in the Covenants, there was an unresolved dispute with respect to the precise terms governing compensation for expropriation of alien-owned property. As a result the private property clause was dropped. However, there is no provision in either Covenant which denies or diminishes the right to own private property, and in view of the drafting history of the Covenants, it is clear that there was no intention to eliminate or weaken that right.

Under general international law, any taking of private property must be non-discriminatory and for a public purpose, and must be accompanied by prompt, adequate and effective compensation. The absence of a private property provision in the Covenants does not contradict or change this customary rule of international law. It should be noted that the Departments of State and Justice have nevertheless recommended that the Senate adopt the following declaration and understanding to be appended to the U.S. instrument of ratification of the Covenant on Economic, Social and Cultural Rights:

"The United States declares that nothing in the Covenant derogates from the equal obligation of all States to fulfill their responsibilities under international law. The United States understands that under the Covenant everyone has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his property."

This recommended Senate statement, which includes a reiteration of Article 17 of the Universal Declaration of Human Rights, would make clear that the United States will become a party to the Covenant only upon a legally binding understanding that private property rights shall be respected under international law and under the Covenants.

In addition, Article 5(2) of each Covenant provides that no derogation from any fundamental rights legally recognized in any country party to the Covenants is permitted simply on the ground that the Covenants do not recognize such rights or recognize them to a lesser extent. Therefore, even if the Covenants did not recognize the right to own private property, this would have no effect in the United States. Indeed, if the United States were a party to the Covenants we would be internationally obligated under Article 5(2) not to derogate in the United States from the fundamental right to own private property.

In any event, United States ratification of the Covenants could not change or affect in any way the guarantee of the right to own private property in the United States as set forth in the U.S. Constitution. The Fifth Amendment to the Constitution provides that private property is not to be taken for public use "without just compensation." Since treaties may not supersede any provision of the Constitution, the absence from the Covenants of a private property clause cannot have any legal effect in this country.

The private property matter was not the reason that Presidents before President Carter did not sign the Covenants. Rather it was believed in prior years that the federal-state system in the United States presented a serious obstacle to U.S. ratification. In addition, the fact that the Senate had not yet approved the Genocide Convention made it appear uncertain that the Covenants would be approved. However, as federal-state relations have developed, most of the obligations of the Covenants are now within the jurisdiction of the federal government. In any event, the Departments of State and Justice have recommended a reservation that would make it clear that the federal-state relationship would not be changed by the Covenants.<sup>2</sup>

#### TERMINATION OF MISSION

(U.S. *Digest*, Ch. 4, §1)

#### *Iran*

On April 7, 1980, President Carter announced that the United States was breaking off diplomatic relations with the Government of Iran and that the Secretary of State had so informed the Government of Iran. The Department of State's notification, by a diplomatic note of the same date, read:

The Department of State hereby notifies the Embassy of the Islamic Republic of Iran that the Government of the United States of America has decided to sever diplomatic and consular relations with Iran,

<sup>2</sup> Dept. of State File No. P80 0056-1357.

effective immediately, and to require the immediate closure of the Iranian Embassy and consular posts in the United States.

Accordingly, the Embassy is directed to terminate its functions and those of the Iranian consular posts in the United States, effective immediately. All persons who have been notified to the Department as being present in the United States as members of the staffs of the Embassy and consulates of the Islamic Republic of Iran, as indicated in the annexed list [not reproduced here], must depart from the United States no later than midnight tomorrow. Members of the families of these persons (other than any who may be citizens or permanent residents of the United States) must also depart by that time. Thereafter, the United States will no longer regard these persons as being entitled to the privileges, immunities and protection which they now enjoy by virtue of their official status, and they will be subject to immediate expulsion.

Until their departure, these persons may continue to use regularly traveled routes for travel between their homes and offices, but otherwise must remain within a two-mile radius of their homes. Any failure to observe this restriction without the express approval of the Department will result in the immediate termination of official status and the immediate expulsion of the individual concerned. All departures are to be from Dulles International Airport unless the Department's consent to another port of embarkation is obtained. The Embassy is required to submit to the Department no later than noon tomorrow a complete list of the scheduled times and places of departure for all individuals who are hereby required to depart from the United States. All credentials issued to these individuals by the Department must be surrendered prior to their departure.

The Department is prepared to consider the appointment of a third state, acceptable to the United States, to which the Islamic Republic of Iran may entrust the custody of its diplomatic and consular property and the protection of its interests. If such an appointment is made before midnight tomorrow, the Department would also be prepared to consider deferring until April 15, 1980, the required departure of one member of the Embassy staff, to be designated by the Department, in order to facilitate transitional arrangements.

The Embassy and consulates shall be closed immediately to any activity (other than internal administrative functions) by or on behalf of the Islamic Republic of Iran. After tomorrow the premises of the Embassy and consulates shall be closed and sealed, except to the extent that the Department may authorize any particular use of such premises by a protecting power.<sup>1</sup>

The Department sent a separate notification regarding nondiplomatic and nonconsular officials and employees, also by a diplomatic note dated April 7, 1980, which read:

The Department of State hereby notifies the Embassy of the Islamic Republic of Iran that the Government of the United States of America has determined that the continued presence of nondiplomatic and

<sup>1</sup> Dept. of State File No. P80 0056-1343.

nonconsular officials and employees of Iran in the United States is no longer acceptable in the present circumstances.

Accordingly, all such officials and employees of the Islamic Republic of Iran (other than any who may be citizens or permanent residents of the United States) must depart from the United States no later than midnight on Friday, April 11, 1980. Should any such official or employee fail to depart voluntarily by that date, his or her official status under section 101(a)(15)(A)(ii) will terminate, and the individual concerned will then be subject to immediate, involuntary departure.<sup>2</sup>

#### OFFICIAL COMMUNICATIONS AND INFORMATION

(U.S. *Digest*, Ch. 4, §1)

##### *Communications to Courts*

In its decision in the *Uranium Antitrust Litigation* (*Westinghouse Electric Corporation v. Rio Algom Ltd. et al.*, Nos. 79-1427, 79-1502, 79-1641, 79-2004, 79-2318, 79-2319, 79-2320, and 79-2321), handed down on February 15, 1980, the United States Court of Appeals for the Seventh Circuit indicated shock, that the governments of the defaulting defendants had "subserviently" presented for them their case against the exercise of jurisdiction. The foreign governments involved had made submissions as *amici curiae*.

Upon learning of the court's criticism, the Legal Adviser of the Department of State, Roberts B. Owen, asked Associate Attorney General John H. Shenefield to draw to the court's attention the concern it had given to the United States Government. In a letter to the Associate Attorney General, dated March 17, 1980, the Legal Adviser wrote:

For reasons that may not have been apparent to the Court, this language has caused serious embarrassment to the United States in its relations with some of our closest allies.

The fact is that the foreign governments concerned have substantial interest not only in this litigation, but also in certain broader issues which it raises. There has been a considerable high-level diplomatic correspondence over the matter for several years. These concerns stem from a fundamental difference of opinion between these governments and the United States Government over the propriety of the exercise of United States jurisdiction, including but not limited to United States antitrust jurisdiction, over persons of foreign nationality for actions taken outside the territorial jurisdiction of the United States. In this case

<sup>2</sup> Dept. of State File No. P80 0056-1351.

President Carter informed the Secretary of the Treasury by a separate memorandum, dated April 7, 1980, that, in connection with his decision to close Iranian diplomatic facilities in the United States, he was directing the Uniformed Division of the Secret Service to "provide any assistance necessary to the Secretary of State and the Attorney General in order to make my decision effective, including control of movement of persons and property into and out of Iranian diplomatic facilities in the District of Columbia." 16 WEEKLY COMP. OF PRES. DOC. 612 (Apr. 14, 1980).

the foreign governments have further concerns arising out of their involvement in developing and/or implementing official policies concerning uranium marketing which they deemed consistent with their national interest and which are now being challenged, not through diplomatic channels, but through private damage litigation in a U.S. court.

Although the United States Government does not share some of the views presented by the foreign governments, we recognize the genuineness of their concerns and believe that they should be afforded an opportunity to present their views to the courts. Accordingly, when we were approached by the foreign governments on the matter, we affirmatively encouraged them to appear *amici curiae* and actively supported their applications for leave to so appear.

The result is that, although the United States is not a party to the Uranium Antitrust Litigation and has taken no position on any of the issues in the case (and although the Department of State certainly does not condone the non-appearance of the nine defaulting defendants), we do recognize the important international implications of the matter and the propriety of the appearances of the Governments of Australia, Canada, South Africa, and the United Kingdom. Their briefs made clear that the issues involved transcend the particular case or the interests of the defaulting companies.

The Department's support and active encouragement of *amicus* filings by foreign governments is rooted in important considerations of public policy. Specifically, we believe that both the administration of justice and the foreign relations of the United States are best served when the United States courts take into consideration the views of foreign governments on issues of concern to them. It is important that courts be made aware of the international implications of their decisions and that they give appropriate weight to these considerations in the process of making their decisions. *Amicus* filings by foreign governments can assist the court both in doing justice to the private litigants in the case and in assessing the public policy implications of their particular rulings. Moreover, since the United States occasionally wishes an opportunity to be heard in foreign courts, it behooves us to assist other governments in appearing in our courts.

As to the manner in which the views of foreign governments are presented, it used to be common practice for such a government to express its views in a diplomatic note and request the Department of State to transmit the note to the appropriate court. In 1978, however, the Clerk of the Supreme Court of the United States notified the Solicitor General that the Federal Judiciary preferred an *amicus* filing in such cases, and the Department of State has since encouraged foreign governments to present their views directly to the courts by counsel. As noted above, the foreign governments who submitted briefs in the Uranium Antitrust Litigation did so at the suggestion of the United States Government, and in such circumstances it is understandable that they should be deeply concerned over the criticism of their action by the Court of Appeals.

On behalf of the Department of State, I respectfully request that you communicate these views to the Court of Appeals for the Seventh



Circuit for such action, if any, as the Court may deem appropriate. It is our belief that in future proceedings in this and other cases, the courts should give due consideration to the views of interested foreign governments and take into account appropriate considerations of comity where there is possible conflict between the laws or policies of nation states.

On the following day, March 18, the Associate Attorney General forwarded the Legal Adviser's letter to the Clerk of the United States Court of Appeals for the Seventh Circuit, Thomas F. Strubbe, with an accompanying letter expressing the full concurrence of the Department of Justice in the views expressed and enclosing a list for service of both letters.<sup>1</sup>

#### EXTRATERRITORIALITY

(U.S. *Digest*, Ch. 6, §4)

##### *Antitrust Laws*

Michael Gadbaw, Assistant General Counsel, Office of the Special Trade Representative, requested the Department of State's view as to whether extraterritorial application of U.S. antitrust laws violated (*i.e.*, conflicted with the rights of its trading partners under) any of its treaties of friendship, commerce, and navigation.

James R. Atwood, Deputy Legal Adviser of the Department, replied on November 19, 1979, in part as follows:<sup>1</sup>

In the absence of treaty constraints, international law recognizes the prerogative of each sovereign state to regulate conduct within its territory and the conduct of its nationals outside its territory. Further, the United States may regulate conduct outside its territory by non-nationals where that conduct results in effects within the United States that are direct and substantial. *See, e.g.*, Restatement (Second), Foreign Relations Law of the United States §18 (1965). Many U.S. cases in the antitrust field recognize the legitimacy of this exercise of extraterritorial jurisdiction.<sup>a</sup> Of course, the principle of comity should be given due weight in cases involving extraterritorial enforcement.<sup>b</sup>

In the view of the Department, our FCN treaties do not constrain the United States from the exercise of extraterritorial jurisdiction that would otherwise be permissible. In specified areas affecting commerce and navigation, and subject to specified exceptions, the FCN treaties confer upon nationals of each contracting party the right to enjoy treatment no less favorable than that enjoyed by nationals of the other

<sup>1</sup> Dept. of State File Nos. P80 0055-1794, 1798.

<sup>1</sup> The footnotes to Deputy Legal Adviser Atwood's reply are as follows:

<sup>a</sup> *See, e.g.*, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 704-05 (1962); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287-88 (1952); *United States v. Aluminum Company of America*, 148 F.2d 416, 444 (2d Cir. 1945).

<sup>b</sup> *See* Restatement (Second) Foreign Relations Law of the United States §40; *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 609 (9th Cir. 1977); K. Brewster, *Antitrust and American Business Abroad* 339-349, 446-448 (1958).

contracting party ("national treatment") or by nationals of the most favored nation ("MFN treatment"). They do not confer upon foreign nationals any immunity from the nondiscriminatory application of antitrust laws, even when those laws are applied in whole or in part to conduct occurring outside the United States. Because the United States antitrust laws are even-handedly applied without discrimination against persons of foreign nationality, we believe their enforcement is fully consistent with the national treatment and MFN treatment obligations of the FCN treaties.

Some of our FCN treaties contain a clause specifically relating to antitrust enforcement. A typical provision of this type reads:

"The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Government agrees upon the request of the other Government to consult with respect to any such practices and to take such measures, not precluded by its legislation, as it deems appropriate with a view to eliminating such harmful effect."<sup>c</sup>

The United States adheres to its treaty obligation to consult with other governments upon request concerning the control of restrictive business practices. Apart from the consultation obligation, this treaty provision does not constrain the United States in the application of its own laws to eliminate harmful effects on its own commerce,<sup>d</sup> but rather affirms the right of the United States to take enforcement action.<sup>2</sup>

#### ECONOMIC SANCTIONS

(U.S. *Digest*, Ch. 10, §12)

##### *Iran*

On April 7, 1980, President Carter signed Executive Order 12205, "Prohibiting Certain Transactions with Iran." The order embodied in large measure the operative paragraphs of the draft resolution the United States had proposed in the UN Security Council regarding exports to Iran (UN Doc. S/13735, January 10, 1980), which the Soviet Union vetoed on January 13, 1980.

The text of Executive Order 12205 read:

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International

<sup>c</sup> Article XVIII, para. 1 of the Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, 7 U.S.T. 1839; TIAS 3593; 273 U.N.T.S. 3.

<sup>d</sup> See *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1222 (C.D. Cal. 1973), *rev'd on other grounds*, 532 F.2d 674 (9th Cir. 1976); *United States v. F.P. Oldham Co.*, 152 F.Supp. 818 (N.D. Cal. 1959).

<sup>2</sup> Dept. of State File No. P80 0055-1791.

Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in order to take steps additional to those set forth in Executive Order No. 12170 of November 14, 1979, to deal with the threat to the national security, foreign policy and economy of the United States referred to in that Order, and in furtherance of the objectives of United Nations Security Council Resolution 461 (1979) adopted on December 31, 1979, it is hereby ordered as follows:

1-101. The following are prohibited effective immediately, notwithstanding any contracts entered into or licenses granted before the date of this Order:

(a) The sale, supply or other transfer, by any person subject to the jurisdiction of the United States, of any items, commodities or products, except food, medicine and supplies intended strictly for medical purposes, and donations of clothing intended to be used to relieve human suffering, from the United States, or from any foreign country, whether or not originating in the United States, either to or destined for Iran, an Iranian governmental entity in Iran, any other person or body in Iran or any other person or body for the purposes of any enterprise carried on in Iran.

(b) The shipment by vessel, aircraft, railway or other land transport of United States, registration or owned by or under charter to any person subject to the jurisdiction of the United States or the carriage (whether or not in bond) by land transport facilities across the United States of any of the items, commodities and products covered by paragraph (a) of this section which are consigned to or destined for Iran, an Iranian governmental entity or any person or body in Iran, or to any enterprise carried on in Iran.

(c) The shipment from the United States of any of the items, products and commodities covered by paragraph (a) of this section on vessels or aircraft registered in Iran.

(d) The following acts, when committed by any person subject to the jurisdiction of the United States in connection with any transaction involving Iran, an Iranian governmental entity, an enterprise controlled by Iran or an Iranian governmental entity, or any person in Iran:

(i) Making available any new credits or loans;  
(ii) Making available any new deposit facilities or allowing substantial increases in non-dollar deposits which exist as of the date of this Order;  
(iii) Allowing more favorable terms of payment than are customarily used in international commercial transactions; or  
(iv) Failing to act in a businesslike manner in exercising any rights when payments due on existing credits or loans are not made in a timely manner.

(e) The engaging by any person subject to the jurisdiction of the United States in any service contract in support of an industrial project in Iran, except any such contract entered into prior to the date of this Order or concerned with medical care.

(f) The engaging by any person subject to the jurisdiction of the United States in any transaction which evades or avoids, or has the purpose or effect of evading or avoiding, any of the prohibitions set forth in this section.

1-102. The prohibitions in section 1-101 above shall not apply to transactions by any person subject to the jurisdiction of the United States which is a non-banking association, corporation, or other organization organized and doing business under the laws of any foreign country.

1-103. The Secretary of the Treasury is delegated, and authorized to exercise, all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order. The Secretary may redelegate any of these functions to other officers and agencies of the Federal government.

1-104. The Secretary of the Treasury shall ensure that actions taken pursuant to this Order and Executive Order No. 12170 are accounted for as required by Section 401 of the National Emergencies Act (50 U.S.C. 1641).

1-105. This Order is effective immediately. In accord with Section 401 of the National Emergencies Act (50 U.S.C. 1641) and Section 204 of the International Emergency Economic Powers Act (50 U.S.C. 1703), it shall be immediately transmitted to the Congress and published in the Federal Register.<sup>1</sup>

The President's message to the Congress regarding his exercise of the authority granted under the International Emergency Economic Powers Act (Pub. L. 95-223, December 28, 1977, 91 Stat. 1626, 50 U.S.C. 1701-1706) summarized the provisions of Executive Order 12205<sup>2</sup> and stated:

Pursuant to Section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703, I hereby report to the Congress that I have today exercised the authority granted by this Act to take certain trade, financial and other measures against Iran and its nationals.

1. On November 14, 1979, I took the step of blocking certain property or interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran. At that time the United States Embassy in Tehran was occupied and American personnel were being held hostage there in flagrant violation of international law. In addition, Iran had threatened suddenly to withdraw its assets from United States banks, to refuse to accept payment in dollars for oil, and to repudiate obligations owed to the United States and to United States nationals. Iran's actions attacked the foundations of the international legal order as well as the stability of the world economy and the international monetary system.

2. The extraordinary threat to the national security, foreign policy, and economy of the United States, which I determined existed on November 14, continues today. The United States has used every diplomatic and legal means available to it to end this extraordinary threat, but without avail. Iran has ignored or rebuffed a decision by the

<sup>1</sup> 45 Fed. Reg. 24,099-100 (Apr. 9, 1980).

<sup>2</sup> The President transmitted a copy of Executive Order 12205 to the Congress, in accordance with the provisions of section 401(b) of the National Emergencies Act, Pub. L. 94-412, Sept. 14, 1976, 90 Stat. 1255, 1257, 50 U.S.C. 1641(b).

For amendments to the Iranian Assets Control Regulations (31 C.F.R., part 535), implementing Executive Order 12205, which the Department of the Treasury (Office of Foreign Assets Control) issued on Apr. 7, 1980, see 45 Fed. Reg. 24,432-34 (Apr. 9, 1980).

International Court of Justice, resolutions by the Security Council of the United Nations and efforts by the Secretary General of the United Nations and others to resolve the underlying problems.<sup>3</sup>

5. The above measures are being taken in furtherance of the objectives of Resolution 461 adopted by the Security Council of the United Nations on December 31, 1979, and would have been specifically mandated by the Security Council on January 13, 1980, but for a veto by the Soviet Union.

6. This action is taken with respect to Iran and its nationals for the reasons described in this report.<sup>4</sup>

When President Carter announced on April 7 that the United States was breaking off diplomatic relations with the Government of Iran, he stated that he had ordered the Secretary of the Treasury (also) to make an inventory of the frozen assets of the Iranian Government and of the outstanding claims of American citizens and corporations against Iran, with a view to preparing a claims program against Iran for the American Embassy "hostages," their families, and other U.S. claimants.<sup>5</sup> The President added that legislation was being prepared for introduction in the Congress, to facilitate processing and payment of these claims.

Subsequently, the President announced at a news conference on April 17, that he was ordering an additional set of actions (the latest of a "series of nonviolent but punitive steps designed to bring about the release of our hostages"). The text of Executive Order 12211, "Further Prohibitions on Transactions with Iran," signed by the President on April 17, read:

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Sections 1732 and 2656 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in order to take steps additional to those set forth in Executive Order No. 12170 of November 14, 1979, and Executive Order No. 12205 of April 7, 1980, to deal with the threat to the national security, foreign policy and economy of the United States referred to in those Orders, and the added unusual and extraordinary threat to the national security, foreign policy and economy of the United States created by subsequent events in Iran and neighboring countries, including the Soviet invasion of Afghanistan, with respect to which I hereby declare a national emergency, and to carry out the policy of the United States to deny the use of its resources to aid, encourage or give sanctuary to those persons involved in directing, supporting or participating in acts of international terrorism, it is hereby ordered as follows:

<sup>3</sup> Paragraphs 3, summarizing section 1-101 of Exec. Order 12205, and 4, summarizing section 1-102 thereof, are not reproduced here.

<sup>4</sup> 16 WEEKLY COMP. OF PRES. DOC. 614-15 (Apr. 14, 1980).

<sup>5</sup> For amendments to the Iranian Assets Control Regulations (31 C.F.R., part 535), issued by the Department of the Treasury (Office of Foreign Assets Control) to accomplish a census of blocked Iranian assets held by any person subject to the jurisdiction of the United States between Nov. 14, 1979, and Mar. 31, 1980, as well as of claims by U.S. nationals against Iran and Iranian entities, see 45 Fed. Reg. 24,407-30 (Apr. 9, 1980). Sample forms were also included.

1-101. Paragraph 1-101(d) of Executive Order No. 12205 is hereby amended by the addition of a new subparagraph (v) as follows:

(v) Make any payment, transfer of credit, or other transfer of funds or other property or interests therein, except for purposes of family remittances.

1-102. The following transactions are prohibited, notwithstanding any contracts entered into or licenses granted before the date of this Order:

(a) Effective immediately, the direct or indirect import from Iran into the United States of Iranian goods or services, other than materials imported for news publication or news broadcast dissemination.

(b) Effective immediately, any transactions with a foreign person or foreign entity by any citizen or permanent resident of the United States relating to that person's travel to Iran after the date of this Order.

(c) Effective seven days from the date of this Order, the payment by or on behalf of any citizen or permanent resident of the United States who is within Iran of any expenses for transactions within Iran.

The prohibitions in paragraphs (b) and (c) of this section shall not apply to a person who is also a citizen of Iran and those prohibitions and the prohibitions in section 1-101 shall not apply to a journalist or other person who is regularly employed by a news gathering or transmitting organization and who travels to Iran or is within Iran for the purpose of gathering or transmitting news, making news or documentary films, or similar activities.

1-103. The Secretary of the Treasury is hereby directed, effective fourteen days from the date of this Order, to revoke existing licenses for transactions by persons subject to the jurisdiction of the United States with Iran Air, the National Iranian Oil Company, and the National Iranian Gas Company previously issued pursuant to regulations under Executive Order No. 12170 or Executive Order No. 12205.

1-104. The Secretary of the Treasury is delegated, and authorized to exercise, all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order. The Secretary may redelegate any of these functions to other officers and agencies of the Federal government.

1-105. The Secretary of the Treasury shall ensure that actions taken by him pursuant to the above provisions of this Order, Executive Order No. 12170 and Executive Order No. 12205 are accounted for as required by Section 401 of the National Emergencies Act (50 U.S.C. 1641).

1-106. The Secretary of State is delegated, and authorized to exercise in furtherance of the purposes of this Order, the powers vested in the President by Section 2001 of the Revised Statutes (22 U.S.C. 1732), Section 1 of the Act of July 3, 1926 (22 U.S.C. 211a), and Section 215 of the Immigration and Nationality Act (8 U.S.C. 1185), with respect to:

(a) the restriction of the use of United States passports for travel to, in or through Iran; and

(b) the regulation of departures from and entry into the United States in connection with travel to Iran by citizens and permanent residents of the United States.

1-107. Except as otherwise indicated herein, this Order is effective immediately. In accord with Section 401 of the National Emergencies Act (50 U.S.C. 1641) and Section 204 of the International Emergency Economic Powers Act (50 U.S.C. 1703), it shall be immediately transmitted to the Congress and published in the Federal Register.<sup>6</sup>

In implementation of Executive Order No. 12211, the Department of the Treasury (Office of Foreign Assets Control) issued further amendments to the Iranian Assets Control Regulations (31 C.F.R., part 535) on April 17, effective the same day. Their effect was to prohibit: (1) imports of goods from Iran or of merchandise of Iranian origin; (2) payments or transfers of funds or other property to any person in Iran (except for certain family remittances, 31 C.F.R. §535.563); and (3) payments and transactions in support of travel to and maintenance within Iran of U.S. citizens and U.S. permanent resident aliens (except for journalists and news correspondents, 31 C.F.R. §535.562).<sup>7</sup>

<sup>6</sup> 45 Fed. Reg. 26,685-86 (Apr. 21, 1980). For the President's message to the Congress, transmitting a copy of Executive Order 12211, pursuant to 50 U.S.C. 1641(b), see 16 WEEKLY COMP OF PRES. DOC. 716-17 (Apr. 21, 1980).

<sup>7</sup> 45 Fed. Reg. 26,940-41 (Apr. 21, 1980).

31 C.F.R. §535.562 and §535.563, as added, read:

§535.562 News material.

(a) *Imports by newsgathering agencies.* The purchase and importation of Iranian origin newspapers, magazines, photographs, films, tapes, and other news material or copies thereof by newsgathering agencies in the United States are authorized, without restriction as to method of payment, provided such materials are intended for use in news publication or news broadcast dissemination.

(b) *Newsgathering activities in Iran by journalists and news correspondents.* The following transactions by a journalist or other person who is regularly employed by a newsgathering or transmitting organization who travels to Iran or is within Iran for the purposes of gathering or transmitting news, filming news or making documentary films, or similar activities are authorized:

(1) Payment of expenses for travel to, and maintenance within, Iran for the purposes of gathering and transmitting news to the United States; and

(2) The acquisition in Iran for transmission to and importation into the United States of newspapers, magazines, photographs, films, tapes, and other news material or copies thereof, necessary for the journalistic assignments.

(3) Within 5 days after engaging in the initial transaction with respect to a trip to or stay within Iran covered by this paragraph, the person engaging in the transaction, or the organization by which such person is employed, shall notify the Office of Foreign Assets Control. The notification shall include the name of the person upon whose behalf the general license is being used. Within 5 days after his departure from Iran, any person utilizing the general license shall send a second notification to the Office of Foreign Assets Control that he has departed Iran.

§535.563 Family remittances to Iran.

(a) Remittances to any close relative of the remitter or of the remitter's spouse, who is a citizen of Iran and who is a resident of and within Iran, are authorized provided they do not involve any debit to a blocked account and are for the support of the payee and members of his household.

(b) The term "close relative" used with respect to any person means spouse, child, grandchild, parent, grandparent, uncle, aunt, brother, sister, nephew, niece, or spouse, widow, or widower of any of the foregoing.

(c) The term "member of a household" used with respect to any person means a close relative sharing a common dwelling with such person.

## JUDICIAL DECISIONS

ALONA E. EVANS

*Extradition—grant of bail before hearing—Extradition Treaty with Canada of 1971*

UNITED STATES V. WILLIAMS. 611 F.2d 914.

U.S. Court of Appeals, 1st Cir., Oct. 12, 1979.

Canada requested the extradition of accused on a charge of conspiracy to import narcotics, pursuant to the Extradition Treaty of 1971 (27 UST 983, TIAS No. 8237). While the extradition hearing was pending, the district court granted the accused's application for release on bail. The court of appeals stayed that order.

In a per curiam opinion, the court of appeals observed that, following *Wright v. Henkel* (190 U.S. 40 (1903)), bail would be granted in an extradition case only under "special circumstances." In the instant case, the district court had held that this rule was limited to bail applications following the extradition hearing. The court of appeals, however, noting that *Wright v. Henkel* concerned detention before a hearing, held that the "special circumstances" rule applied to bail applications made before as well as after an extradition hearing.

The district court had also reasoned that special circumstances existed in the instant case because the accused's brother, held in New York for extradition to Canada on similar charges, had been granted bail. In the opinion of the court of appeals, "special circumstances" had to be read as involving "situations where 'the justification is pressing as well as plain'" or "in the most pressing circumstances, and when the requirements of justice are absolutely peremptory."<sup>1</sup> These conditions were not met by the plea of "discomfiture of jail,"<sup>2</sup> on the one hand, nor by the difference in the treatment accorded to the accused and his brother, on the other hand.

*Extradition—waiver of speciality rule—whether accused should be returned to requested state for hearing on waiver—Extradition Treaty with Italy of 1973*

BERENGUER V. VANCE, 473 F.Supp. 1195.

U.S. District Court, District of Columbia, July 13, 1979.

Italy requested the extradition of accused, a French national, on charges of murder and aggravated robbery pursuant to the Extradition Treaty of 1973 (26 UST 493, TIAS No. 8052) (Treaty). After extradition was granted and the accused returned to Italy, Italian authorities requested that the Department of State waive the speciality rule (Art. XV(3)), so that accused could also be tried on the charge of illegal possession of a military firearm, an offense which was included in the list of extraditable

<sup>1</sup> Quoting *In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930), and *In re Mitchell*, 171 F. 289 (S.D.N.Y. 1909).

<sup>2</sup> 611 F.2d 914, 915.



offenses in the Treaty (Art. II(29)). The Department, finding that there was probable cause to try the accused on this charge, waived the speciality rule.<sup>1</sup> After criminal proceedings had begun in Italy, accused petitioned for a writ of mandamus to compel the Secretary of State to revoke the waiver and requested that he be returned to the United States for an extradition hearing on the additional charge. The district court denied the petition and dismissed the action with prejudice.

In a memorandum opinion, District Judge Green pointed out that while 18 U.S.C. §3184 provided for a hearing prior to extradition, it made no provision for a hearing in the circumstances of this case. Similarly, Article XV of the Treaty made no provision for the kind of procedure to be followed in regard to a waiver.

As for petitioner's contention that he had a right to a second hearing under the due process clause of the Constitution, the court observed that the initial extradition hearing conformed to the requirements of due process of law. The court said:

As long as petitioner, who is a French national, was within the jurisdiction of the United States, this judicial system acted to protect the full panoply of his rights as vigorously as it would the rights of any citizen. Once his extradition was accomplished, however, he became subject to the judicial process of the receiving nation and could no longer claim a right to a judicial hearing on due process grounds.<sup>2</sup>

District Judge Green also noted that in an extradition proceeding, the court's role is limited to determining whether there is probable cause to order the surrender of the accused. The court said:

The ultimate decision to surrender the defendant lies with the executive branch, and any objections to the treatment of an extradited party must be made through diplomatic channels. The very fact that extradition is accomplished under treaty indicates that it is most properly considered to be part of the foreign affairs responsibility of the President. In all but the most egregious circumstances, the role of the court must come to an end once the defendant is transported to the foreign country to stand trial. For this Court to find otherwise and to insist that an extradited defendant must have a hearing before an American judicial officer prior to the Government's consenting to an expansion of extradition would be to intrude in affairs that are traditionally, and appropriately, considered to be exclusively within the province of the executive branch.<sup>3</sup>

*Jurisdiction — maritime accident — whether United States law could be invoked — test of substantiality of links*

CHIRINOS DE ALVAREZ V. CREOLE PETROLEUM CORP. 613 F.2d 1240.  
U.S. Court of Appeals, 3d Cir., Jan. 28, 1980.

Plaintiffs, the widows of employees of defendant who died in an explosion on a crew launch on Lake Maracaibo, Venezuela, brought wrongful death

<sup>1</sup> For additional details, see 74 AJIL 161 (1980).

<sup>2</sup> 473 F.Supp. 1195, 1198.

<sup>3</sup> *Id.*, 1199.

and survival actions against defendant in federal court, arguing that the Jones Act (46 U.S.C. §688) and general maritime law should apply. Both plaintiffs and decedents were Venezuelan nationals. The launch was registered in Venezuela. The employees' contracts and responsibility for their deaths in the course of their employment were covered by Venezuelan law. Defendant was incorporated in Delaware. At the time of the accident, it was wholly owned by the Exxon Corporation. Defendant's corporate headquarters and properties were in Venezuela. Most of its officers and directors were either Venezuelan nationals or American nationals residing in Venezuela. The annual stockholders' meeting, however, was held in New York at the headquarters of Exxon. Defendant moved to dismiss the suits for want of subject matter jurisdiction, *forum non conveniens*, and failure to state a claim upon which relief could be granted. In dismissing plaintiffs' complaints, the district court held that the only link between the United States and the accident was defendant's ownership of the launch. This fact did not constitute sufficient ground for bringing suit under United States law. (462 F.Supp. 782 (D.Del. 1978).) On appeal, the court of appeals affirmed this decision.

Circuit Judge Higginbotham pointed out that the district court's dismissal was not on jurisdictional grounds and only relied to a limited extent on the principle of *forum non conveniens*. The main issue was whether United States law, in particular the Jones Act, applied to the accident in Venezuela. In the opinion of the court, an examination of the case law<sup>1</sup> showed that

a court reviewing a claim to Jones Act coverage should determine the substantiality of the links to the United States and the links to the foreign sovereignty. This process is undertaken in order to discern in whose "domain" the paramount interest lies. . . . Under certain circumstances the Jones Act may be far-reaching. However, when the links to the United States are weak and the interests of another sovereign are substantial, the Jones Act is not applicable.<sup>2</sup>

Here, the court found that the only links supporting application of U.S. law were the facts that the shipowner was a U.S. national and U.S. law was the law of the forum. All other factors linked the accident to Venezuela. The court also observed that the same "test of substantiality" applied to plaintiffs' attempt to rely upon general U.S. maritime law, pointing out that "[t]here too, the substantiality of Venezuela's interest takes precedence and United States law is not applicable."<sup>3</sup>

*Jurisdiction—nationals abroad—control of activities by revocation of passport*

AGEE v. VANCE, 483 F.Supp. 729.

U.S. District Court, District of Columbia, Jan. 28, 1980.

In an action for declaratory and injunctive relief, plaintiff, a United States national, challenged the authority of the Secretary of State to revoke his passport on the grounds that plaintiff's activities abroad were detrimental

<sup>1</sup> Citing *Lauritzen v. Larson*, 345 U.S. 571 (1953); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), 64 AJIL 960 (1970).

<sup>2</sup> 613 F.2d 1240, 1246.

<sup>3</sup> *Id.*, 1248.

to the national security or to the foreign policy of the United States. (22 C.F.R. §§51.70(b)(4), 5171.) Plaintiff, a former employee of the Central Intelligence Agency and a resident of the Federal Republic of Germany, had been living abroad for several years, during which time he had criticized U.S. intelligence activities and allegedly revealed the names of CIA agents. He was informed about the reasons for the revocation and was offered an administrative hearing in the matter. Plaintiff brought this action instead. Conceding for purposes of his motion that his activities abroad were causing serious damage to the national security or foreign policy of the United States, he claimed that there was no congressional authorization for the regulation the Secretary had invoked and that the regulation violated the First and Fifth Amendments. The district court granted plaintiff's motion.

In a memorandum opinion, District Judge Gesell pointed out that the right to travel is protected under the Constitution and that denial of a passport significantly limits that right. Any power the Secretary of State might have to limit the use of such a right would have to be granted by Congress. Although the Secretary sought to show that such authorization had been granted in 22 U.S.C. §211a, the statute, in fact, did not provide for unlimited discretion, as the Supreme Court had established in several cases.<sup>1</sup> "Close attention is particularly warranted where, as here, the Secretary promulgated a rule enabling him to take action against the passport of a single individual."<sup>2</sup> Congress had rejected an effort by the Department of State to acquire the authority here claimed in 1958. The court observed that in its amendments to the statute in 1978, Congress did not address this matter. If the Secretary could not show an explicit statutory basis for the regulation, he had to show implied congressional approval, as by a longstanding administrative practice unquestioned by Congress. In fact, there was no such established practice. There was only one instance of revocation of a passport pursuant to 22 C.F.R. §51.70(b) (4) in a 12-year period. The only other evidence of a practice of denying passports involved either persons accused of criminal conduct or the need to protect U.S. interests in time of war or national emergency. Neither situation obtained in the instant case. The court concluded:

This holding in no way is intended to affect the President's authority to limit Agee's travel by other means. While it is obvious in the present crisis that the national security may be endangered when a former government official travels among foreign countries denouncing the United States' intelligence service and revealing the names of government agents, the precise problem presented is whether the regulation invoked was legally authorized. If Agee is indicted for any violation of law, his passport may be cancelled. If his activities are detrimental to the hostages in Iran, a special statute exists, 22 U.S.C. §1732 (1976), which appears to give the President extraordinary authority to act. There may be other options. All that is held here is that because Congress has not acted to grant the Secretary authority, the regulation in issue cannot be upheld.<sup>3</sup>

<sup>1</sup> Citing *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965), 59 AJIL 935 (1965); *Lynd v. Rusk*, 389 F.2d 940 (D.C.Cir. 1967), 62 AJIL 981 (1968).

<sup>2</sup> 483 F.Supp. 729, 730-31.

<sup>3</sup> *Id.*, 732.

*Jurisdiction—objective territorial theory—crime committed abroad having no effect in United States*

UNITED STATES v. COLUMBA-COLELLA. 604 F.2d 356.

U.S. Court of Appeals, 5th Cir., Oct. 10, 1979.

Appellant, a British subject and a resident of Mexico, was charged in a United States District Court in Texas with receiving a stolen vehicle in foreign commerce (18 U.S.C. §2313). It was shown that appellant had agreed to purchase the vehicle in Juárez, Mexico, knowing that it had been stolen in El Paso, Texas. He pleaded guilty to the charge, but reserved the right to appeal the issue of the court's jurisdiction. The court of appeals reversed the judgment below and dismissed the case.

Circuit Judge Wisdom pointed out that there was no question that U.S. law could reach the conduct of an American national abroad or the conduct of an alien which was intended to have an effect within the United States. Here, however, the objective territorial theory did not apply, for appellant's act of receiving stolen property in Mexico was a separate offense from the theft of the vehicle in the United States; appellant's offense had no effect within the United States. Neither was appellant charged with conspiracy to commit an offense within the United States. This case was distinguishable from *United States v. Fernandez* (496 F.2d 1294 (5th Cir. 1974), 69 AJIL 900 (1975)) and *United States v. Pizzarussó* (388 F.2d 8 (2d Cir. 1968), 62 AJIL 975 (1968)), in both of which the court had jurisdiction under the protective theory. Similarly, this case could be distinguished from *United States v. Postal* (589 F.2d 862 (5th Cir. 1979), 73 AJIL 698 (1979)) and other cases involving conspiracies by aliens to import illegal drugs into the United States. The court added that upon his release, appellant would be subject to whatever sanctions that were applicable under the law of Mexico.

*Jurisdiction—theories of criminal jurisdiction—extraterritorial reach of United States law—contiguous zone*

UNITED STATES v. BAKER. 609 F.2d 134.

U.S. Court of Appeals, 5th Cir., Jan. 2, 1980.

Defendants, crew members of the shrimp boat, *Captain Otis II*, were convicted on a charge of illegal possession of marijuana with intent to distribute (21 U.S.C. §841(a) (1)); one defendant was also convicted on a conspiracy charge (21 U.S.C. §846). The Coast Guard had boarded the vessel at a point 9 miles off the Florida coast for purposes of safety inspection. Their inspection revealed some bales of marijuana, and a subsequent warrantless search uncovered 51,280 pounds of marijuana. The vessel was seized, and the crew arrested. On appeal from their convictions, the court of appeals affirmed defendants' convictions.

The issue before the court of appeals was whether section 841(a) (1), illegal possession with intent to distribute, had been intended by Congress to reach beyond the 3-mile limit into the contiguous zone or "customs waters." The Government conceded that pursuant to Article 24(1) of the Convention on

the Territorial Sea and the Contiguous Zone of 1958 (15 UST 1606, TIAS No. 5639, 516 UNTS 205), the area in which the boarding was made constituted the high seas for purposes of criminal jurisdiction. Circuit Judge Roney observed that while Congress had long exercised the right to enact penal statutes that had extraterritorial effect, there was no express provision in section 841(a) (1) to this effect. In the opinion of the court, it was possible to infer such a design by Congress from the nature and purpose of the statute. Clearly, the object of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. §801 *ff.*) was to control illegal traffic in drugs, including "importation," which term would reach possession with intent to distribute such drugs in the United States.

The court noted that various theories of criminal jurisdiction were available here. The objective territorial theory would apply as defendants' acts were intended to have an effect within the United States. Similarly, U.S. jurisdiction could be asserted on the bases of the vessel's American registry and of the nationality and protective theories. Circuit Judge Roney said:

The question remains open whether jurisdiction may be maintained over a [21 U.S.C.] §963 conspiracy, without proof that any acts whatsoever took place within United States territory, or whether mere proof of intended territorial effects is enough. . . . In terms of §841(a) (1), which proscribes the substantive crime of possession with intent to distribute, we hold that so long as it is clear that the intended distribution would occur within the territorial United States, as in this case, jurisdiction may be maintained, where defendants are apprehended outside the territorial waters, and inside the contiguous zone. With jurisdiction maintained over the substantive offense, the district court could rightfully exercise jurisdiction over the conspiracy charge. 21 U.S.C. §846.<sup>1</sup>

The court concluded that there were no grounds for defendants' contention that the search of the vessel violated the Fourth Amendment as the Coast Guard's boarding was shown to have been made for the purpose of a routine safety inspection.

*Jurisdiction—whether petitioners voluntarily and intelligently consented to transfer—Treaty with Mexico on Execution of Penal Sentences of 1976*

ROSADO V. CIVILETTI. Nos. 80-2001/3.  
U.S. Court of Appeals, 2d Cir., April 23, 1980.

Petitioners were three United States nationals who had been convicted on narcotics charges in Mexico and sentenced to 9 years in prison. They were transferred from a Mexican prison to a U.S. federal prison to complete their sentences pursuant to the Treaty with Mexico on Execution of Penal Sentences of 1976 (28 UST 7399, TIAS No. 8718) (Treaty). Seeking their release from federal prison on writs of habeas corpus, petitioners contended that they had consented to their transfers out of fear for their lives and that their detention in an American prison on the bases of convictions under

<sup>1</sup> 609 F.2d 134, 139.

Mexican law violated the due process clause of the Fifth Amendment. They also argued that 18 U.S.C. §3244(1), which provides that a challenge to a conviction in Mexico must be brought in a Mexican court, essentially denied them access to the writ of habeas corpus in violation of Article I, section 9(2) of the Constitution. The district court granted the petitions. On appeal, the court of appeals reversed this judgment.

In treating the matter of petitioners' consent to transfer, Chief Judge Kaufman accepted as fact their descriptions of the circumstances of their arrests, trials, and convictions in Mexico, and the conditions of their imprisonment there. The court pointed out, however, that unless American authorities could be shown to have been directly involved in the abuse of petitioners, which was not the case here, their rights under the Bill of Rights could not be asserted against acts of foreign authorities committed in foreign territory.<sup>1</sup> The court observed that a judgment upon the conduct of Mexican prison officials would constitute an interference by the court in Mexican penal processes to the detriment of relations between the countries. In addition,

[i]f, here, the conduct of Mexican officials on Mexican soil were held to be determinative of the voluntariness of an American prisoner's consent to transfer, those prisoners most desperately in need of transfer to escape torture and extortion, including the petitioners at bar, would never be able to satisfy a magistrate that their consents were voluntarily given.<sup>2</sup>

The district court had used consent to automobile searches by police as the standard of voluntary consent. In Chief Judge Kaufman's opinion, this standard was not relevant to the instant case. A more appropriate standard would be the voluntariness of consent to a plea bargain, as in *North Carolina v. Alford* (400 U.S. 25 (1970)), where, given the weight of the evidence against the accused, the Supreme Court found that the accused's decision had not been coerced when he was given a choice between a jury trial with the possibility of the death sentence or pleading to a lesser charge which carried a long prison sentence. In the present case, the court agreed with the district court that petitioners' choice between serving out their sentences under Mexican prison conditions or transferring to the United States might seem to present no real choice; nonetheless, the alternatives had been before them, and their consent to transfer had to be deemed to have been made both voluntarily and intelligently.

Petitioners argued that their detention by the U.S. Government pursuant to a foreign sentence and without the opportunity to challenge the validity of that sentence in U.S. courts violated the due process clause of the Fifth Amendment. Chief Judge Kaufman observed that although Chief Justice Marshall had stated that "[t]he courts of no country execute the penal laws of another,"<sup>3</sup> that "dictum [does not] suggest any principle limiting the

<sup>1</sup> Compare *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), 69 AJIL 406 (1975) with *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), cert. denied, 423 U.S. 847 (1975), 70 AJIL 142 (1976).

<sup>2</sup> Nos. 80-2001/3 (2d Cir. April 23, 1980), slip op. at 2525, 2545 (footnote by court omitted).

<sup>3</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825), quoted by court.

power of sovereign nations to enter into mutual compacts or treaties obligating the signatories to honor and enforce the penal decrees of one another."<sup>4</sup> Practice with respect to extradition was in point. The court continued:

The instant Treaty does not call upon the United States to enforce Mexico's penal laws or procedures, but only to execute criminal convictions entered in its courts against American citizens who elect to transfer to United States custody. Thus, once a prisoner has consented to transfer, the United States is bound simply to take custody of the offender and, with a few significant exceptions, detain him as if he had been convicted in a United States court. The Treaty serves to ameliorate the condition of Americans imprisoned in Mexico by offering them an opportunity for repatriation and, hopefully, better prison conditions and more positive means for rehabilitation. In lessening the number of United States citizens incarcerated in Mexico, the Treaty additionally serves to relieve a worrisome source of tension in Mexican-American relations. In view of these benevolent purposes, we believe the Treaty is a valid exercise of the treaty-making power conferred by Art. II, §2, cl. 2 of the Constitution.<sup>5</sup>

At the same time, as the court observed, there was a question as to whether pursuant to the Treaty, Americans could be detained in the United States on convictions based on proceedings so summary as to violate the standards of the Fifth and Sixth Amendments and could also be denied the right to challenge such proceedings in the United States. According to 18 U.S.C. §3244(1), however, Mexican courts have exclusive jurisdiction over proceedings to challenge convictions or sentences. After examining several cases arising in related contexts,<sup>6</sup> the court said:

Under such circumstances, we believe these petitioners have a right to test the basis for their continued confinement in a United States court. In reaching this conclusion, we by no means imply that each element of due process as known to American criminal law must be present in a foreign criminal proceeding before Congress may give a conviction rendered by a foreign tribunal binding effect. Indeed, we are keenly sensitive to the historical and cultural limitations of our own constitutional heritage, and respect the similarly indigenous underpinnings of the process accorded criminal defendants abroad. We simply hold that a petitioner incarcerated under federal authority pursuant to a foreign conviction cannot be denied all access to a United States court when he presents a persuasive showing that his conviction was obtained without the benefit of any process whatsoever.<sup>7</sup>

While granting the right of petitioners to question their detention in United States courts in principle, the court had to consider the effect of their undertaking not to do so pursuant to the Treaty and to 18 U.S.C. §4108(b) (1). An examination of the legislative background of section 4108 indicated that Congress particularly desired that it be understood that

<sup>4</sup> Nos. 80-2001/3 (2d Cir. April 23, 1980), slip op. at 2551.

<sup>5</sup> *Id.*, 2551-52 (footnote by court omitted).

<sup>6</sup> *E.g.*, *Reid v. Covert*, 351 U.S. 1 (1956); *Neely v. Henkel*, 180 U.S. 109 (1901); *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

<sup>7</sup> Nos. 80-2001/3 (2d Cir. April 23, 1980), slip op. at 2561-62.

before transfer a prisoner must agree that he could only attack his conviction or sentence in a Mexican court. Chief Judge Kaufman observed:

The consents contemplated by the Treaty entail much more than simple expressions of the desire to transfer, and the permission to do so. They also include reciprocal representations by each of the parties upon which the others rely in deciding to give their consent. For example, the United States promises Mexico that it will execute the prisoner's Mexican conviction and provide biannual reports on the status of the offenders who have transferred to the United States. It also promises the prisoner that he will enjoy the benefit of parole in accordance with United States law. Mexico agrees to relinquish custody of an individual found to have committed a criminal offense within its jurisdiction, while promising to hear subsequent challenges to the sentences rendered by its courts. For his part, the transferring prisoner agrees to his change in custody, and further promises to abide by the terms of the Treaty, including the reservation of jurisdiction to Mexico over all challenges to convictions and sentences imposed by its courts.

It requires little imagination to conclude, in light of this background, that if petitioners had refused to agree to abide by the Treaty's conditions, neither Mexico nor the United States would have consented to their transfers. Accordingly, petitioners would have continued to be imprisoned in Mexico, without right of access to American courts. But that fact alone does not persuade us their bargain should be enforced. If, in holding these petitioners to their agreement, we would serve no substantial and legitimate governmental interest which the United States put in jeopardy in reliance upon their promises not to attack their convictions in American courts, we would have difficulty in concluding that their custody should be continued.<sup>8</sup>

In the opinion of the court, it had to be shown that petitioners had voluntarily and intelligently agreed to the conditions of section 4108(b) (1). The court said:

Viewed in the light of the alternatives available to them, . . . we find petitioners' decisions to promise to abide by the Treaty's limitation upon their right to seek relief to have been both informed and intelligent. If, as we have said, they had insisted upon their right, once held in federal custody, to seek review of their Mexican convictions in a United States court, neither the United States nor Mexico would have consented to their transfers. If, however, they agreed to abide by the limitations of the Treaty, petitioners could escape the brutal conditions of Mexican confinement, acquire a hitherto unenjoyed right to parole, and have virtually the same opportunity to challenge their Mexican convictions in Mexico's courts as they previously enjoyed. In addition, petitioners would gain access to United States courts for all claims unrelated to their convictions or sentences.<sup>9</sup>

It remained to be shown whether petitioners' agreement that they would challenge their convictions solely in Mexican courts was "voluntary," as that term was used in *United States v. Jackson* (390 U.S. 570 (1968)). Chief Judge Kaufman said:

<sup>8</sup> *Id.*, 2564-65 (footnotes by court omitted).

<sup>9</sup> *Id.*, 2566.



Arguably, the choice between sacrifice of a right to seek judicial redress from a United States court once repatriated, and continued imprisonment in Mexico, "needlessly penalize[d]" the prisoners' constitutional right to a federal forum once they were placed in United States custody. . . . We are satisfied, however, that the congressional decision to require offenders transferring to American custody to agree to abide by the jurisdictional provision was neither needless nor arbitrary. Moreover, we believe the conditional requirement that prisoners agree to challenge their convictions solely in the courts of the transferring nation legitimately serves two important interests that can be vindicated only by holding these prisoners to their agreements.

In assessing the interacting interests of the United States and foreign nations, "we must move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations," *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959). Since Mexico was unwilling to enter a treaty that provided for review of its criminal judgments by United States courts, American negotiators did not have a completely free hand in structuring the Treaty's terms. Guided throughout by their humane concern to ameliorate the plight of hundreds of United States citizens imprisoned in Mexico, the negotiators obviously extracted a significant number of important concessions. At the same time, however, our negotiators were anxious to improve relations with Mexico and hopefully eliminate what had become an important source of tension between the two nations. . . .

Of paramount importance, however, is the interest of those Americans currently incarcerated in Mexico. Whatever hope the Treaty extends of escaping the harsh realities of confinement abroad will be dashed for hundreds of Americans if we permit these three petitioners to rescind their agreement to limit their attacks upon their convictions to Mexico's courts. We refuse to scuttle the one certain opportunity open to Americans incarcerated abroad to return home, an opportunity, we note, the benefit of which Caban, Velez, and Rosado have already received. In holding these petitioners to their bargain, we by no means condone the shockingly brutal treatment to which they fell prey. Rather, we hold open the door for others similarly victimized to escape their torment.<sup>10</sup>

#### FRENCH CASE NOTE

*Extradition—definition of political offense—Extradition Convention between Italy and France of 1870*

*Re* PIPERNO. No. 1343-79.\*

Cour d'Appel de Paris, Chambre d'Accusation, 1ère Section, Oct. 17, 1979.

In a proceeding in the French court, Italy requested the extradition of Francesco Piperno, an Italian national and sometime member of a group known as the Red Brigades, on a variety of charges pursuant to the Extradi-

<sup>10</sup> *Id.*, 2566-68 (insert by court, footnotes by court omitted).

\* Text of opinion from William S. Kenney, Esq. Translation by editor.

tion Convention with France of 1870 (Convention).<sup>1</sup> In the warrant for the arrest of the accused, dated July 7, 1979, the Italian authorities charged him with membership in subversive organizations and armed bands, as well as incitement to insurrection and to civil war. In the opinion of the court, these charges were political in nature, and extradition on that basis was barred under the Convention. The French court therefore denied extradition. In a second warrant, dated August 29, 1979, the Italian authorities charged the accused with 46 offenses. The court disallowed 27 of these charges, including illegal possession of arms, falsification of vehicular registrations, and damaging property, on the grounds that they were not included in the list of extraditable offenses in Article 2 of the Convention. The remaining 19 charges, including such offenses as assassination, murder, illegal detention, and armed robbery, were comprehended by the list. The court found, however, that of these several offenses the accused could only be properly charged with complicity in the kidnapping and assassination of Aldo Moro, former Premier of Italy. The court was satisfied that these charges met the double criminality requirement of the Convention and that there was evidentiary support for them.

It was argued on behalf of accused that he had not sought the death of Moro and that the offenses charged had taken place in a "political context"; hence, that extradition should be denied. The court said:

The Chambre d'Accusation must take cognizance, however, of the extreme gravity of the charges, for they comprehend not only the physical and mental torture of prolonged detention but also the murder of the innocent victim.

Whatever the objective may have been or the context in which these acts took place, considering their gravity, they could not be treated as having a political character.

This principle forms the basis for the provision in Article 5(2) (para. 2) of the Extradition Law of March 10, 1927, that extradition may be granted for acts of odious barbarism which are committed in the course of an insurrection or a civil war.

If the aforementioned law bars the political motive as justification for such grave acts committed under the conditions of violence which would characterize an insurrection or a civil war, *a fortiori* the same rule holds in the absence of such extreme conditions when the institutions of government are operating normally and fully in the requesting state.

A contrary conclusion would imply that any person could be subjected to physical danger and death by reason of his convictions or his public office and that the defendant would only have to plead that such an eventuality had not been his intention.

In the circumstances, the Court finds that the offenses charged were not political in nature.<sup>2</sup>

<sup>1</sup> 61 British & Foreign State Papers 523.

<sup>2</sup> No. 1343-79 at 14.

## CURRENT DEVELOPMENTS

### CHINA'S LEGAL POSITION ON PROTECTING CHINESE RESIDENTS IN VIETNAM

In early 1978, Vietnam began to "expel" many of its Chinese residents to the People's Republic of China (PRC), and both countries began publicly to exchange acrimonious statements about the protection of Chinese residents in Vietnam and the question of their "expulsion" to China. This paper summarizes the legal position of China with respect to this dispute.

At the time of the Communist takeover of South Vietnam in 1975, there were about a million people of Chinese origin there, most of whom were businessmen, technicians, and other urban workers. Their properties were soon expropriated by the Vietnamese Government in carrying out its policy of "socialist transformation."<sup>1</sup> Despite the fact that during the Republic of Vietnam period (1954–1975) these people were treated as Vietnamese, the PRC continued to consider them as Chinese and, therefore, as entitled to its protection.<sup>2</sup> Vietnam, however, maintained that "it is a historical fact that the Chinese residents in south Vietnam took Vietnamese citizenship and became Vietnamese of Chinese origin 20 years ago."<sup>3</sup> As a result, Vietnam rejected the PRC's right to intervene diplomatically on their behalf on the ground that their treatment was a matter of Vietnamese internal affairs.

According to the PRC, an agreement was concluded between the Chinese Communist Party (CPC) and the Vietnam Workers' Party (VWP) in 1955 on the nationality of the Chinese in Vietnam. The essential contents of the agreement, as stated by Chung Hsi-tung, leader of the PRC delegation at the first session of the Chinese-Vietnamese Talks on the Question of Chinese Nationals on August 8, 1978, were as follows:

The two sides acknowledged that the Chinese residents in North Vietnam, on condition of their enjoying equal rights as the Vietnamese and after being given sustained and patient persuasion and ideological

<sup>1</sup> See *Lies Cannot Cover up Facts*, Jen-min jih-pao (*People's Daily*; transliterated as *Renmin ribao* since 1979), June 10, 1978, at 1, translated in *PEKING REV.*, June 16, 1978; at 20.

<sup>2</sup> A PRC Foreign Ministry statement issued on June 9, 1978, asserted:

It is well known that there are one million and several hundred thousand Chinese residents in Vietnam . . . and about 90 percent of whom reside in south Vietnam. . . . And now, the spokesman of the Vietnamese Ministry of Foreign Affairs has asserted that back in 1956 almost all the Chinese residents in south Vietnam adopted Vietnamese nationality. They are no longer Chinese nationals but Vietnamese of Chinese origin. In this way one million and several hundred thousand Chinese nationals in south Vietnam are written off at one stroke. This is absolutely unacceptable to the Chinese Government.

*Statement of Chinese Foreign Ministry on Expulsion of Chinese Residents by Vietnam*, *PEKING REV.*, June 16, 1978, at 12, 14.

<sup>3</sup> Vietnamese statement quoted from *History Stood on its Head—On the Vietnamese authorities' position concerning the question of Chinese residents in South Vietnam*, *id.*, July 7, 1978, at 28.

education, may gradually become citizens of Vietnam on a voluntary basis. As to the question of Chinese residents in South Vietnam, that was to be resolved through consultations between the two countries after the liberation of South Vietnam.<sup>4</sup>

The PRC therefore considered that any unilateral Vietnamese action to decide the nationality of the Chinese in South Vietnam would violate the above agreement. Although technically the agreement was concluded between political parties and not states, the PRC seemed to consider that the agreement was as binding as it would have been had the contracting parties been states.<sup>5</sup>

With respect to the Vietnamese allegation that those Chinese became Vietnamese nationals about 20 years ago, the PRC pointed out that Vietnam's position was based on the validity of the "illegal" decree issued by the "reactionary Ngo Dinh Diem regime" in August 1956, which compelled the Chinese in Vietnam to renounce their Chinese nationality and adopt Vietnamese nationality. In this connection, Chung Hsi-tung said:

In May 1957, the Commission of Overseas Chinese Affairs of the People's Republic of China issued a statement which strongly denounced and gravely protested this arbitrary measure taken by the reactionary authorities in South Vietnam to forcibly change the nationality of the Chinese residents.<sup>6</sup> The Democratic Republic of Vietnam (North Vietnam) endorsed and supported this just Chinese stand. *Nhan Dan*, organ of the Workers' Party of Vietnam, published an article saying that "the action of the Ngo Dinh Diem clique to compel Chinese residents in South Vietnam to adopt Vietnamese nationality is a dictatorial and fascist act in serious contravention of international law."<sup>7</sup>

In an earlier official statement issued on May 24, 1978, the PRC also maintained that "the Vietnamese side's practice of compelling the Chinese residents to become naturalized" not only violated the 1955 agreement but also "[ran] counter to the general principles of international law."<sup>8</sup>

The Vietnamese maintained that the 1955 agreement between the CPC and the VWP on the Chinese residents in Vietnam was only applicable to North Vietnam and that the purpose of the agreement was to persuade Chinese residents voluntarily to adopt Vietnamese nationality through a period of time that had ended a long time ago.<sup>9</sup>

<sup>4</sup> *China Seeks Settlement Though Consultation of Question of Chinese Nationals in Vietnam*, *id.*, Aug. 18, 1978, at 26.

<sup>5</sup> The agreement was not published in the official PRC treaty series or in other official sources, but it was repeatedly referred to in the PRC's official statements on the subject. Vietnam did not argue that the agreement was not valid but insisted that it had been fully executed; see below.

<sup>6</sup> For a summary of the statement, see *Ngo Dinh Diem's Persecution of Overseas Chinese*, PEOPLE'S CHINA, June 16, 1957, at 40, reprinted in J. A. COHEN & H. CHIU, 1 PEOPLE'S CHINA AND INTERNATIONAL LAW, A DOCUMENTARY STUDY 772-77 (1974).

<sup>7</sup> *China Seeks Settlement*, *supra* note 4, at 27-28.

<sup>8</sup> *Statement on Vietnam's Expulsion of Chinese Residents by Spokesman of the Overseas Chinese Affairs Office of the State Council*, PEKING REV., June 8, 1978, at 16.

<sup>9</sup> See summary of the Vietnamese position in *Vietnamese Authorities Must Return to the Road of 1955 Agreement*, *Jen-min jih-pao*, August 13, 1978, at 6. The Vietnamese statement did not clearly indicate whether all Chinese in North Vietnam had become Vietnamese nationals. According to the PRC, of the 160,000 or so Chinese "expelled" to China up to July 16, 1978,

While the PRC insists that there are Vietnamese of Chinese origin in Vietnam who remain Chinese, it does not seem to accept any legal obligation as to their repatriation to China.<sup>10</sup> It insists that only those Chinese residents in Vietnam with a "certificate of returning to China" issued by the Chinese Embassy in Vietnam and an exit visa issued by Vietnamese authorities will be admitted to China.<sup>11</sup>

Only with respect to the so-called victimized Chinese residents in Vietnam does the PRC assert its right to repatriation. Thus, in late May of 1978, the PRC decided to send ships to bring home the "victims" from Vietnam, "in view of the continued persecution of Chinese residents in Vietnam by the Vietnamese authorities."<sup>12</sup> According to the PRC, "it is international practice and the inalienable right of a sovereign country to send ships to another country to bring back nationals in distress, especially those whose lives are in jeopardy."<sup>13</sup>

While Vietnam agreed to the PRC's sending two ships to pick up Chinese there, it denied that there were "victimized Chinese" in Vietnam and only permitted the PRC to "take Hoa people to China." "Hoa people" were defined as "Vietnamese of Chinese origin" and those Chinese "who have already become citizens of Vietnam." Vietnam also informed the PRC that "before the Chinese ships enter Vietnamese ports . . . the Chinese Embassy will be informed [by the Vietnamese authorities] of the lists of Hoa people who will leave Vietnam on board these ships."<sup>14</sup> The PRC considered that this condition for repatriating Chinese was unreasonable. Because neither side was willing to yield, two Chinese ships, after staying outside Vietnamese territorial sea for several weeks, were called home on July 27, 1978.<sup>15</sup> On September 26 of the same year, the Sino-Vietnamese Talks on Chinese Nationals, which had started on August 8, were also suspended.

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95% came from North Vietnam, and only some of them had Vietnamese nationality. See Jen-min jih-pao, July 18, 1978, at 4.

<sup>10</sup> It is not possible to find any PRC official statement committing the PRC to accepting the repatriation of overseas Chinese to China. Earlier, on May 20, 1975, then PRC Foreign Minister Ch'iao Kuan-hua already pointed out the difficulty of repatriating overseas Chinese to China for settlement. He said:

Since there are millions of overseas Chinese, how many of them can we evacuate? And after they are evacuated, how do we settle them? This is not a simple matter. . . . Our people residing overseas numerically rank first in the world. Even if China were the most powerful country in the world, she could not settle all of them.

Ch'iao Kuan-hua's Address, May 20, 1975, ISSUES & STUDIES, December 1975, at 106.

However, it should be noted that the PRC indicated that, among the people "driven" to China, there were some with Vietnamese nationality, and it considered that "the Vietnamese side is duty-bound to receive them back and make proper arrangements for settling them in Vietnam." See *Hanoi Talks, Vietnam Should Abide by the 1955 Agreement*, PEKING REV., Sept. 15, 1978, at 19.

<sup>11</sup> See *Maintaining Agreement Governing Sino-Vietnamese Boundary, Defeating Vietnam's Conspiracy to Expel Chinese*, Jen-min jih-pao, July 13, 1978, at 4. It is not possible to locate the alleged agreement mentioned in this report.

<sup>12</sup> *Chinese Government Decides to Send Ships to Bring Home Persecuted Chinese from Vietnam*, PEKING REV., June 2, 1978, at 15.

<sup>13</sup> *Who's to Blame?*, *id.*, July 7, 1978, at 30. <sup>14</sup> See *id.* at 30, 39.

<sup>15</sup> Jen-min jih-pao, July 29, 1978, at 5.

The question of compelling Chinese to adopt Vietnamese nationality gradually became moot after late 1978, and especially after the Chinese invasion of Vietnam in early 1979 as Vietnam began to expel even those Chinese residents whom Vietnam claimed to be Vietnamese. In view of the changed circumstances, the PRC no longer argued with Vietnam on the basis of protection of nationals abroad, but began to accuse Vietnam of violating international law, the United Nations Charter, and humanitarian principles. An editorial in the authoritative *Renmin ribao* (*Jen-min jih-pao* in the Wade-Giles system of transliteration) of July 13, 1979, commented that "the expulsion and even murder of refugees on such a large scale and in such a planned and purposeful way [by Vietnam] can only be compared to the genocidal atrocities perpetrated by Hitlerite fascism."<sup>16</sup>

At the official level, the PRC Foreign Ministry formally issued a statement in June 1979 calling upon

the United Nations and all governments and peoples to voice strong condemnation and take firm measures to stop the Vietnamese authorities from pursuing their policies of aggression and ethnic discrimination in violation of the U.N. Charter and humanitarian principles and in denial of man's basic right to life and to sternly deplore and resolutely demand that they stop at once their criminal action of creating and exporting refugees.<sup>17</sup>

At the United Nations-sponsored International Conference on Indochinese Refugees, held in Geneva on July 20 and 21, 1979, PRC delegate Zhang Wenjin (Chang Wen-chin in Wade-Giles) said that "[t]he exportation of refugees [by Vietnam] on such a huge scale is a violation of the basic principles of international law."<sup>18</sup>

In the whole episode, the PRC was legally in a dilemma. By claiming that there were more than a million Chinese in Vietnam, the PRC ran the risk of being asked to accept their repatriation to China. The PRC certainly would not want to commit itself to such a wholesale repatriation because it is already beset with overpopulation problems. Also, while the PRC actively asserted its right to protect the Chinese in Vietnam, it had done nothing to prevent the mistreatment or massacre of thousands of Chinese by the Pol Pot regime of Democratic Kampuchea. At one point in the Sino-Vietnamese dispute over Chinese nationals in Vietnam, the Vietnamese pointed out that there were more than 26,000 Chinese refugees who had escaped from Democratic Kampuchea and stated that it was willing to discuss this problem with China.<sup>19</sup> China, however, declined to respond. This apparently inconsistent Chinese attitude certainly contributed to Vietnam's perception that

<sup>16</sup> Translated under the title, *Stop Vietnam's Refugee Export—An Urgent Matter*, BEIJING REV., July 13, 1979, at 24.

<sup>17</sup> *Chinese Foreign Ministry Statement Calls for International Action to Stop Vietnam from Exporting Refugees*, *id.*, June 22, 1979, at 22.

<sup>18</sup> *Geneva Conference, China's Stand on the Question of Indochinese Refugees*, *id.*, July 27, 1979, at 22.

<sup>19</sup> Radio broadcast of "Voice of Vietnam," Hanoi, September 12, 1978, cited in Yu Chi, *Hanoi-Peking Disputes Over Overseas Chinese Problems*, CHUNG-KUNG YEN-CHIU (Studies in Chinese Communism), October 15, 1978, at 109.

China was only interested in intervening in Vietnamese affairs on the pretext of protecting nationals in Vietnam.

Nevertheless, after Vietnam engaged in large-scale "exportation" of refugees, the Chinese were able to strengthen their legal position by criticizing Vietnam on grounds of the UN Charter, principles of international law, and humanitarian principles.

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#### THE NEGOTIATIONS FOR THE FUTURE POLITICAL STATUS OF MICRONESIA

On January 14, 1980, the Government of the United States and the Government of the Marshall Islands in the Trust Territory of the Pacific Islands initialed a Compact of Free Association, signaling a significant evolutionary step in the process of self-determination of the peoples of this United Nations strategic trusteeship.<sup>1</sup> The negotiations between the peoples of the Trust Territory, which is known geographically as Micronesia, and the Government of the United States began formally on October 1, 1969. The recent plenary negotiating round, which took place from January 7 to 14, 1980, in Kona, Hawaii, has brought a conclusion to the negotiations within reach and allows realization of President Carter's announced intention to see termination of the Trusteeship Agreement by 1981.<sup>2</sup>

The Kona session was attended by representatives of the Governments of the United States, the Marshall Islands, and the Federated States of Micronesia and by a delegation appointed by the legislature of the Trust Territory District of Palau.<sup>3</sup> Both the Federated States of Micronesia and

<sup>1</sup> Trusteeship Agreement for the Former Japanese Mandated Islands, approved by the United Nations Security Council on April 2, 1947, and by the United States on July 18, 1947, entered into force July 18, 1947, 61 Stat. 3301, TIAS No. 1665, 8 UNTS 189. For a discussion of the Trusteeship Agreement, see S. DE SMITH, *MICROSTATES AND MICRONESIA* 131-42 (1970). The Trust Territory of the Pacific Islands is the only remaining trusteeship of the 11 originally created by the United Nations and is the only territory placed under the trusteeship system between 1946 and 1950 that was designated as "strategic."

<sup>2</sup> See OFFICE FOR MICRONESIAN STATUS NEGOTIATIONS, SUMMARY RECORD OF U.S. MICRONESIAN ROUNDTABLE CONFERENCE 30 (Honolulu, Hawaii, May 18-21, 1977) (message from President Carter dated May 18, 1977). In this message, President Carter announced the administration's goal to terminate the trusteeship by 1981.

<sup>3</sup> The Trust Territory of the Pacific Islands is currently composed of 4 administrative districts, Palau, the Federated States of Micronesia (which include the states of Yap, Truk, Ponape, and Kosrae), the Marshall Islands, and the Northern Mariana Islands. The negotiations for free association are being conducted with the Governments of Palau, the Federated States of Micronesia, and the Marshall Islands. The future status of the Northern Mariana Islands as a United States Commonwealth was determined in 1976. In this note, the term "Trust Territory of the Pacific Islands" is used in a jurisdictional sense, as distinguished from the term "Micronesia," which is used in a geographical sense.

the Marshall Islands are organized under constitutions approved in referenda observed by UN Trusteeship Council visiting missions, on July 12, 1978, and on March 1, 1979, respectively. Although a Constitution was adopted by Palau in a similarly observed referendum on July 9, 1979, the implementation of this Constitution has been delayed by a series of locally initiated actions. The seventh Palau Legislature, which took office on January 3, 1980, has undertaken to validate the Constitution and to install a constitutional government in 1980.<sup>4</sup>

The next step in the negotiating process for the Federated States of Micronesia is initialing the Compact, but this must follow a complex process of state and federation approval.

Approval of the Compact by Palau is complicated by the U.S. policy not to enter into free association with a government whose prospective constitution is inconsistent with international law and with the negotiated concept of free association. Specifically, the Palau Constitution includes a claim of sovereignty and jurisdiction over adjacent seas incompatible both with the concepts being developed at the United Nations Conference on the Law of the Sea and with U.S. global foreign policy and security objectives. Also included in the draft Constitution are provisions that would have the effect of limiting the ability of the United States to perform its defense functions under free association. Third, the draft Constitution would restrict the ability of the Government of Palau to acquire land for other than local purposes. The success the new Palauan leadership achieves in reconciling these constitutional issues with the Compact of Free Association will determine whether the free association relationship will extend to Palau upon termination of the Trusteeship Agreement.

Assuming resolution of these issues, the Government of the United States and the Governments of Palau, the Federated States of Micronesia, and the Marshall Islands will submit the Compact to a plebiscite in each of the three areas and a special mission of the United Nations will be invited to observe it. If the Compact is approved, it will be submitted to Congress and, if ratified, to the President for signature, a process similar to the one following the negotiations that culminated on February 15, 1975, in the signing of a Covenant to Establish a United States Commonwealth in the Trust Territory District of the Northern Mariana Islands. After approval of the Covenant by the people of the Northern Mariana Islands in a plebiscite, the U.S. Congress approved it by joint resolution, and it was enacted into law on March 24, 1976.<sup>5</sup> Until the Trusteeship Agreement is terminated with respect to all the Trust Territory, however, the Northern Mariana Islands remain *de jure* a part of the Trust Territory of the Pacific Islands and subject to the provisions of the Trusteeship Agreement.

<sup>4</sup> The proposed Palau Constitution was submitted to referendum on July 9, 1980, and appears to have been ratified by more than a three-fourths majority. At the time this article went to press, however, the vote had not yet been certified. Ratification of the Constitution has not affected the positions of the Governments of the United States and Palau with respect to the compatibility of the Constitution of Palau and the Compact of Free Association.

<sup>5</sup> 48 U.S.C. §1681 (1976).



The document initialed on January 14, 1980, establishes a new political status known as "free association," which has no precise precedent either in international practice or in United States constitutional law.

The Compact contemplates termination of the Trusteeship Agreement and assumption by the Governments of Palau, the Marshall Islands, and the Federated States of Micronesia of authority and responsibility for their internal and foreign affairs. The United States will exercise plenary security and defense authority and the Governments of Palau, the Marshall Islands, and the Federated States of Micronesia will refrain from actions that the United States, after consultation with those Governments, determines to be incompatible with its security and defense authority.

The United States will provide economic assistance in the form of annual grants and the extension of specified domestic federal programs. The grant funds are designed to advance the economic self-sufficiency of the freely associated states by the dedication of a substantial portion to economic development projects. With respect to Palau, the United States has agreed to complete certain capital infrastructure projects there prior to the 15th anniversary of the Compact instead of providing direct grant assistance for economic development. The grant aid package also includes special annual sums for surveillance and enforcement by the freely associated states of their respective maritime zones, for health and medical programs, and for a higher education scholarship fund. The domestic services offered, subject to a detailed agreement, are in the areas of weather, postal, aviation, and federal emergency assistance. The United States has also agreed to negotiate the extension of some federal categorical programs in education and health. Compensation for the use of land by the United States will be handled bilaterally with each affected Government.

The economic and defense aspects of the Compact are designed to run for 15 years. The Compact, however, provides that the parties shall, on its 13th anniversary, commence negotiations regarding these provisions. Moreover, an additional 2-year grace period is provided so that these provisions will continue in full force and effect should the negotiations not be resolved earlier.

The political relationship has no fixed termination date and continues in effect until terminated by agreement or unilaterally. A freely associated state, however, may terminate unilaterally only after a plebiscite has demonstrated the freely expressed will of the people.

The one critical international legal criterion for a political status is that it be chosen freely by the former non-self-governing peoples. The most widely recognized forms of self-government are independence, integration with an independent state, and free association, which itself has a variety of forms. The Compact of Free Association establishes relationships between the United States and the freely associated states that, in some aspects, are analogous to the relationship between independent states and, in other aspects, are analogous to the relationship between the United States and its territories. This form of free association, the negotiating Governments believe, is consistent with the United Nations Charter, the Trustee-

ship Agreement, and the guidance contained in General Assembly Resolutions 742, 1514, 1541, and 2625.<sup>6</sup>

Under the Compact, the Government of the United States recognizes the capacity of the Governments of the freely associated states to conduct their foreign affairs. The negotiating parties agreed, however, that from time to time, economic and political constraints may cause Palau, the Marshall Islands, or the Federated States of Micronesia to ask the United States to assume authority and responsibility for certain foreign affairs activities or, in the alternative, to act as agent on behalf of those Governments. The Compact provides for these alternative agreements and, for example, specifies that U.S. consular services abroad may be provided to the citizens of the freely associated states as if they were U.S. citizens.

The treaties and other international agreements to which the United States is a party and which it applies to the Trust Territory pursuant to the Trusteeship Agreement (for example, certain extradition treaties) devolve upon the freely associated states. However, defense treaties that are currently applied will continue to extend to these states in the same fashion as during the trusteeship period. It is contemplated that the freely associated states will enter into treaties and other international agreements, including those requisite for membership in regional and international organizations, but membership in the United Nations is not contemplated.

The exact nature and extent of participation of the freely associated states in international organizations is also unprecedented. For example, membership in the Universal Postal Union and the International Telecommunication Union is open to members of the United Nations and to "sovereign countries."<sup>7</sup> How the voting state members in these and other multinational organizations will perceive the international legal personality of Palau, the Marshall Islands, and the Federated States of Micronesia is an open question. Clearly, their judgment will be based on their perceptions of the legal precedent established by accepting the freely associated states into membership, as well as on a multitude of political considerations. If the voting members are guided by their assessment of the Micronesian states' capacity to comply fully and in good faith with international obligations, and their independence from the United States in the areas covered under a given organization's charter, the new freely associated states should qualify for membership.

The Compact of Free Association affords Palau, the Marshall Islands, and the Federated States of Micronesia many rights and benefits typically enjoyed only by U.S. territories and states. This policy is exemplified in the area of environmental protection. The Compact envisions that the Governments of the United States, Palau, the Marshall Islands, and the Federated States of Micronesia will promote the prevention and elimination

<sup>6</sup> UN Doc. A/RES/742 (VIII) 1953; UN Doc. A/RES/1514 (XV) 1960; UN Doc. A/RES/1541 (XV) 1960; UN Doc. A/RES/2625 (XXV) 1970; UN Charter Arts. 1(2), 55, 73(a), 73(b), and 76(b); Trusteeship Agreement, *supra* note 1.

<sup>7</sup> See Universal Postal Union Constitution, July 10, 1964, 22 UST 1056, TIAS No. 7150, 810 UNTS 7; International Telecommunication Convention, Oct. 25, 1973, 28 UST 2495, TIAS No. 8572.

of damage to the environment of the Micronesian area. To this end, the United States has undertaken to continue to prepare Environmental Impact Statements (EIS) in connection with its activities in posttrusteeship Micronesia. The preparation of an EIS will trigger the development of standards in the affected area; it is contemplated that those standards will be substantively similar to those required under the environmental laws of the United States, including the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act of 1976. In actions to enforce those standards in U.S. courts, the Governments of the freely associated states will be treated as if they were U.S. citizens. The Compact provides that the United States District Courts for the Districts of Hawaii and the District of Columbia will have jurisdiction over any such actions. Appeals will be allowed to the respective circuit courts and to the Supreme Court.

The Compact of Free Association provides a flexible legal framework for the peoples of the Trust Territory of the Pacific Islands, who were represented in the Micronesian Status Negotiations by the Governments of Palau, the Marshall Islands, and the Federated States of Micronesia. Under it they will achieve self-government, preserve their autonomy in cultural development, and strive toward economic self-sufficiency, becoming substantially full members of the international community. Consequently, the Compact touches on virtually every area of conceptual and practical concern to an emerging nation and recognizes that, after an era of outside administration, the peoples of Palau, the Marshall Islands, and the Federated States of Micronesia will once again become the guardians of their own destinies.<sup>3</sup>

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<sup>3</sup> See generally Armstrong, *The Emergence of the Micronesians into the International Community: A Study of the Creation of a New International Entity*, 5 BROOKLYN J. INT'L L. 207 (1979). Compare Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980).

\* The opinions and conclusions expressed in this note are those of the author and do not necessarily represent the views of any United States governmental agency.

## BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

*New Horizons in International Law.* By T. O. Elias. Alphen aan den Rijn: Sijthoff & Noordhoff; Dobbs Ferry: Oceana Publications, Inc., 1979. Pp. xxii, 260. Index. \$33.

Quoting Judge Alvarez to the effect that "[t]his new international law is not *lex ferenda* . . . it has real existence," Judge Elias supports the same argument with a highly personalized account, based considerably on his own experiences as one of the formulators of the new law. To him the Third World is setting the pace, and the evidence of its influence is so compelling in the work of the General Assembly of the United Nations, the International Law Commission, diplomatic conferences, and the International Court of Justice that no jurist can deny that pre-United Nations law barely exists.

Although half of the book contains carefully reasoned proposals for restructuring the International Court through adoption of an election procedure like that for the International Law Commission and much else, the arresting message as proclaimed in the title is that of "new horizons." Elias says that the basis for revision of international law is enhancement of "social justice." He feels that the game of power politics is increasingly subjected to universal influences and is modified by a new climate of opinion and growing awareness of the need for social justice. He senses that the new majority can be as tyrannical as the old, but he hopes that it will defend the very justice that it demands, and that he thinks the world expects.

Since much of his evidence lies in resolutions of the General Assembly, Elias quite expectedly argues that these resolutions can no longer be ignored as of no legal consequence. Still, he does not argue that they have created a new *jus cogens* binding on treaty-makers in establishing bilateral relations in the Western world. He tells of his own experience in suggesting a formula to break the deadlock in the Vienna Conference on the Law of Treaties when the Third World and even the socialists wanted no judicial review of claims of violation of *jus cogens*. He shows himself here as elsewhere to be a defender of the International Court, as reconstituted with the election of Asian and African judges. He restates his faith in decrying the action of the law of the sea conferees in placing the Court second to a new Law of the Sea Tribunal in the list of alternatives open to disputants to resolve conflicts of interpretation.

Curiously, he almost ignores the socialist world; indeed, he does not even list the *Soviet Yearbook of International Law* or the Soviet Society of International Law among his catalog of sources of information on law, even though the socialists have so often sided with the Third World in new departures. Perhaps he is disappointed in the socialists' reluctance to join in pressing

for a "new international economic order," which to him is a necessary step in redistributing the resources of the world in accordance with justice. Perhaps also he is unhappy because the socialists (and others as well) will not accept the Third World's desire to abolish the veto in the Security Council. In this and throughout the book, Elias shows himself to be an independent Third Worlder, and not aligned with East or West.

Although the "new horizons" part of the book is not written with a systematic structure, it is attractive as a conversation with a notable African jurist; a bit rambling and anecdotal, but filled with foretastes of what is ahead for international law so long as its development rests upon numbers of votes. Indubitably, the large numbers of Third World states, large and small, now joining together in spite of some basic splits, as among ASEAN states and Cuba and Vietnam, are having great impact upon classical international law. Readers who have failed to follow trends will find this volume a convenient source for what has happened.

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*Office Without Power: Secretary-General Sir Eric Drummond, 1919-1933.* By James Barros. Oxford: Clarendon Press; New York: Oxford University Press, 1979. Pp. ix, 423. Appendix. Index.

Professor James Barros with this book confirms his status as a leading historian of the League of Nations and a leading critic of the response of international institutions to world problems. This book on the first Secretary-General of the League complements Barros's earlier work on the second Secretary-General, *Betrayal from Within; Joseph Avenol, Secretary-General of the League of Nations, 1933-1940* (1969).<sup>1</sup> Together, he has written a meticulous and perceptive history of the office of Secretary-General of the League whose quality is unlikely to be surpassed.

*Office Without Power: Secretary-General Sir Eric Drummond, 1919-1933* is enigmatically entitled, for Barros demonstrates so persuasively that in fact Drummond exercised considerable power. At any rate, if power is defined to embrace influence, then the office held by Drummond, as he used it, was not without power, because Drummond exercised a measure of genuine influence over the international relations of the years in which he was Secretary-General.

Barros's demonstration of the fact that Sir Eric Drummond exercised significant political influence is not new. But his incisive examination of the details of the exercise of that influence is impressive in its richness and extent and in the excellence of its scholarship. Barros probes widely and deeply and with revealing effect. He sets out to show "[h]ow Drummond used his office, the range of his influence, his personal and political contacts, and his intervention behind the scenes in political issues facing the world organization" (preface). He accomplishes this task by setting forth and analyzing,

<sup>1</sup> Reviewed in 65 AJIL 862-64 (1971) by this author.

in a series of chapters, Drummond's actions on aspects of the League's agenda from its earliest days, as in Danzig and the Saar in 1919 and 1920, to the Manchurian crisis of the early 1930's. These chapters are preceded by a discussion of the establishment of the office of Secretary-General (an extraordinary story in itself) and of Drummond's attitudes, approaches, and perceptions. The author concludes with some thoughts on Drummond and his successors that compare the latter unfavorably with the former.

Drummond was the exemplar of diplomatic discretion, of skillful conciliation. A man of outstanding intellect, integrity, and administrative ability, he played a commanding role in the conception and construction of the League Secretariat as an international body that, in principle, was professionally responsible to the organization alone (an achievement to which Barros gives inadequate recognition). Drummond never played a public political role; he confined his political activities to unceasing, behind-the-scenes efforts to make the League a force in world affairs and to give reality to the obligations member states assumed in the Covenant. No ideologue, Drummond was a sufficient idealist—devoted to the League and its ability to make a positive contribution to the resolution of international problems, but having a tempered, realistic view of the limitations of the League's powers, and, *a fortiori*, of his.

Barros writes:

Drummond was . . . forced back on whatever powers or influence he could muster or invoke from the very nature of the Secretary-General's office. In this seemingly limited arsenal Drummond proved to be a master of invention. He was an unending source of ideas, advice, recommendations, proposals, schemes, and formulas, not merely to delegations, but often directly to those governments involved or to those governments not directly involved but interested in peacefully settling a particular question. Most important, Drummond's initiatives were always behind the scenes. . . . The advantage of this non-public approach was that . . . it allowed him to continue his endeavors, which public failure or public comments, particularly of the interested parties, might have quickly compromised or undercut. . . . The longer that Drummond stayed in office, the more that he was trusted, and the more extensive his experience, the greater weight his initiatives carried because they now had added to them the ingredient of wisdom which is largely the product of experience [pp. 397–98].

With this record, Barros contrasts that of Drummond's successors, concluding that, "if experience has taught us anything, it is that the United Nations secretaries-general have very often by their public political initiatives undermined their political usefulness" (p. 399).

There is something to be said for Barros's conclusion. Public discretion on the part of the Secretary-General is vital to his effective performance. But it does not follow that the Secretary-General of the United Nations can act in this era with the anonymity with which Drummond so ably acted in his. For one thing, diplomacy as a whole has become more transparent than it was 50 years ago. This is not necessarily good but it is no less the fact for that. Especially in the country in which the UN headquarters is lodged, where

the media wield the press conference, the backgrounder, the leak, and the Freedom of Information Act daily to denude diplomacy of its confidential garb, it is difficult for the Secretary-General to retreat so fully behind those scenes from which Drummond never emerged. For another, there may be occasions of public assault on Charter principles when the Secretary-General has little choice but to defend them, either because of his sense of responsibility for those principles or because UN organs have invested him with public responsibilities of a controversial character. Nor is it clear, on the UN record, that those Secretaries-General of the United Nations who did take principled public stands were in fact the less influential. Their actions may have limited their time in office, but, after all, their tenure is not the object of the exercise.

STEPHEN M. SCHWEBEL  
*Board of Editors*

*Networks of Interdependence: International Organizations and the Global Political System.* By Harold K. Jacobson. New York: Alfred A. Knopf, 1979. Pp. xxiv, 486. \$14.95.

Both text and treatise, this volume gives much of its attention to appraising the achievement of international organizations in the fields of security, the world economy, social welfare, and human rights. In this respect, it differs markedly from, for example, Inis Claude's much admired *Swords Into Plowshares*, which, as generations of students and their teachers will recall, concentrated on ideas about world order, which Claude termed "approaches" to peace. In its focus on international organizations as a going concern, Jacobson's work may be said to have proclaimed that "international organization" has arrived. It shows how international organizations have become inextricably a part of the world's system of governance, with important implications for the distribution of the goods and bads of significant sectors of contemporary life, even though the organizations rarely dispose of powers comparable to those of national governments. In some salient ways, this book resembles a treatise on government.

The book has many strengths. It has a good section on the historical development of international organizations. Its historical depth is matched by its breadth in considering organizations across the spectrum of contemporary agencies. Much attention is given to international nongovernmental organizations (INGO's) and their interactions with intergovernmental organizations (IGO's). There is a chapter on philosophical perspectives on the evolution of international organizations—federalism, functionalism, neofunctionalism, public goods theory, and Marxism-Leninism. A chapter setting forth the powers, functions, and structures of international organizations shows the influences of Jacobson's previous collaboration with Cox and others which resulted in *The Anatomy of Influence*. Particularly, he employs a typology of the decisions and functions of international organization which is a modified version of the typology outlined in the earlier work. In the chapters in which he examines the achievements of international

organizations, he looks at their informational, normative, rule-creating, rule-supervisory, and operational roles. In a chapter on decisionmaking, Jacobson again draws upon the earlier work in emphasizing the distinction between "representative subsystems," that is, the participants in making and expressing the views of members vis-à-vis the international organizations, and the "participant subsystems," that is, the participants in decision-making within the organizations themselves. Overall, Jacobson is interested in what the analysis implies for the territorial state. Is it, he asks, the ultimate form of political organization?

The work is unmistakably and admirably ambitious. Yet, the book's main weaknesses are to be found in its very ambition. The work well depicts the dynamic evolution of international organizations over time. But, in the chapters in which he evaluates the performance of the agencies function by function, the analysis does not capture the dynamism in the interactions among the problems on the international agenda, the politics of dealing with them, and the institutional and structural frameworks in which they are confronted. The perceptive insights in the chapter on decisionmaking, for example, do not significantly enter the analysis of what international organizations have done. The good theoretical analysis does not significantly penetrate the empirical assessment. We end up knowing what international organizations have done, in the large, but not enough about why they have done so, in terms of the political dynamics relevant to useful speculation about the near future. To be fair, it would no doubt have been an impossible task to combine within acceptable limits of length an adequate description of what international organizations have come to do, with an analysis of the political processes at play in each field of action, and an assessment of the results. All the same, some case studies of the political processes would have helped to underline the dynamic relationships between the political processes and the results achieved.

The task of assessment, moreover, encounters two inescapable and serious limitations.

For the bulk of his work, Jacobson has clearly adopted a functional standard: what have international organizations done to solve the problems they were set up, or which they have evolved, to deal with? In itself, that is admirable. Although there are other criteria by which to judge international organizations, none is self-evidently better. However, actually evaluating the performance of international organizations is another matter. For one thing, it is inordinately difficult to segregate the effects of their efforts from other factors which may have contributed to the observable developments. The temptation is to adopt the *post hoc propter hoc* line of reasoning. Thus: "None of this, of course, proves that international organizations have made a decisive contribution to security. What we do know is that the percentage of states entering war has declined over time . . ." (p. 213). Aggregate data prove there has been progress. They do not prove that the progress results from what international organizations have done.

The second problem is closely related. We do not have enough empirical



scholarship to know what are the real effects of what international organizations purport to do. What is the real consequence of a declaration, or even of a convention, calling for enhanced rights for women? Or, what is the real consequence of an operational program to improve rural education in a developing country? Only in a few cases, such as the well-heralded, easily observable, and highly successful WHO campaigns to erase particular diseases, or perhaps aspects of the International Labor Code, can the effects be confidently assessed. In most instances, what is needed, and what is lacking, is empirical research in the field, whether that field be the legislative chambers of territorial units with authority to carry out the human rights norms established by international agencies or the classroom in which new internationally developed educational techniques are supposed to be employed. Without what might be termed "end use" analysis, we can only speculate about what international organizations have achieved, except in those cases in which, as McLuhan might have said, the word is the deed.

The main strength of Jacobson's work is thus its depiction of the historical development of international organizations' roles with respect to security, the world economy, social welfare, and human rights. Of particular interest is the description in the chapter "International Action to Promote Human Dignity and Justice: the Search for Roles" of the growth of agency jurisdictions so that these matters have become legitimate issues on the international agenda.

One issue deserves special attention in this *Journal*. Throughout the study, a distinction is made between normative formulation and rule creation by international agencies. The difference, of course, lies in the nonbinding or binding form given to new standards. Jacobson argues that, in the domain of human dignity and justice, the distinction between norms and rules is less pronounced than in other areas. He argues that the only available sanction, publicity, is more readily used than the economic or military coercion considered applicable in other domains (p. 374). Yet one wonders whether, in the other domains, rules are really all that much more binding than norms and whether the theoretically relevant coercive sanctions are really all that much more relevant than publicity. For example, the "new international economic order" has no legally binding effect. Yet it gains in reality and it does so at least as much through the mobilized publicity, and voting power, of its clamant advocates as through the threatened sanctions of the oil-rich states. It is not self-evident that norms and rules are more usefully thought of as belonging in nominally separate categories than in a continuum in terms of their real effects.

Although Jacobson naturally emphasizes the growth of activity, relevance, and influence of international organizations, he is far from concluding that the nation-state is passé. But he does see the sovereign state as entangled in a web of international organizations in a world system in which power and authority are not organized hierarchically. The most important role of the international organizations, he concludes, is their function as communication networks. In performing this role, they have already "become

effective instruments for narrowing the differences among countries concerning basic values and for working toward the development of a significant consensus" (p. 419).

LAWRENCE S. FINKELSTEIN  
*Northern Illinois University*

*The Ideal in Law.* By Eugene V. Rostow. Chicago and London: The University of Chicago Press, 1978. Pp. xiii, 305. Index. \$20.

These essays put the pleasure back into reviewing. They are of exceptional quality and are written with that singular elegance of style that one has come to associate with their author. Their central theme is the role of law, and lawyers, in shaping a liberal, democratic society. They deal with a variety of specific issues: "The Negro in our law," "The citizen and the law," and "Force and Morals in International Relations." But all of them are firmly set in the framework of legal philosophy. There are other common factors: they reflect a very considerable scholarship and a great interest in history in general and in English tradition and *mores* in particular.

The essays on obligation (and on the limits of the right of the citizen to disobey in a democratic society) are calmly and cogently argued. Professor Rostow tests current fashionable political views against enunciated philosophical principles; every proposition is probed and analyzed. He is resolutely tough-minded:

We saw [at the time of the Black Panther trials] these contagious fevers do not respect the generation gap. Otherwise serious scholars wondered whether it is wise or moral to try men duly charged with murder, and whether possible error on the part of a judge warranted burning a few buildings, or jail delivery.

At the same time, he appreciates that law is about justice as much as about order:

The phenomenon [of disobedience of the law] raises two issues: first, the citizen's moral relation to the law in a society of consent; and second, the capacity of the American legal and political order to meet the felt needs of our people for social justice. The two problems are reciprocal. They cannot be studied in isolation from each other: the idea of order without justice is odious [p. 87].

Rostow's essay, *Is the Charter going the way of the Covenant?*, echoes those perceptions of politics and collective security that underlay his strongly held views on Vietnam. His assertions will seem tendentious to some, and the breadth of his subject does not allow him to vindicate his contentions in any legal detail. This reviewer finds it much less clear than Rostow that Indian military action against Pakistan regarding Bangladesh represented an illegal use of force or that Security Council 242 was an authoritative denial (p. 292) of the lawfulness of the Egyptian-Syrian war against Israel in 1973. It is more than a willful refusal to distinguish black from white that makes one think that some qualification is needed. In this same chapter

Rostow also views the concept of self-help in a way that does not sufficiently distinguish it from self-defense.

Making available these essays within one cover is much to be welcomed. In particular, the essay on British and American experience with legislation against restraints of competition is especially timely. The Protection of Trading Interests Bill, recently adopted by Parliament, represents the low water mark of Anglo-American understanding in these matters. Rostow, in this as in his other essays, takes us back to underlying principles—a salutary experience.

ROSALYN HIGGINS  
*Board of Editors*

*The World Court and the Contemporary International Law-Making Process.* By Edward McWhinney. Alphen aan den Rijn: Sijthoff & Noordhoff, 1979. Pp. vii, 219. Index. Dfl.70; \$35.

The theme that unifies this provocative and welcome study is that contemporary international lawmaking is “a dynamic, continually operating process of rejection and refinement of old rules; and the confirmation of new ones in supplement or replacement of the old” (p. 1). The primary focus is on judicial lawmaking with four chapters devoted to balancing judicial self-restraint and judicial activism in the *South West Africa* case, Second Phase (1966), the *Namibia* (South West Africa) Advisory Opinion (1971), the *Nuclear Tests* cases, the *Western Sahara* Advisory Opinion, and the *Aegean Sea Continental Shelf* case. Three alternative “law-making modes” are explored to a lesser extent: the international codifying conference in relation to the law of the sea; the General Assembly resolution as it relates to the “new international economic order” and parliamentary “glosses” on the Charter exemplified by resolutions of the General Assembly; and the issue of political representation in southern Africa.

As a result of both the increased politicization of the process of election of judges in the aftermath of the Court’s one-vote majority decision in the *South West Africa* case in 1966 and the staggered system of judicial elections, a Court in transition has emerged. Its decisions in recent years have been characterized by “multiple opinion-writing—both dissenting and also special, concurring opinions—with doctrinal divisions among the individual judges so great that it is often very difficult to extract any common principle or *ratio decidendi*, even in matters decided by near unanimity in voting terms” (p. 14). The superb, richly documented chapter on the *Western Sahara* case provides the most graphic example. Although the three substantive law questions were decided nearly unanimously, the ten separate declarations or opinions apart from the official opinion of the Court make it difficult “to discover for just what the Court’s ruling stands as authority” (p. 67).

As a contribution to the literature, the treatment of the different modes of contemporary lawmaking is of uneven significance. The efforts of the Third World to remake the old law in the image of a new political majority, whether through the codifying conference, General Assembly resolutions,

or parliamentary "glosses" on the Charter, have been charted by others. Nevertheless, the concise, but scholarly, treatment here will be useful, especially to political scientists who teach international law.

The greater contribution of this study lies in the illumination of the profound effect the fundamental philosophical disagreement within the ranks of the judges has had on the body of the Court's jurisprudence. The author does not purport to offer philosophical disagreement as the only relevant variable, and indeed other recent studies have suggested the influence of other factors.<sup>1</sup> The point is that there has been very little work done on the personal, political, and organizational variables affecting the decisional process of the Court. The present study offers further encouragement that this type of judicial behavior analysis is both doable and worth doing.

Many scholars will no doubt quarrel with the author's willingness to see merit and even advantage in a Court that would continue to tolerate this spate of separate opinion writing and that would provide "the public fora, through their canvassing in individual judicial opinions," with the opportunity to test "alternative policy constructs for the future, on a trial and error basis" (p. 169). They will find comfort in Articles 95 and 107 of the Rules of the Court, adopted on April 14, 1978, which restrict the use of declarations as a vehicle of judicial expression.<sup>2</sup> These revised Rules suggest that the Court itself, as presently constituted, is not satisfied with the direction in which it seems to be drifting.

DANA D. FISCHER

*Graduate Institute of International Studies, Geneva*

*Studies in International Law. With Special Reference to the Arab-Israel Conflict.*

By Nathan Feinberg. Jerusalem: The Magnes Press, The Hebrew University, 1979. Pp. xi, 640. Subject and name indexes. \$30.

International lawyers love to debate legal issues that are primarily political. Professor Feinberg of the Hebrew University has collected 21

<sup>1</sup> Lillich and White have suggested the influence of organizational variables on the Court's jurisprudence. On the basis of interviews with many of the judges, they concluded that the practice during the deliberative process of writing extensive "notes" on a case provides part of the motivation for separate opinions. "Many judges stated frankly that the time invested . . . naturally engenders a desire to see one's thoughts in print." Lillich & White, *The Deliberative Process of the International Court of Justice: A Preliminary Critique and Some Possible Reforms*, 70 AJIL 28, 37 (1976). Rosenne has suggested that the desire of the Court to become involved in the political activities of the United Nations may well be due to some extent to the growing number of individuals elected to the Court "with a long history of personal involvement in UN affairs" and "who by way of experience and intellectual inclination possess an intangible psychological relationship with the UN." Rosenne, *The Composition of the Court*, in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 388 (Gross ed. 1976).

<sup>2</sup> The International Court of Justice, Rules of the Court (1978), reprinted in 73 AJIL 748 (1979), 17 ILM 1285 (1978). Article 95 provides, *inter alia*, "a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration." Article 107 makes the same provision for the advisory procedure. For a discussion of the expansion of the scope of the declaration in the Court's practice, see Jhabvala, *Declarations by Judges of the International Court of Justice*, 72 AJIL 830 (1978).

studies written by him during the last half-century to give us a mélange of problems, many of which have long since faded from the public eye, but the section dealing with the Arab-Israeli conflict offers a legal analysis that will justify including this scholarly volume in every international law library.

Under the heading of "General International Law," the author includes eight articles dealing with such diverse subjects as the legality of the USSR's expulsion from the League,<sup>1</sup> the validity of minority treaties, and a controversy with the tsar regarding discrimination against Jews. Some of the articles, such as the analysis of "armed attack" and a study of the right of nations to withdraw from international organizations, might well have been supplemented by notes of recent developments, but they still merit attention. An enduring contribution can be found in Feinberg's excellent laudation of Hersch Lauterpacht. Lauterpacht's efforts to impose the rule of law and justice on international relations by restricting sovereignty and honoring human rights, as well as his recognition of the need for compulsory jurisdiction and an international court to deal with crimes against peace and against humanity, receive justified praise.

Feinberg's section on "The Jewish Question" offers a historical analysis of the recognition of the Jewish people in international law. His articles describe the origins and activities of Zionist organizations and the role played by Jews in furthering the legal concept of humanitarian intervention and the protection of human rights. A 1929 paper, in German, deals with the legal basis for granting Palestinian nationality to Jewish residents of the mandate territory. A study 7 years later argues against Arab participation in a legislative council for Palestine, as contrary to the League mandate whose sole objective, according to the author, was to create a Jewish national home. More contemporaneous articles deal with the political organization of Jews outside Israel and their efforts to deflect the persecutions by Hitler Germany. A brief, but persuasive, analysis in French, justifies the trial of Adolf Eichmann before an Israeli court despite the fact that at the time the Nazi crimes were committed Israel did not exist as a state and the defendant was admittedly illegally abducted from Argentina.

In close to 200 pages devoted to the Arab-Israeli conflict the author levels his attack against two specific targets. In July 1967 a number of Arab jurists met in Algiers to consider the legal problems related to the war against Israel. Their conclusions were published in a book that Feinberg dissects with a sharp legal scalpel. He concludes that the manifest purpose of the Arab book was to provide a legal basis for justifying "in a supposedly scientific manner, the extinction of a State set up with the support and encouragement of the two central institutions for mankind (the League of Nations and the United Nations Organization)" (p. 514). After rejecting the Algiers conference as having "no legal basis whatsoever," Feinberg asks, in answer to the charge that Zionism is a form of aggression (Zionism as racism not yet having been invented), who is being accused? Is it the League that entrusted the mandatory power with the task of setting up a

<sup>1</sup> The author takes issue here with Gross, *Was the Soviet Union Expelled from the League of Nations?*, 39 AJIL 35-44 (1945).

Jewish homeland in Palestine, or the United Nations that voted for partition, or the United States and the Soviet Union who were the principal promoters of the partition plan? His second target, a book by Henry Cattán dealing with Palestine, the Arabs, and Israel, receives no kinder treatment as it is pierced by Feinberg's legal spears.

It will come as no surprise that a professor at the Hebrew University in Jerusalem should regard the establishment of the state of Israel as one of the most inspiring events in human history. He cites Solzhenitsyn in support of Israel's right to exist and asks why 17 Arab states with lands exceeding 12 million square kilometers should deny to Israel its minute homeland. He argues that where two rightful claims are in conflict, it should be resolved in a manner that will create the least human suffering. Understanding the legal arguments will be essential for all those who seek a just solution to a problem that threatens the peace of the world. The Feinberg book is thus worth reading.

BENJAMIN B. FERENCZ  
*Of the New York Bar*

*Israel, The West Bank and International Law.* By Allan Gerson. Totowa, N.J.: Frank Cass & Co., Ltd., 1978. Pp. xvii, 285. Index. \$25.

Allan Gerson has written a book that all those interested in international law and the Arab-Israeli conflict will want to add to their collection of useful literature. Its strength lies in the last two chapters, which form half of the book.

The first chapter is entitled "War, Conquered Territory and Military Occupation in the Contemporary International Legal System." It is unsatisfactory because it provides a far too cursory run-through of the main legal controversies. The text is general and often disposes of major issues in a couple of lines. Part of the difficulty in this chapter, and subsequent ones, is that too much that is of serious legal interest is to be found in the footnotes, and they are removed from the text. The blame, one knows, usually lies with publishers rather than authors.

The problem of reconciling the *ex injuria jus non oritur* maxim with the recognition of facts by international law (crucial in the Middle East) cannot be dealt with in a couple of paragraphs. The references to scholarly writing on this issue are very limited, and it seems curious simply to pronounce agreement with Brierly's dictum: "[T]he truth is that international law can no more refuse to recognise that a finally successful conquest does change title to territory than municipal law can change a regime brought about by a successful revolution" (p. 14). To explain that once annexation and international recognition has occurred, international law must recognize it, but that international law will deny an aggressor's claim to occupy and eventually to acquire title by annexation, does not really carry the matter forward analytically.

In the second chapter Gerson deals with the historical and judicial basis of the Palestine controversy. At a certain level it is an acceptable brief

resumé; but one would have wished again for more rigor of analysis. The compatibility of the Balfour Declaration with the terms of the mandate is of genuine legal interest, but the author dismisses speculation on this as "pointless," merely accepting Judge Moore's observation in the *Mavrommatis* case that the Balfour Declaration was embodied in the mandate by a legislative act of the council (p. 43). The historic and legal issues surrounding the 1948 hostilities, the armistices, the Suez intervention, and the 1967 war are all dealt with in a few brief pages. This cannot be satisfactory from the scholarly point of view.

But with chapters III and IV the book becomes of considerable interest. Throughout his study Gerson has made the valuable distinction between international law as it applies to the *management* of territory, and international law as it applies to the *disposition* of territory. He now returns to these themes in separate chapters. In chapter III, "Management of the West Bank," the author first examines the framework of applicable authority. Israel's position is that it applies the Geneva and Hague Conventions de facto, but that it is not under any obligation to do so de jure, as Jordan does not have sovereignty over the West Bank. This Israeli view raises important questions—both as to the interpretation of the circumstances and purposes of the binding nature of the Geneva and Hague Conventions, and as to questions of title or indeed of "better title." Unfortunately, Gerson states that there is no need for him to deal with these:

Whatever the correct answer to this dispute may be, it is of little importance for our immediate purposes. This is because Israel stipulates, though believing it is not obligated to do so, that its military commanders and courts are bound by the Conventions. Thus, implicitly Israel agrees to be judged by the standards of conduct imposed by the relevant international conventions pertaining to belligerent occupation [p. 115].

This is hardly satisfactory: "our immediate purposes" surely include an objective analysis of the requirements of international law.

This chapter contains useful material on judicial management on the West Bank, as well as on selections and appointments. The management of the education system is also clearly presented and analyzed in terms of the scope of the occupant's international legal authority in this area. Naturally, the detailed presentation of the question of the settlement of Israeli nationals on the West Bank holds special interest, and, quite apart from the political and military reasons for, and implications of, this policy, Article 49 of the Geneva Convention has to be accounted for. Gerson fairly reports criticism that has been offered in various public and private forums, but in his concluding chapter restricts himself to the view that "Israeli land practices, though perhaps diplomatically and otherwise unsound, never reached unlawful proportions" (p. 236). The only reason offered is that Israeli policy falls short of evidencing a clear intention to annex (p. 237). Whether or not one agrees with Gerson, this is a less than adequate analysis of the legal conclusions to be drawn from the information that he has so interestingly made available.

The author has some (fairly widely shared) criticisms of his own to make about the UN Investigation Committee on occupation practices. Even if that body has been biased, and even if it cannot properly assume the role of surrogate protecting power, it is nonetheless hard to accept his view that this makes it "perhaps legally speaking, *ultra vires* the authority of the Assembly" (p. 159).

Chapter IV, on "Disposition: Sovereignty and Postliminium Problems," includes a very good discussion of Jordan's status and the replacement of King Hussein by the Palestine Liberation Organization as the appropriate negotiating power for the future disposition of the West Bank. Gerson deals well with the problems of, and options for, Jerusalem and also offers interesting observations on likely problems concerning reparations and treaty validity.

ROSALYN HIGGINS  
*Board of Editors*

*Teleservices via Satellite. Experiments and Future Perspectives.* By Delbert D. Smith. Alphen aan den Rijn: Sijthoff & Noordhoff, 1978. Pp. xxiii, 280. Index. Dfl.80; \$40.

Although this book was timely when Delbert Smith wrote it, so rapid have developments been since its publication that many teleservices via satellite already being used, or envisioned for the future, were barely touched on by the author.

As the copious footnotes show, much of the material in *Teleservices via Satellite* (*Teleservices*) has been taken from congressional hearings, reports, and debates. Herein lies the principal value of this book. Anyone who has tried to make up a legislative history of a particular bill after its enactment knows that these materials are fast out of print and very difficult to obtain outside of Washington, D.C. Also, there are some reports by nongovernmental organizations or individuals which become less accessible as time goes on. For example, it is valuable for the researcher who wishes to have more detail than would have been appropriate for a book of the scope of *Teleservices* to go into, to have a careful citation such as that given in note 14 to chapter 2.

The author gives a picture of early developments that led to the enactment of the Communications Satellite Act and the creation of the novel corporation known as COMSAT. One would have wished to have a little more discussion of the successful development of COMSAT and a little less detail about experimentation in the Rocky Mountain states. After all, it is COMSAT that has participated in the development of MARISAT. MARISAT was organized to establish a global satellite system for commercial maritime communications. In 1978 Congress passed legislation designating COMSAT the sole operating entity to participate in MARISAT on behalf of the United States.

We are now at a time when private enterprise shows an increasing interest in making use of outer space, as witness the centerfold advertisement that



appeared in the February 1978 issue of *Nation's Business*, with a picture of a starry sky and the caption, "This fine industrial site available soon." Much of the interest of private enterprise in outer space can be attributed to the writings of the well-known astrophysicist, Dr. Gerard K. O'Neill; *e.g.*, see his *The High Frontier* (1976).

Two of the best chapters in the book from the standpoint of the international lawyer are chapters 6 and 7. Chapter 6 is entitled "The Joint India/U.S. Satellite Instructional Television Experiment," and chapter 7 is entitled "The Canadian and United States User Experiments with the Communications Technology Satellite (Hermes)." Chapter 7 not only describes how the international arrangements that made the experiment possible were made, but also discusses operations under these arrangements.

Chapter 6 gives a vivid picture of how two governments and an international organization work together to assist in the application of modern technology to a developing country (India) to the advantage of that developing country.

*Teleservices* is carefully constructed, has a good index, and a helpful list of acronyms and abbreviations. Delbert D. Smith has done a thorough research job.

KATHERINE DREW HALLGARTEN  
*Washington, D.C.\**

*Regionalism and the United Nations.* Edited by Berhanykun Andemicael. Dobbs Ferry: Oceana Publications, Inc., 1979. Pp. xx, 603. Index. \$45.

Scholars have sometimes viewed regional and universal-membership international governmental organizations as alternative approaches to world order. States, however, have consistently demonstrated a proclivity to create, join, and utilize both types of IGO's. The practical issue for world order is therefore not the relative advantages of the two types of organizations, but rather how the many IGO's in existence can be fitted together effectively. This book makes a useful contribution to understanding this issue.

It is a collection of studies on relationships between the United Nations and regional IGO's commissioned by the United Nations Institute for Training and Research. The list of regional IGO's covered is extensive. Separate chapters deal with the Commonwealth, the Organization of American States, the Organization of African Unity, the League of Arab States, the Council for Mutual Economic Assistance, the Council of Europe, and the European Communities. In addition there are chapters that deal with the role of national governments in effecting coordination; relationships between the UN regional commissions and regional IGO's in Africa, Asia, and Central and South America; and selected regional organizations in Asia. The most important limited-membership IGO's that are not covered are the North Atlantic Treaty Organization, the Warsaw Treaty

\* The *Journal* regrets the death of Mrs. Hallgarten on July 19, 1980, while this review was in the press.

Organization, and the Organization for Economic Cooperation and Development, presumably because they are not, strictly speaking, regional organizations.

The studies are each both descriptive and prescriptive; they chronicle the development of relationships between regional IGO's and the United Nations, outline existing arrangements for consultation, cooperation, and coordination, and suggest steps to make these arrangements more effective. The proposed improvements in relationships between regional IGO's and the United Nations are modest and reasonable.

While chapter VIII of the UN Charter provides a rough framework governing relationships between regional IGO's and the United Nations with respect to security issues, the Charter does not provide a comparable framework for other issues. Although several of the studies mention various agencies of the UN system, the focus is clearly on the United Nations itself. Because of these two factors and the omission of the OECD, the treatment of security issues seems more substantial than that of other issues. In dealing with security issues, conflicting jurisdictional claims are analyzed and changes in accepted norms are traced. To achieve a comparable treatment with respect to many economic issues, greater attention would have had to have been given to the General Agreement on Tariffs and Trade and the International Monetary Fund. As it is, the chapters dealing with economic issues deal mainly with procedures for liaison and coordination. The failure to treat the OECD precluded analysis of the relationship between the substantive activities of that organization and similar activities of the United Nations and its agencies.

Some of the studies are exceptionally good. Sir Peter Smithers persuasively argues that it would be more realistic and more likely to produce fruitful results if the purpose of coordination were thought of in terms of dealing with "overlapping" jurisdictions and activities rather than in terms of preventing duplication. He also perspicaciously asserts that the main responsibility for achieving coherent programs rests with governments rather than with IGO's. Berhanykun Andemicael, in his study of the OAU, skillfully uses categorization to develop generalizations and analyzes informal as well as formal relationships. All of the studies, though, bear reading. UNITAR made an important contribution by commissioning them.

HAROLD K. JACOBSON  
*Board of Editors*

*Les Sanctions Privatives de Droit ou de Qualité dans les Organisations Internationales Spécialisées.* By Charles Leben. Brussels: Emile Bruylant, 1979. Pp. xi, 402. Index. F.2900.

The purpose of this book is to ascertain whether there is an effective and legally binding system of sanctions applicable to members of specialized international organizations. Within the framework of the international law of cooperation, sanctions of nonparticipation are intended to deprive

states that have violated their institutional obligations of the rights and privileges attached to their membership in international organizations.

In general international law, the law of a completely decentralized society, remedies are fundamentally deficient. Either the remedies are decided and implemented by the states themselves, or they may be decided by an international court in the rare cases when states refer to such a court. International organizations have changed this situation by their constitutional provisions under which the organs of the organizations are entitled to judge states' actions and to enact sanctions. But how legal and effective are these institutional sanctions?

The author has doubts regarding the capacity of international organizations to enact sanctions with a sufficient degree of legality. The organs that centralize the rule of adjudication are mainly political organs. Thus, although purporting to act as judicial organs, they are primarily directed by political motives. While these motives may be adjusted by juridical concerns, they may also obscure such concerns more or less radically.

After a detailed examination of the practice of a great number of international organizations, the author considers sanctions to be of doubtful effectiveness. They are applied only exceptionally. However, even non-applied sanctions are a positive element in that the mere threat of a sanction helps to reinforce the process of international accountability of a member state to a given organization and its other member states. Nevertheless, it must be concluded that at best the deterrent effect of sanctions is very weak.

Are there, then, true international sanctions? The book gives this question only a qualified answer. A repressive procedure exists in international organizations whereby sanctions may be imposed. But the classical problems of legality and effectiveness are not so much overcome by an international organization as transferred to the organization itself. Hence, the elimination of the political element by an international organization is illusory, although that element may be somewhat reduced in the context of such an organization.

It follows that the sanction of nonparticipation of a defaulting state in an international organization may not be as powerful as might be imagined on a cursory reading of the apparently promising provisions on sanctions found in the constitutive instruments of some international organizations. This is not to say that these provisions are useless, since international organizations can sometimes exploit them so as to mobilize shame, if not sanctions, and thus manage to keep states in line with respect to the functional and technical matters the organizations have been charged with administering for the benefit of the world community.

Charles Leben has produced a thought-provoking book which is the product of careful and painstaking research. Students of international organizations are indebted to him for having written it.

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*International Humanitarian Law of Armed Conflict*. By Esbjörn Rosenblad. Geneva: Henri Dunant Institute, 1979. Pp. x, 200. Index.

This thin volume is one of the flood of books that may be anticipated, and that are definitely needed, with respect to the contents and meaning of the 1977 Protocols Additional to the Geneva Conventions of 12 August 1949.<sup>1</sup> Unfortunately, despite its impressive imprimatur, this book was a disappointment. It is somewhat of a rambling hodgepodge that, although it has a highly structured outline, is at times quite difficult to follow. If one is prepared to expend the time and effort on probing the author's intent, it emerges that he believes there are currently four major legal problems in the law of international armed conflict: (1) the doctrine of just and unjust wars; (2) the doctrine of wars of national liberation; (3) the disparity between new methods of warfare and treaty rules in force; and (4) the "questioned validity of the principle of distinction."<sup>2</sup> After some discussion of these four problems, he concentrates on three methods of warfare which he considers to have a major impact on the principle of distinction: (1) guerrilla warfare; (2) starvation as a method of making war; and (3) aerial bombardment (pp. 53-143).

With respect to just and unjust wars, the author states that "so long as the prohibition of recourse to war is not observed, warfare must be regulated in order to protect all victims of armed conflicts, whether 'just' or 'unjust'" (p. 21), and that "the concept of just and unjust war is alien to a viable law of armed conflict" (p. 24). The revival of the defunct doctrine of the just war by the Communist nations could well result in a future war being fought with none of the humanitarian laws of international armed conflict being applied on either side: the Communists because they are, as always, fighting a "just" war against an aggressor, and their adversaries because it is extremely doubtful that they will long apply such laws in the total absence of similar action by the other side.

With respect to guerrilla warfare, the author finds that the treaty law existing prior to the adoption of the 1977 Protocol I was not, in general, such as to induce respect for the law of war; and he concludes that Article 44(3)<sup>3</sup> of that protocol, dealing with combatants and prisoners of war, by which the Diplomatic Conference sought to update the existing law, may well prove to be a "retrograde step" (p. 97). There appears to be considerable merit to this conclusion.

This reviewer confesses to complete confusion with respect to many parts of this book—but nowhere more than when attempting to understand the author's distinction regarding "area attacks," "area bombing," and "target area bombing"; and it is extremely doubtful that the crew of a plane doing

<sup>1</sup> Reprinted in 16 ILM 1391 (1977).

<sup>2</sup> It would seem that the Diplomatic Conference that drafted the 1977 protocols, with one notable exception, spent by far the greater part of its time in ensuring the continued existence of, and in enlarging upon, the principle of distinction. The exception is the protection it granted to members of national liberation movements, an action that definitely blurs the distinction between combatant and civilian (pp. 20-41).

<sup>3</sup> Reproduced at p. 173.

the bombing would understand such a distinction if, in fact, there is one. Moreover, in his discussion of target area bombing the author twice states that "for more than 30 years this term has been used to denote *indiscriminate and terror-aimed attacks*" (pp. 127, 138). Without in any way intending to champion this method of warfare, which will, in any event, be outlawed should the 1977 Protocol I attain universal acceptance, this reviewer believes the term "target area bombing" means, and means only, exactly what Article 51(5) of the 1977 Protocol I prohibits: an attack "which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area." The Diplomatic Conference apparently so understood the term inasmuch as it considered it necessary to include separate and specific prohibitions of "terror bombing" in Article 51(2) and "indiscriminate bombing" in Article 51(4).<sup>4</sup>

Under the caption "Non-combatants," the author lists "military doctors, nurses, chaplains, judge advocates and other kinds of military officials" (p. 64). While there is undoubtedly authority for including the first three categories under that rubric, it would be interesting to learn the authority for so characterizing "judge advocates and other kinds of military officials." This reviewer was a judge advocate for many years and certainly never considered himself to be a "non-combatant"; and "other kinds of military officials" is so vague a term as to be meaningless. Moreover, Article 43(2) of the 1977 Protocol I specifically states that "[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . .) are combatants."<sup>5</sup>

The book concludes with the text of five specific treaty proposals, presumably to be included in a redrafted Protocol I. While there is probably merit to some of these proposals, the author, as a member of the Swedish delegation to the 1974 and 1975 sessions of the Diplomatic Conference, must be aware of the impracticality of these proposals at this time.

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*Terrorism. Documents of International and Local Control. Volumes 1 and 2.* By Robert A. Friedlander. Dobbs Ferry: Oceana Publications, Inc., 1979. Vol. 1: pp. xx, 572; Vol. 2: pp. viii, 753. Index. \$75 for two volumes.

*Terrorism: Theory and Practice.* Edited by Yonah Alexander, David Carlton, and Paul Wilkinson. Boulder: Westview Press, 1979. Pp. xiii, 280. Index. \$20.

These volumes are recent contributions to what is fast becoming an avalanche of writings on national and international terrorism. They are noteworthy additions to the literature.

<sup>4</sup> In view of the position thus taken by the author, it is somewhat strange to find that in a later discussion (at p. 152) he states that "Protocol II lacks specific treaty rules bearing on indiscriminate attacks other than terror attacks—particularly a ban on target area bombing."

<sup>5</sup> Reproduced at p. 173.

The primary contributions of Robert Friedlander's volumes are twofold. First, they contain numerous documents that constitute primary source material for scholars and government officials concerned with terrorism. Second, in an introductory commentary, Professor Friedlander utilizes his training both as a historian and as a lawyer to set the problems of terrorism in historical perspective.

The documents, from a variety of official and private sources, are arranged in some instances by source and in others on the basis of the subject matter they cover. Thus, for example, the documents part of volume I begins with a section on "Twentieth-Century Overview" that includes such diverse materials as "League of Nations Council Resolutions on International Terrorism, December 1934," a Central Intelligence Agency report on international terrorism in 1977, and "Statute for an International Criminal Court: Bellagio-Wingspread Drafts, 1972." This overview section is followed by sections on "United Nations and Northern Ireland Reports" and on "United Nations Resolutions, Declarations, and Conventions." Volume II, which is entirely devoted to documents, shifts initially to a subject matter focus, with sections on "Interference with Air Transport" and "Cases on Piracy, Interference with Air Transport, and Terror-Violence," and then back to a sources focus with sections on "U.S. Government Approaches—National and International," "European Attempts to Control Terror-Violence," "Inter-American Attempts at Transnational and Local Control of Terrorism," and lastly, "United Nations, Current Activity."

This reviewer would have preferred to have these documents organized consistently by subject matter rather than by source. It would seem of less importance that the reader know that the United Nations has produced particular reports or resolutions, declarations, and conventions than that he be able to find in one place all the documents dealing with such particular manifestations of terrorism as interference with civilian aviation, attacks on internationally protected persons and diplomatic premises, and the taking of hostages.

An emphasis on specific subject matter would also have been useful in distinguishing between documents that deal with individual acts of international terrorism and those that are concerned with human rights generally or with so-called acts of state terrorism. In the section on "United Nations Resolutions, Declarations, and Conventions," for instance, one finds the International Covenant on Civil and Political Rights (human rights), the General Assembly's Resolution on Forcible Diversion of Civil Aircraft in Flight (state terrorism), and the General Assembly's 1970 Resolution on Prevention of Hijackings or Any Other Interference with International Civil Air Travel (individual terrorism). While a knowledge of human rights and state terrorism is necessary to an understanding of individual acts of terrorism, the former areas are distinct from the latter and should be separately categorized.

Since no two volumes could possibly encompass the full range of documents on terrorism, Friedlander faced a difficult task of selection. On the

whole, he has chosen wisely and well. But this reviewer would have included more documents bearing on what is sometimes called "technological terrorism," *e.g.*, attacks on nuclear facilities or the use of nuclear materials by terrorists, or terrorist attacks on supertankers carrying liquefied natural gas or on offshore oil rigs, electrical power stations and power grids, chemical manufacturing plants, and computer communication network systems. One significant document of another kind omitted from the collection is the extradition treaty between the United States and Canada, which expressly excludes attacks against civil aircraft or internationally protected persons from the scope of the political offense exception to extradition.

Finally, it is worth noting two significant documents that were adopted too late for inclusion in this collection. The first is the Bonn Summit Declaration of July 17, 1978, under which the heads of state of Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States, resolved to halt their national air service with a country that refuses either to extradite or prosecute those who have hijacked an aircraft or to return the aircraft. The second is the International Convention against the Taking of Hostages adopted by the UN General Assembly in December 1979, 3 years after its introduction in the United Nations by the Federal Republic of Germany.

In his historical overview of terrorism, Friedlander notes that the term "assassin" was derived from the Arabic and applied to a sectarian group of Moslem fanatics who, at the end of the Middle Ages, spread terror among prominent Christians and other religious enemies. Friedlander's observation on the assassins that "[r]eligious dogma combined with political fanaticism to make a potent terrorist brew" (vol. 1, p. 8) would seem especially applicable to the situation in Iran. Equally applicable to the current milieu is his observation that, "[f]rom the time of the French Revolution, terrorism and guerrilla movements have become inextricably intertwined" (vol. 1, p. 14). The perception of many developing countries that terrorism is an indispensable tactic for guerrilla groups engaged in "wars of national liberation" has been a major stumbling block to efforts in the United Nations and elsewhere to prevent and suppress international terrorism. In the same vein, Friedlander notes that state support of "terrorist brigands" precipitated the outbreak of the Balkan Wars of 1912-13 and that the origin of the First World War can be traced to an act of transnational assassination arising out of revolutionary terrorism.

The author points out that the world community has been unable to define international terrorism and suggests, as have others, that an exact legal definition is unnecessary. More troubling is the inability of even like-minded states to develop a workable definition of political crimes and thus remove a major impediment to effective control of the prosecution of international terrorism. Highest priority should be given by statesmen and scholars to resolving problems arising from the complex matrix of asylum, extradition, and the political offense.

Friedlander's apparent approval of the proposal that capital punishment be employed as a deterrent to terrorist attacks raises issues of criminal

justice that transcend terrorism and that are beyond the scope of this review. But it may be noted that execution of terrorists would provide the terrorist group concerned with martyrs for its cause and gain the group considerable sympathy it might otherwise not enjoy.

Similarly provocative and debatable is Friedlander's comment that "[i]f the state truly wishes to protect itself from the threat and destruction of terrorist violence, then social order must be strengthened at the expense of individual freedom" (vol. 1, p. 114). In this reviewer's opinion, the primary danger of terrorism is its threat to individual liberties and freedoms, and a society must guard against an overreaction to terrorism that undermines the very values sought to be protected.

Still another provocative suggestion advanced by Friedlander is that the U.S. Congress should pass a law "declaring that anyone who paid ransom, or otherwise subjected himself to a kidnapper's demands, would be imprisoned for a term of not less than one year and fined not less than \$10,000" (vol. 1, p. 115). In support of this proposal, Friedlander argues that "such statutory penalty would be more effective in ending hostage-taking activity than . . . making forcible seizures a mandatory capital crime" (*ibid.*). As a matter of governmental policy, some countries, such as Argentina, Colombia, the United Kingdom, and Venezuela, have prohibited compliance with ransom demands of terrorists both by public authorities and by private parties. But as Clarence Mann has cogently argued,<sup>1</sup> such a policy may be unenforceable: private corporations and individuals will simply refuse to inform the police of the fact of a kidnapping or of a ransom demand.

Some other proposals advanced by Friedlander but outside the scope of discussion in this review include the establishment of a permanent international hijacking tribunal to try all criminal acts relating to interference with air transport, the adoption of legislation at the national level especially designed to curb terrorism, and the drafting of an international criminal code. These and other proposals, as well as the documents collected in Friedlander's two volumes, should provide scholars and government officials concerned with combating terrorism with a substantial amount of material to ponder.

The volume edited by Messrs. Alexander, Carlton, and Wilkinson includes essays by 11 contributors from a variety of disciplines, mainly history, law, and political science. The essays are arranged in sections on "Overview," "The Causes," "The Perpetrators," "The Issues," and "The Future." The goal of the editors is to offer "a cool, long-term appraisal of terrorist phenomena" and to relate "the theory and practice of terrorism both to wider changes in social behavior, attitudes, and conditions and to advances in scientific knowledge and technology" (p. ix). In large measure they have succeeded in reaching their goal.

In the overview section, Charles A. Russell, Leon J. Banker, Jr., and Bowman H. Miller provide a number of useful insights into the terrorism

<sup>1</sup> Mann, *Personnel and Property of Transnational Business Operations*, in *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* (A. Evans and J. Murphy eds. 1978), at 399.



problem. They suggest that "[a]ccidental catastrophes, coupled with the continued increase of criminal violence within our society, would appear to be reducing the impact of calculated terrorism upon the spectators" (p. 14). Faced with this phenomenon, terrorists have two alternatives for future courses of action.

They can lower the threshold of violence and redirect their operations at those aspects of society upon which the entire populace depends—utilities, energy, food and water, transportation, communications, monetary and financial systems, and similar essential services. Or, conversely, they may attempt to increase the number and range of casualties (human targets) by mustering greater resources and proceed to mass destruction [*ibid.*].

The authors conclude that disruption of essential services is the tactic most likely to be followed by future terrorists, coupled with "small scale destruction operations using high-technology or bacteriological resources" (p. 36).

In the section on causes, Paul Wilkinson takes the reader on a survey of various theories on the causes of human violence, including, *inter alia*, those of Konrad Lorenz, Robert Ardley, B. F. Skinner, Sigmund Freud, and Erich Fromm. On the basis of his survey, Wilkinson concludes that "[w]e really understand very little about the origins and causes of human violence in all its daunting variety" (p. 45), although he does suggest, one would hope not too optimistically, that "[t]here is no anthropological evidence to support the Hobbesian and instinctivist assumption that for man the state of nature must inevitably be the state of war" (p. 51).

For her part, Amy Sands Redlick suggests that the transnational flow of information is a primary cause of terrorism. She hypothesizes and illustrates by examples that "the transnational flow of information can affect significantly a crisis or an event in an open, ethnically divided society and, more specifically, that external information may be a catalyst to the outbreak and development of terrorism in tense situations" (p. 74). Her primary prescriptions for resolving this problem are "more accurate, less sensational reporting of events and groups" (p. 87) and delays in the release of information about potentially explosive news events. She wisely eschews government censorship or regulations that would limit society's access to certain information. The undesirability of such governmental action is also noted by Professor Alexander in his essay on *Terrorism and the Media*, which stresses the need for law enforcement officials and the media to cooperate in order to ensure that the media help to combat rather than to promote terrorism.

Especially relevant to the current crisis in Iran is Abraham H. Miller's essay on *Hostage Negotiations and the Concept of Transference*. The psychological concept of transference is a mental process through which a sense of closeness and attachment develops between the hostage and his captor. The hope of officials negotiating with hostage takers is that such transference will occur and result in release of the hostages. But as Miller points out, hostage takers are becoming increasingly sophisticated in techniques designed to resist such transference.

One controversial essay in this volume is that of L. C. Green on *The Legalization of Terrorism*. Professor Green's thesis is that the United Nations has taken a number of actions that, far from combating terrorism, attempt to "legalize" it. One may be critical of certain UN actions or inactions in this area yet reject Green's thesis, which he attempts to support by some questionable assertions. He contends, for example, that the General Assembly resolution annexed to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents "sanctifies" attacks on internationally protected persons if they are committed "in the sacred name of twentieth century holy writ: self-determination" (p. 186). But the resolution is not part of the convention, even if it is by its terms related to it and is to be published with it. Moreover, the language of the resolution appears merely to state the self-evident fact that the convention cannot in any way prejudice the right to self-determination, and is not able to affect the legal obligations set out in the convention itself.

Other essays in this volume include *Terrorist Movements* by Paul Wilkinson, *Northern Ireland, Terrorism, and the British State* by Alan O'Day, *The Future of Political Substate Violence* by David Carlton, and *Coping with Terrorism: What is to be Done?* by Robert A. Friedlander. The volume also contains a selected bibliography of books, articles, and other materials (such as unpublished manuscripts and government reports).

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*Human Rights: The International Petition System, Binder 1* (three binders projected). By Max E. Tardu. Dobbs Ferry: Oceana Publications, Inc., 1979. \$75 per binder.

These projected three volumes on international human rights petition systems represent the most ambitious work to date focusing on the practitioner's, rather than the scholar's, needs for information on the international protection of human rights. While not a "how-to-do-it" book in the same sense as the excellent, if now somewhat dated, guide by Glenda da Fonseca, *How to File Complaints of Human Rights Violations: a practical guide to inter-governmental procedures* (1975), Tardu's emphasis on the actual workings of the various petition systems clearly sets his work apart from more general and comprehensive human rights "course books," e.g., Richard Lillich and Frank Newman, *International Human Rights: Problems of Law and Policy* (1979), and Louis Sohn and Thomas Buergenthal, *International Protection of Human Rights* (1972).

By the most important standard—that of informing the potential lawyer, nongovernmental organization, or individual complainant about available international petition options—the first volume is a resounding success. In its first section, Tardu offers a fairly straightforward and easily understood overview of the various petition procedures: the "gross violations" standard of ECOSOC Resolution 1503; the optional protocol to the Cove-

nant on Civil and Political Rights; specialized UN organs that deal with decolonization, racial discrimination, and apartheid; ad hoc UN bodies such as those concerned with southern Africa, the Israeli-occupied territories, and Chile; the longstanding procedures of the International Labor Organization; the recently adopted petition machinery of UNESCO; and the procedures of regional organizations, *i.e.*, the European Convention on Human Rights, the Court of Justice of the European Communities, and the Inter-American Commission on Human Rights, both pre- and post-entry into force in 1978 of the American Convention on Human Rights.

A relatively brief and unexceptional historical survey follows, tracing in broad lines the development of international petition systems from the 19th-century doctrine of humanitarian intervention and other discretionary utilization of individual petitions, through the protection of minorities by the League of Nations, up to the recent explosion of human rights petition systems since the mid-1960's. Tardu emphasizes the role of individual and collective desires for justice and equality in the development of meaningful international petition procedures, although he also correctly notes the importance of national self-interest in motivating states to accept at least pro forma participation in international human rights machinery as a lesser evil than ignoring such procedures. The primary scholarly contribution of this section is the insider's detail Tardu is often able to bring to explaining developments within the United Nations itself.

The final section of this first volume presents a series of unrelated essays that offer Tardu's views on the major issues arising from the protection of human rights through international petition systems. While he suggests few solutions, he does raise many of the problems that concern human rights activists and scholars. Tardu asserts that "the only effective representation is that afforded by a lawyer," and proposes the establishment of an adequate system of legal aid on the pattern of the European system. He also attacks, with justification, the increasingly noticeable inequality under many procedures between the individual petitioner and the accused state, citing the "wall of secrecy" that rises between a complainant and his submission under the UN Human Rights Commission's "1503 procedures" as the most striking example of this unequal access to comments, evidence, and the decisionmaking body itself. Other questions considered include problems of compliance and monitoring, the importance of publicity, possible conflicts that may arise due to the multiplicity of petition procedures, and the inadequacy of current systems in dealing with complaints against non-state powers, *e.g.*, transnational corporations and intergovernmental organizations.

The major substantive criticisms that can be directed against this first volume are primarily sins of omission. For example, while Tardu draws a useful distinction between "petition-recourse" and "petition-information" systems, he does not address in sufficient detail the use that the individual might make of at least informal challenges to state reports under the two UN Covenants or the periodic reports to the Human Rights Commission required by ECOSOC Resolution 1074C. Some attention also might have been de-

voted to distinguishing between the Human Rights Commission's confidential 1503 procedures and its public debates on human rights under ECOSOC Resolution 1235. While these fora might be technically outside the "petition" systems that are the focus of Tardu's work, their inclusion would have given the reader a better perspective from which to view the petition process as a whole.

On the editorial side, however, volume I fares less well. In addition to mechanical problems which range from duplicated pages to numerous typographical errors, citations are inconsistent and often missing entirely; while Tardu evidently did not intend to write a law review article in which footnotes outweigh text, additional documentary and other references would have been helpful at several points. The presentation of material in a separate looseleaf format with nonconsecutive pagination is also bothersome. These editorial lapses are the more outrageous when one considers the suggested cost of \$225 for the complete three-volume set. While supplementary material will apparently be issued "from time to time" at additional cost, there is little in the first binder (with the exception of new inter-American materials necessitated by the recent entry into force of the American Convention on Human Rights) for which supplementary treatment would seem to be appropriate. Indeed, an entirely new book could undoubtedly be produced every few years for less than the suggested price, and the decision to present this material in its present form is indefensible.

The substance of *Human Rights: The International Petition System* represents a significant contribution to the literature on international human rights; it is unfortunate that the only ones to benefit from Tardu's observations are likely to be well-endowed law libraries and a few fortunate reviewers.

HURST HANNUM

*Of the District of Columbia and California Bars*

*Legal Protection of Individuals in the European Communities. Volume I: The Individual and Community Law. Volume II: Remedies and Procedures.* By A. G. Toth. Amsterdam, New York, and Oxford: North-Holland Publishing Co., 1978. Vol. I; pp. xxi, 226; Vol. II; pp. xv, 372. Indexes.

The title of Toth's book may be somewhat misleading, at least to American readers anticipating a civil rights or human rights approach. "Individuals" here include all those natural or legal persons who in some sense possess substantive or procedural rights, obligations, and capacities under European Community law, and most of Toth's observations concern economic entities as well as natural persons. "Protection" might also be better understood in terms of access, in a broad sense, to European or national courts, and not in the more restricted meaning of the safeguarding of fundamental civil or human rights.

The first volume sets forth in occasionally turgid detail the nature, scope, and sources of Community law before dealing briefly with the status of the individual, and it is perhaps the more helpful of the two volumes to non-European readers. "Community law" is a "new, independent (autonomous),

supranational, self-contained, uniform and unitary legal order of a *sui generis* type, with a limited field of application," and its unique character is stressed throughout the book.

The second volume describes the general jurisdiction and procedure of the European Court of Justice and then considers each of the major types of proceedings: actions for annulment, for failure to act, for damages, against Community-imposed economic sanctions, and against member states themselves for failure to fulfill their Community obligations. The final section deals with the jurisdiction of national courts over Community organs and domestic actions taken pursuant to Community laws and decisions, including a discussion of the requirements for reference to the European Court of Justice for interpretive rulings on Community law.

With respect to protection of the fundamental rights of the individual, Toth submits that the European Convention on Human Rights "is a binding instrument which forms a source of Community law and which, as an international treaty, enjoys supremacy over the acts of the institutions." Although the source of law in each case is not clear, he states that the European Court of Justice has affirmed, "explicitly or by implication," the right of nondiscrimination on grounds of nationality or sex; freedom of movement for persons, services, and capital; the right to ownership and freely to choose and practice a trade or profession; freedom of association, including membership in trade unions; freedom of religion; and the right to elect governmental officials.

While this would seem to expand the protections available to the individual within the European Community, one must question whether an institution whose primary purpose is to promote specified economic goals is the most appropriate forum to protect the rights of individuals who may be threatened by the implementation of those goals. Toth even suggests that an individual may be required to appeal to the European Court of Justice as a prerequisite to filing a complaint with the European Commission of Human Rights, under the principle of exhaustion of domestic remedies. On the other hand, Community enforcement of such economic rights as equal pay for equal work obviously represents a meaningful advance in the protection of human rights, and the Court remains the only "human rights" forum directly accessible to individuals that has the power to issue decisions that are immediately binding on states.

Toth describes his work as "a lawyer's book" dedicated to the practitioner and civil servant, and its style is, for the most part, that of a black-letter-law hornbook, copiously footnoted to the case law of the Court of Justice as well as to national courts. Unfortunately, the citations are rarely accompanied by meaningful explanations, and the voluminous notes are of little use without constant recourse to the *European Court Reports*. In discussing the direct applicability of Community law in national courts, for example, Toth notes that some courts have refused to apply treaty provisions in the absence of domestic implementing legislation, but he then concludes, "All these doubts have, however, been removed by the European Court of Justice," leaving the reader merely with a footnote reference to two cases.

Much of the text is repetitive, which almost creates the impression that each section was written separately.

Toth evidently possesses a thorough knowledge of the present state of Community law. At the same time, however, these volumes leave the American reader with the unsatisfied feeling that comes from reading only the headnotes to a judicial opinion; much trust must be placed in the headnote writer and, similarly, in Toth himself. The difficulties of overgeneralization, repetition, and conclusory observations detract from the usefulness of an obviously well-researched book; one is left with the nagging suspicion that there might be less here than meets the eye, although the book does offer a wealth of material that could point the way to further exploration of the jurisprudence of the European Court of Justice.

HURST HANNUM

*Of the District of Columbia and California Bars*

*Human Rights and U.S. Foreign Policy.* Edited by Peter G. Brown and Douglas MacLean. Lexington: D. C. Heath and Company, 1979. Pp. xxvii, 310. Index.

This is a timely compendium of diverse essays broken down into four broad categories, all of which deal with human rights and the conduct of American foreign policy. In the first instance, there is a review of recent provisions of various foreign assistance programs that purport to limit aid to those nations which engage "in a consistent pattern of gross violations of internationally recognized human rights." These limitations are subject to exceptions which permit sales and grants of arms to violators where "extraordinary circumstances exist which necessitate a continuance of security assistance" and on balance it is deemed in the national interest to do so, and, in the case of economic aid, if the assistance "will directly benefit the needy people" of the violating country. The broad range of legal concepts contained in these provisions and their exceptions are, at the outset, the subject matter of a group of essays by various contributors to the book. These writers analyze the nature of the human rights in question and seek to determine the correctness of the congressional limitation of these rights to those which include "torture, or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person." Such rights, dealing with liberty and security of the person, were given precedence by Congress over civil and political liberties as well as over economic or welfare rights. Several of the essayists engage in an interesting debate about the rationale and wisdom of this priority. The reviewer, nevertheless, remains convinced of the correctness of the congressional approach.

The same thread that runs through the first debate runs through the second: the value of setting mandatory limitation provisions for nations which are human rights violators. One author argues convincingly that American policy objectives are better served by a flexible, pragmatic ap-

proach, while another urges yet stricter standards and more rigid adherence to them. This leads into an interesting discussion on the morality and legality of interference in the domestic affairs of another nation, an old saw to be sure, but one that is still fresh because several authors stress neither law nor morality as the controlling factor but, rather, the practical limits of national boundaries and the real meaning of the nation-state in the present conduct of foreign affairs. If anything, this group of authors tends more toward justifying intervention in diverse forms against flagrant violators of human rights than toward urging a policy of nonintervention.

The last group of essays is of a more practical nature, dealing with the determination and interpretation of the exception clauses. Case studies, such as Korea, the Philippines, and Iran under the Shah, are reviewed. Richard Cottam's essay is especially interesting. He argues persuasively that insistence on human rights standards undermined the Shah against our own strategic interests. Human rights advocacy, he urges, constituted intervention in the affairs of Iran with the bluntest and least controllable of instruments. Moreover, it was probably misconstrued by many in Iran who saw it as another form of Dulles-like intervention and not a policy premised on the highest moral considerations. In the case of the Soviet Union as well, Cottam argues that human rights as the centerpiece of American foreign policy "has been and is likely always to be a mistake." The policy will be inconsistent, interpreted as hypocritical, misinterpreted as to motive, and momentous in terms of overall policy considerations of the United States. The reader will do well to ponder this aspect of a fascinating exchange on human rights as a major component of foreign policy, especially in light of the events which have transpired in Iran since the publication of this book.

RITA E. HAUSER  
*Of the New York Bar*

*The Host State and the Transnational Corporation. An Analysis of Legal Relationships.* By Juha Kuusi. Westmead, England: Saxon House, Teakfield Ltd., 1979. Pp. xvi, 177. Index. \$25.25.

Despite an overinclusive title, this is a study of the international legal norms, doctrine, and practice concerning contracts between states and foreign enterprises. It is focused on the theories advanced in the late 1950's and the 1960's supporting the application of international law or some body of law other than the host country's municipal law to such contracts. The author, a young Finnish diplomat, studies these theories in the light of their economic assumptions, past and present contractual and arbitral practice, and other recent manifestations of international legal policy.

A first part is devoted to the legal and factual background. Succinct chapters deal with the structure and nature of international investment before and since the Second World War, the approach to state contracts (state bonds as well as concessions) in classical international law, and the emergence of the transnational corporation as a significant actor in the interna-

tional economy. The second and principal part of the book examines in detail the theoretical proposals in question. After thorough analysis of the few relevant arbitral awards and the limited contractual practice until the mid-sixties, the author distinguishes three schools of proponents of recourse to "non-municipal law": The first sees general principles of law and some principles and rules of international law as incorporated, expressly or by implication, into the host country's municipal law; the second maintains that state contracts are governed by "a new legal system"—whether "transnational law" or the *lex contractus*; the third school suggests that state contracts can be internationalized, *i.e.*, public international law may be applied to them. Kuusi studies these positions carefully and in detail. He does not stop with broad classifications: he is remarkably sensitive to the profound differences in the policy preferences of writers adopting otherwise similar doctrinal positions.

The author then reviews developments since the late sixties, pointing to the extremely limited arbitral practice, to the reversal in the direction of contractual practice, now largely favoring the applicability of national law and effective regulation of foreign investments, and to the positions taken by developing countries in international fora against application of any law other than the host state's to state contracts (and to nationalizations of foreign property). He concludes that, while the various proposals discussed were "defensible" and not unreasonable at the time they were made, "the trend of the law has not met the prescriptions of the proponents of the theories concerned" (p. 164). Current efforts within UN bodies for the elaboration of mutually agreed "codes of conduct" are seen as providing a possible alternative. As the valuable introduction by Professor Gabriel Wilner points out, such codes, containing international standards acceptable to all parties, may be "an effective means of bridging the wide gap" between the "non-municipal law" theories examined and the blanket assertion of host country jurisdiction.

This is a valuable and useful study. The author writes clearly and concisely; he is fair and moderate in his positions; with the exception of a certain neglect of the relatively late German literature—Böckstiegel, Rengeling, Fischer, *et al.*—some of which he mentions but does not discuss in theoretical context, he covers his subject most thoroughly. He studies the "non-municipal law" theories against the background of changing perceptions concerning the role of private foreign investment and effectively contrasts doctrinal positions and actual state practice. One may disagree about details—*e.g.*, the description of Luis Drago's position (pp. 8–10), and the disregard of bilateral treaty practice. But then there can be no complete agreement on such a controversial and multifaceted topic. Juha Kuusi's study is likely to remain for a long time the definitive summing-up of an important, if abortive, debate.

A. A. FATOUROS  
*Board of Editors*



*O Convenio do Café de 1976: Da Reciprocidade no Direito Internacional Económico.*

By Celso Lafer. São Paulo: Editora Perspectiva S.A., 1979. Pp. xvi, 267. Bibliography.

This study, by Brazil's leading international legal scholar, examines the Coffee Agreement of 1976 as an illustration of the centrality of reciprocity in contemporary international affairs.

The first third of the book is of the broadest general interest. In it, Professor Lafer sets forth a challenging and innovative theory, built around the recent radical change in the function and perception of the role of the state and of public international law as a device for ordering world economic relations. From this, he narrows his focus to the less-developed countries, addressing how the international legal system has attempted—and pretty much failed—to regulate North-South cooperation and govern the appropriate transfer of resources to the LDC's. An extensive treatment of the principles of consensus and reciprocity in contemporary theory sets the stage for an examination of development cooperation as represented by agreements relating to primary products. It is within this framework that the author proceeds to examine the specific case of coffee: the historic efforts to manage the market that culminated, if that is quite the right word, in the 1976 convention.

It is scarcely news that such commodity agreements are of profound importance to the aspirations of the developing countries. Amelioration of the loudly proclaimed defects of the primary products markets was the central purpose of the "new international economic order" of the LDC's from the beginning, and of the 1976 Nairobi UNCTAD Integrated Program for Commodities. Much of the analysis of these experiments in international cooperation, however, has been by economists; Lafer has broken new ground in his effort to examine them in the legal context.

Analytically, he points out, such agreements strive to develop flexible, self-regulating mechanisms to promote the mutual interests of producers and consumers relative to price and supply. Several types of commodity arrangements—indexing, buffer stocks, and producer cartels—are considered. In the specific case of coffee, the agreements of 1962 and 1968, he points out, were established when supply exceeded demand, in an effort to stabilize declining prices. The nominal price stability achieved represented an actual decline in real income for the producers, which made a new and different arrangement inevitable.

During the preliminary negotiations leading to the 1976 arrangement, various suggestions including indexing and differential pricing for selected types of coffee were considered, but no agreement emerged. However, after the frost in Brazil in July 1975, which assured diminished supplies for several years, a consensus began to develop. Consumer countries saw a need to create conditions that would stimulate investment in new production to assure supplies, while producers saw a need for long-term stability,

even at the expense of short-term gains in an undisciplined market, which could reduce demand. Reciprocity and mutual interest had finally emerged.

The basic method devised to assure stable supplies at "adequate" prices was to select a price range below which export quotas would be established. Consuming countries agreed to purchase only certified coffee from members of the agreement. The quotas would have a fixed component, to supply 70 percent of the market, and a variable component, to be distributed in proportion to the producers' verified stocks on hand. Incentives to production resulted from the rule that failure to fulfill the fixed portion of the quota would reduce the quota. The initial allocation of quotas among producers was based on historic performance. It was anticipated that the price would not descend to the quota trigger level for some years and that quotas would be suspended periodically, which would create an automatic system for regulating reciprocal interests. Investment in production was supposed to vary to induce an equilibrium in supply and demand. (We now know that the anticipated adjustments have not taken place, perhaps because of the lack of alternative investment opportunities in producer countries in recent years.) To reinforce the arrangement, export certificates are denied by the administering authority to countries that markedly exceed their export quotas or otherwise violate the agreement.

The coffee experience, for the author, serves to emphasize the difference between reciprocity and justice in relations among states. In the early 1970's it appeared that the consuming countries had the whip hand. But the prospect of reduced supplies which emerged during the negotiations, and the mechanism finally adopted to regulate the market, resulted in a considerable improvement in the prospects of the producers. To them, all this, embedded in a system with a fair balance of reciprocity, was preferable to the invocation of some abstract principle of justice. The author concludes that the pragmatic definition of mutual interests is far more likely than rhetoric to result in equitable arrangements for the sharing of the world's resources in the ominous years ahead.

And all those who have sat through an UNCTAD meeting on commodities will say, Amen.

WILLIAM D. ROGERS

*Of the District of Columbia Bar*

HENRY N. SCHIFFMAN

*Of the District of Columbia Bar*

*The Effective Management of Resources. The International Politics of the North Sea.*

Edited by C. M. Mason. London: Frances Pinter Ltd.; New York: Nichols Publishing Co., 1979. Pp. ix, 268. Index. \$22.50.

These eight essays by Scottish authors report the success since 1963 of the nations bordering the North Sea in creating a comprehensive, and for the most part successful, scheme of resource allocation. In contrast to the inability of the world generally to agree on matters of seabed exploitation elsewhere, the North Sea nations supply an encouraging model. The matrix of treaties, agreements, and administrative rules is understandably complex,

but the authors describe their creation and relationship in detail. Here is a case history of the development of regional, and very specialized, international law. While the title refers to the role of "politics," the contents reveal that law mattered more, partly because international law norms supplied a framework for negotiation, and also because the participants willingly declined to link wider political interests with the narrow issue of who gets what in the North Sea. Geography explains the results more than politics, and law supplied the grounds for its domination.

That ignorance helped is also clear. If, for example, the actual location of oil and gas deposits had been known in advance, it is unlikely that boundaries would have been set as they were. As it turned out, Norway and the United Kingdom captured nearly all the oil, and about 80 percent of the natural gas under the seabed. However, exploration and investment were impracticable until the boundaries were established. A prudent investor, even multinational oil companies willing to gamble, usually demands that title to the place of investment be clear before proceeding.

It is remarkable that the North Sea regimes were established quickly; 15 different, but interrelated, international agreements were proposed, negotiated, and ratified in less than 7 years. In addition, Denmark, West Germany, and the Netherlands sought and obtained the advice of the International Court of Justice in less than 2 years. That judgment, unlike many judicial decrees, actually facilitated a subsequent political settlement by forcing the disputants into trilateral negotiations. The Court, in rejecting some of the claims of all parties, made it easier for them to abandon previously firm legalistic arguments that could not command respect.

Half the book is devoted to matters of oil and gas extraction. Chapters are devoted to the international regime created, the system of national laws applied to the various areas, the role and authority of multinational oil companies, and the relationship of the system to the European Community generally.

Fishing problems and the new international concern for conservation are the subjects of a good chapter jointly produced by a lawyer and an economist. The essay on the regulation of North Sea marine pollution is timely and instructive.

This is a technical book telling general readers more than they may wish to know. But it is a practical book that reports one of the most heartening developments of international law since World War II.

GORDON B. BALDWIN

*University of Wisconsin Law School*

*The Exclusive Economic Zone. A Study of the Evolution and Progressive Development of the International Law of the Sea.* By Winston Conrad Extavour. Geneva: Institut Universitaire de Hautes Etudes Internationales, 1979. Pp. xv, 369. Index.

This comprehensive and well-documented book is concerned with the progressive development, both past and present, of the concept of the exclusive economic zone. In his survey of this development, the author goes

back to the early evolution of coastal state claims to jurisdiction in adjacent waters, follows the trends in state practice since the 1930 Hague Codification Conference, considers major developments at the first two United Nations Conferences on the Law of the Sea, and then analyzes the emergence and scope of the exclusive economic zone concept before and during the early stages of the Third UN Conference.

The text is concise and logically arranged. From the territorial sea and the contiguous zone it moves to the issues of "special interests" and "preferential rights" of coastal states, particularly with regard to fishing in their extraterritorial waters. Consideration is given to the concept of the "patrimonial sea," and to the gradual coalescence of state practice with regard to offshore claims among many of the coastal states of Latin America and Africa. The book is especially valuable as a historical record of the expansion of offshore claims throughout the world and of the roles played by such factors as the Montevideo, Lima, and Santo Domingo Declarations on the Law of the Sea, the report of the Asian/African Legal Consultative Committee, and the conclusions of the 1972 Yaoundé Regional Seminar on the Law of the Sea.

One particularly noteworthy feature is the extensive discussion of coastal state rights and responsibilities in the exclusive economic zone, as contained in the provisions of the Revised Single Negotiating Text (RSNT), compared with the rights and duties of other states, including the landlocked and the geographically disadvantaged. The author is rightfully concerned with the issue of residual rights in the economic zone—whether these, according to the negotiating texts, are vested in the coastal states or in the international community. It is, in a sense, unfortunate that so much time elapsed between the completion of the manuscript (January 1977) and the publication of the book (early 1979). The consequence is a reliance on the RSNT for assessing the nature of the exclusive economic zone, and although in a postscript the author seeks to update the discussion through reference to the Informal Composite Negotiating Text (ICNT), latter-day developments in such areas as marine scientific research and other high seas freedoms within the exclusive economic zone are not completely covered.

Early in the book Extavour notes that although the developing countries initially propounded the exclusive economic zone concept, its implementation will, in practice, bestow greater economic benefits upon a handful of developed states. Thinking on this, he writes, "the satisfactory adjustment of the inequities inherent in this situation is one of the most important questions awaiting solution." But nowhere does he really address the issue of the "adequate compensatory mechanisms" that might be adopted to offset the inequities of geography. His dilemma here is the dilemma of a majority of the countries of the world who see a small group of states falling heir to most of the living and nonliving economic zone resources. In the view of this majority, was the exclusive economic zone concept really such a good idea?

LEWIS A. ALEXANDER  
*University of Rhode Island*

*The Hamburg Rules on the Carriage of Goods by Sea*. Edited by Samir Mankabady. Leiden and Boston: A. W. Sijthoff, 1978. Pp. xxi, 358. Index. Dfl.85; \$42.50.

The Hague Rules, more formally known as the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, was a compromise arrangement adopted by the seafaring nations in 1924 to allocate the risk of loss to oceanborne cargo among the carrier, the shipper or consignee, and, by implication, their respective insurers. With the technological move toward containerization that began in the late 1950's, growing dissatisfaction emerged over the terms of the 1924 compromise; and in 1967 and 1968, international conferences were convened in Brussels to produce a modernized allocation in a new protocol.

But even before the ink was dry on the 1968 Brussels Protocol, it was apparent to all who participated in its formulation that, if the Hague Rules were to be updated from their procarrier orientation, something far more comprehensive would be necessary than the "Band-Aid" improvements it contained.<sup>1</sup> Spurred on by the efforts of developing countries through UNCTAD and UNCITRAL, and guided by the farsighted intellect of Norwegian Professor Erling Selvig, preparatory meetings looking to new rules were held periodically over almost a decade until March 1978, when the UN conference meeting at Hamburg finally adopted the rules described in this book.

But if the developing countries and legal modernists were to conclude that all this time and effort were worthwhile, they might be better advised to read the essays collected by Samir Mankabady. Thus, for example, Professor William Tetley of Canada, in his incisive *Comments on Articles 9 and 13 of the Rules*, concludes that "such was the counterattack of shipowners to the UNCITRAL text and the Hamburg Rules that shipowners have benefited as much as they suffered." For his part, B. K. Williams, writing on behalf of cargo underwriters, concludes that the rules do "not measure up to the commercial and practical requirements for the efficient exportation of overseas trade" and that, as a consequence, "no commensurate decrease in cargo insurance costs can be expected."

Yet, as has always been true in this intriguing minisector of private international law, there is still another and, of course, contrary opinion, best articulated by J. P. Honour, general manager of a British P. & I. Club.

<sup>1</sup> In U.S. dollar terms, the 1924 Hague Rules and its counterpart under U.S. law (the 1936 Carriage of Goods By Sea Act, 46 U.S.C. §§1300-1315, 49 Stat. 1207) set out a limitation of liability by the carrier to the shipper or consignee of \$500 per package or unit. The 1968 protocol increased the per package limit to approximately \$660 and also adopted an alternative weight-based limit of 90 cents per pound. In addition, the 1968 protocol, acknowledging the escalating trend toward containerization, adopted a so-called "container clause." The practical effect of this clause is to count each package within the container (rather than the container and all its contents) as a separate package for purposes of the \$660 limit—and presumably at no additional cost or higher freight rate for the shipper. See DeGurse, *The Container Clause In Article 4(5) of the 1968 Protocol To the Hague Rules*, 2 J. MAR., L. & COMM. 131 (1970).

Concluding that overlapping insurance coverage is almost impossible to avoid in this area of transportation, Honour finds that the Hamburg Rules represent "a material change in the apportionment of risk as between ship-owners and cargo interests" which will inevitably "result in increased [Protection and Indemnity] costs."

If each author had not presented his views so persuasively and appealingly, a reader might throw up his hands in wonderment. Or he might simply ask why the international maritime community did not consider adopting the very simple, yet highly effective, liability system of section 20(11) of the United States Interstate Commerce Act. This provision governs all surface cargo transportation in the United States, places almost an insurer's liability on the carrier (limited to the actual value of the goods lost or damaged), and has resulted in practically no overlapping insurance.<sup>2</sup>

Another highly appealing aspect of the book is its inclusion of a 40-page summary of the various amendments proposed by the countries attending the conference. Studying this summary will help readers and students of international law to focus attention on the identities of countries supporting particularly sensitive positions. Consider the issue of whether to retain the anachronistic procarrier defense of nautical fault, *i.e.*, exoneration of the shipowner when the damage is caused by the fault of the master or crew in navigating the vessel. The summary shows that the United States opposed its retention but that Belgium, the Federal Republic of Germany, Ireland, Italy, Liberia, the Netherlands, Poland, Portugal, Switzerland, and the United Kingdom formed a coalition for its retention, with the USSR and Bulgaria indirectly lending their support.

As for retaining the similarly anachronistic fire defense (also a procarrier position), Czechoslovakia and Austria supported the modern view of deleting it entirely. The United States, while originally opposing the fire defense, ultimately joined the United Kingdom in opting for its retention unless—as the provision finally reads—a claimant bears what may well be the almost insuperable burden of proving that the fire resulted from the carrier's negligence.

Also among the proposals which the summary lists—and which would otherwise have surely disappeared in the filing cabinets of *travaux préparatoires*—is perhaps one of the more farsighted approaches yet to be proposed for cargo limitation. This approach suggests that the limitation be based on the actual value of the goods which the shipper shall declare on the bill of lading. At Hamburg, this proposal was advanced not by any of the traditional cargo-oriented countries, but by Mauritius.

It is safe to say that this book, which may be the only one to set out the text of the Hamburg Rules, the 1968 Brussels Protocol, and the 1924 Hague Rules, will become an essential acquisition for all who are concerned with maritime law or the ways by which private law international treaties and

<sup>2</sup> See 49 U.S.C. §20 (11); see also *Missouri Pacific R. v. Elmore & Stahl*, 377 U.S. 134 (1964). There is no evidence in U.S. law or practice that any arguably higher insurance rates that a U.S. rail or motor carrier might pay to cover his insurer's-type liability has had any impact on the amount of that carrier's freight rates for particular commodities.

limitations of liability are made. In addition, the articles and comments, all well organized and well written by internationally recognized authorities, will provide invaluable guidance to lawyers and jurists of all nationalities who will be handling and adjudicating future maritime cargo claims.<sup>3</sup>

The book becomes, of course, all the more valuable should countries move to ratify the rules. By signing on the very last possible day the convention was open to states for that purpose, the United States definitely indicated an intent to ratify. But it will surely not be an easy road either for the executive branch or the Senate. For once again, and despite the fact that the Hamburg Rules represent a signal improvement in international transportation law, ratification will confront the United States with the uniquely provocative question of whether to accept international limitations of liability.

However, there is one critical difference between the coming debate over Hamburg and similar debates of past years. This time, the U.S. Senate cannot, as it has done in the past, simply follow a course of inaction. If the Senate does not choose to advise and consent to Hamburg, then the United States will have no real alternative but to denounce the Hague Rules and repeal the Carriage of Goods by Sea Act. Both of these are almost universally agreed to be seriously outmoded in their limits as well as terms of liability.

It may be fortunate that the United States is now facing much the same difficult choice in the context of whether to accept liability limitations in international air law. Should the United States fail to accept these air liability limitations, it will then have no real alternative but to denounce the half-century-old Warsaw Convention. This reviewer<sup>4</sup> modestly suggests that, confronted with such choices, the United States would probably be best served if it ratified the new limits but at the same time appointed a blue ribbon panel

<sup>3</sup> The only slight defect that this reviewer could find with the book appears in Mankabady's own comprehensive and otherwise excellent introductory comment, where he implies (p. 102) that choice-of-forum clauses in bills of lading are enforced in the United States and that *Muller v. Swedish American Lines, Ltd.*, 224 F. 2d 806 (2d Civ. 1955), is still viable U.S. law on the subject. In fact, *Muller* was expressly overruled by Judge Friendly's decision in *Indussa Corp. v. S. S. Ramborg*, 377 F. 2d 200 (2d Civ. 1967). See Mendelsohn, *Liberalism, Choice of Forum Clauses, and the Hague Rules*, 2 J. MAR. L. & COMM. 661 (1971). While a choice-of-forum clause was upheld in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), it was not in the context of COGSA, and in addition, the contracting parties enjoyed equal bargaining strength. See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 145 n.23 (2d ed. 1975). In any event, the frequently vexatious problem of choice of forum was solved by the Hamburg conferees when they wisely adopted Article 21, providing a plaintiff/claimant with 6 different choices of forum in which to bring suit. This type of plaintiff/claimant choice clause was first proposed by the U.S. Government at the 1967 Brussels Conference for the Convention on Luggage Liability, and it has since become almost standard language in all subsequently adopted private international law limitation conventions. See Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. AIR L. & COMM. 624, 629 (1967). It works effectively to clarify the law, avoid needless litigation, and provide the claimant (whether shipper, consignee, or passenger) with a convenient forum if suit must be brought.

<sup>4</sup> Mr. Mendelsohn was one of the U.S. Government delegates to the 1967 and 1968 Brussels Conferences. In 1969, following entry into the private practice of law, he served as a consultant to UNCITRAL, coauthoring with Professor David Sassoon a comprehensive study on the Hague Rules.

to recommend for this country a definitive future course of action on the broad subject of limitations of liability. Moreover, the terms of reference for such a panel ought to include liability limits under domestic as well as international law and for cargo as well as for personal injury and death.

ALLAN L. MENDELSON  
*Of the District of Columbia Bar*

*Contribution à l'Etude des Accords Culturels vers un Droit International de la Culture.* By Eulalia Ghazali. Grenoble: Service de Reproduction des Thèses de l'Université des Sciences Sociales de Grenoble, 1979. Pp. xiii, 505. Annex.

In this work, the author identifies and analyzes a developing "new domain of public international law," the international law of culture. This body of law is abstracted primarily from bilateral agreements between nations establishing cultural relations during the past century. The book consists of two parts: part I examines general principles, while part II surveys the actual practice of cultural relations under bilateral agreements. The book also contains an ample bibliography and several exhaustive appendixes.

The cultural accords that the author analyzes are classified into four separate historical epochs, each possessing particular characteristics: In the pre-World War I period, very limited cultural exchanges were established by agreement. Those agreements covered such items as the freedom of missionaries to teach and the rights of merchants to maintain their books in native languages. During the period of time between the First and Second World Wars many cultural agreements began to embrace a much larger realm of intellectual cooperation. The third period of development occurred during World War II when the Conference of Allied Ministers of Education met and prepared studies that proposed international cultural cooperation. These studies led to the creation of UNESCO after the war. During this wartime period there was, however, an evident fear that cultural cooperation might be a mask for a kind of cultural aggression, *i.e.*, propaganda. As a result, the conference urged that cultural conventions carefully exclude political and economic matters.

The present period begins with the end of World War II and the formation of UNESCO. In 1966, UNESCO listed a total of 4,600 cultural accords. The current abundance of accords raises the question whether they have the effect of creating any generalized international law. The author concludes that they do, but that it is necessary to distinguish between obligatory norms and ideals, both of which are present in cultural accords. The obligatory norms that are reflected in (and perhaps reinforced by) the cultural accords include: the obligation to refrain from using force, noninterference in matters of self-determination, and cultural sovereignty (pp. 75, 199).

The second part of the book is a study of the actual practice of cultural relations on the basis of general bilateral agreements. The study separates the nations of the world into three groups: countries having a free market economy, countries having a socialist economy, and countries in the process



of development. A sample of the author's conclusions from this study are shared here:

(1) Cultural treaties are bound to be concluded between countries of unequal bargaining strength. This is viewed as a reality of international relations that makes it inappropriate to demand that true reciprocity appear in the agreements (pp. 244, 456).

(2) Socialist countries have concluded more cultural accords among themselves than free market countries have. On the other hand, free market countries have concluded more accords with Third World countries than have socialist countries.

The book is a very valuable aid to anyone who wishes to examine the impact of bilateral cultural arrangements.

HOWARD C. ANAWALT

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*The British Year Book of International Law, 1976-1977*. Vol. 48. Edited by R. Y. Jennings and Ian Brownlie. Oxford: Clarendon Press, 1978. Pp. ix, 466. Index. \$75.

The leading article in this volume of the *British Year Book* is a magisterial study by F. A. Mann of *The Consequences of an International Wrong in International and Municipal Law*. The emphasis is on national law, and, for those familiar with the critical writings of Mann on the act of state doctrine and the *Sabbatino* case, there will be few surprises. A taking of property in violation of international law should be treated as null and void, and the claimant is likewise entitled to specific performance or a declaratory judgment in the event of an internationally unlawful breach of contract. Those who look to sources of international law other than the decisions cited by Mann, such as the Charter of Economic Rights and Duties of States, will of course disagree. Ultimately, the central problem does seem to be one of deciding where we get our law in these days.

James Crawford, whose book *Creation of States in International Law* was published last year, provides an analysis of a topic which has commanded relatively little attention in recent years—*The Criteria for Statehood in International Law*. One of the significant developments to which he calls attention is that UN practice has established something functionally equivalent to the collectivization of recognition (pp. 144-45) and of nonrecognition, as in the case of the South African Bantustans (pp. 176-80). He is on less sure ground when he writes of "international nationality" under the "effective link doctrine" (p. 115) and refers to the "Draft" *Restatement of Foreign Relations Law* (p. 140).

The Vienna Convention on the Law of Treaties, which has just entered into force, leaves many questions about *Reservations to Non-Restricted Multilateral Treaties*. D. W. Bowett tends to favor "objective" determination of the permissibility of reservations, rather than to leave this question to subjective

appreciation by states. One cannot complain if more determinations by international tribunals are called for. It would have been interesting to have had Bowett's observations on the dilemma posed in *Power Authority of the State of New York v. Federal Power Commission*, 247 F. 2d 538 (D.C. Cir. 1957).

Two articles deal with legality in international organizations—the first under that title by Felice Morgenstern and the other on *Ultra Vires Acts in International Organizations—The Experience of the International Labour Organization* by Ebere Osieke of that organization. He concludes by suggesting that international organizations establish “independent judicial machineries, with powers to give binding decisions, for the determination of claims of illegality or unconstitutionality with respect to the acts of international organizations and their organs” (pp. 279–80). A tall order, but a courageous proposal!

Professor Rosalyn Higgins provides a thorough study of *Derogations under Human Rights Treaties*, enriched by analysis of the ample jurisprudence on this subject under the European Convention on Human Rights. There is a need for a further study of how the humanitarian law of war enjambs on human rights law and fills up the gaps left by derogations from human rights conventions.

The volume also contains an appreciation by J. G. Merrills of *Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the International Court of Justice* and a note by Geoffrey Marston on *The Evolution of the Concept of Sovereignty over the Bed and Subsoil of the Territorial Sea*. The latter destroys any illusions the reader may have about the age or systematic development of a concept now firmly rooted in Article 2 of the Geneva Convention on the Territorial Sea of 1958.

The volume contains the usual ample harvest of book reviews and of analyses of the decisions of British courts, the European Court of Human Rights, and the Court of Justice of the European Communities.

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*The British Year Book of International Law*, 1978. Vol. 43. Edited by R. Y. Jennings and Ian Brownlie. Oxford: The Clarendon Press; New York: Oxford University Press, 1979. Pp. ix, 454. Index. \$79.

With the present volume, the *British Year Book* is once again an annual instead of a biennial publication as were the three previous volumes. Its customary high quality is maintained, not only in its articles but in its back two hundred pages of summaries of recent developments in judicial decisions and UK practice. The two European courts (Luxembourg and Strasbourg) are covered as well as the British courts. Five of the seven articles and two of the three notes are by writers outside of the United Kingdom; no one can charge insularity. The contributors are generally well known in the field and nearly all of them have combined scholarly work with practice of one kind or another. Happily, they are not shy about taking clear-cut positions on controversial questions of law and policy.

Derek Bowett, the Whewell Professor-designate at Cambridge, contributes an enlightening piece on the 1977 arbitral decision concerning the continental shelf boundary dispute between Britain and France. The decision is largely concerned with the complex geographical features of the Channel and its southwestern approaches, but Bowett lucidly brings out its significance for other marine boundary disputes, especially in regard to "special circumstances" and equitable considerations. Having argued on the British side (a fact strangely not mentioned here), Bowett is not entirely happy with the decision, which on the whole favored the French claims. But he pays tribute to the "high intellectual quality" and "sophistication of reasoning" of the award and attributes the difficulties he finds mainly to the "inherent" difficulties of marine boundary delimitation. Because no two sets of geographical features and other relevant factors will be alike, Bowett concludes that no arbitral award "can ever be treated as a truly reliable precedent and prediction about the correct and 'equitable' boundary will perforce be hazardous." That may mean that marine boundary disputes will not often be submitted to arbitration or judicial settlement. Lawyers may still play a significant role in negotiation or conciliation, but they will have to steep themselves in the geographical, geological, and economic aspects of the particular situations in order to make a contribution. Bowett's article is an instructive beginning.

Hans Blix, the well-known Swedish international lawyer and a former Foreign Minister, provides a detailed account of the background and drafting of the new rule on "area bombardment," Article 51(5)(a) in Protocol I, adopted in 1977 by the Diplomatic Conference on Humanitarian Law in Armed Conflicts. The rule prohibits all types of bombardment which treat as a single military objective a number of targets separated by some distance in a city or other area with a concentration of civilians. It seeks, in other words, to outlaw "massive," "target area" or "carpet" bombing by air or artillery. Blix was a leading proponent of the new rule in the conference and he does not hide his strong commitment to that rule and to other prohibitions of indiscriminate warfare. Nonetheless, he fairly presents other views and indicates the complexity and uncertainties involved in the result.

Another "committed" scholar, Lucius Caflisch of Geneva, takes up the cause of the landlocked states in their quest for secure rights to access to the sea. Caflisch as a Swiss delegate to UNCLOS has been in the thick of the fray for the landlocked states. His article is admirably comprehensive and concise, covering customary rules, existing conventions, and the draft articles in the UNCLOS negotiating text. Although the proposed new rules are shown to fall short of the landlocked states' desire, they are still much better than the 1958 convention or what can be obtained generally in bilateral negotiations. Unlike some other provisions of the ICNT draft, these rules are not likely to gain acceptance as customary law should the conference fail, since transit states will shun them in that event. Hence the landlocked states have a strong interest in the success of the conference. Never again, Caflisch says, will they have a better opportunity to exercise leverage to improve their transit situation.

Felice Morgenstern of the ILO takes a broad look at problems of international lawmaking, noting various shortcomings in the international legislative process. In the tradition of Wilfred Jenks, she calls for intellectual efforts by international lawyers and other specialists to bring about greater coherence and effectiveness of lawmaking treaties. She raises important questions about the need and utility of the growing number of treaties as well as about technical methods of treaty drafting. It is a thoughtful and timely article.

Two articles deal with more specific issues of the law of treaties. D. M. McRae of British Columbia makes a useful contribution by analyzing the legal effects of interpretive declarations, an increasingly common device to which no reference is made in the Vienna Convention. Theodor Meron of New York University examines the significance of Article 46 of the Vienna Convention in respect to two recent treaties which raised questions of conformity with constitutional prescriptions for concluding treaties. One of the treaties was the Sinai II Agreements of 1975. The legislative counsel of the Senate concluded that the agreement should have been submitted as a treaty rather than an executive agreement; that Israel should have known of the constitutional defectiveness of the agreement; and therefore that the United States is not bound by the agreement in keeping with Article 46. Meron disagrees, citing the much quoted comment of Louis Henkin that "since no one can say with certainty" when the consent of the Senate to an agreement is required, failure to obtain such consent cannot be manifest. The issue is more difficult for Meron in regard to the Panama Canal Treaties and the Panamanian constitutional requirement of approval by a plebiscite. The Panamanian Government considered that the amendments, understandings, and reservations adopted by the Senate after the plebiscite could be accepted by Panama without a plebiscite. Meron has doubts about the Panamanian Government's arguments in view of the modifications made by the United States. However, since Panama publicly advised the U.S. Government that a second plebiscite was not necessary, it would be hard for a future Panamanian Government to argue that violation of its Constitution was manifest. Despite the logic in both cases, it still remains to be seen whether Article 46 may be invoked by a successor government to declare a constitutional interpretation by its predecessor government a manifest violation invalidating its consent.

The volume also includes an article on the *Western Sahara* ICJ decision by Malcolm Shaw of Liverpool Polytechnic. Shaw is critical of the Court's reasoning in finding legal ties of a nonterritorial character between some tribes and the Sultan of Morocco, a flaw which in his view unfortunately gave Morocco an opportunity to assert legal authority for its territorial claim and to reject self-determination. The author notes with approval the Court's emphasis on self-determination as a legal right in the context of decolonization. He regrets that the Court did not examine more directly the intertemporal law issue on the question of which legal ties in the 1880's may be relevant to self-determination in the 1970's.

There are brief interesting notes on the dilemma of the British fishing

industry in the light of fishing zones and related developments (by Joyce Gutteridge) and on the new Swiss constitutional provisions governing the optional and mandatory submission of treaties to a popular referendum (by Georges Malinverni of the University of Geneva).

The 28 book reviews include German and French as well as English books but surprisingly no works in other languages. This is surely a shortcoming that should be remedied in future volumes.

OSCAR SCHACHTER

### BRIEFER NOTICES

*The United Nations: How It Works and What It Does.* By Evan Luard. (New York: St. Martin's Press, 1979. Pp. 187. Index. \$18.95.) This book is exactly what the subtitle indicates. It is a highly knowledgeable, realistic—yet positive—review and assessment of the United Nations and, to a limited extent, of the specialized agencies. The author's mastery of the subject and felicitous style convey a surprising amount of information and a depth of judgment with great economy. Convenient for use in courses on international organization, the book also speaks to the interested citizen. The reviewer would particularly recommend it to individuals connected officially or otherwise professionally concerned with the United Nations as affording a fresh perspective at a time when the Organization suffers from a general underestimation of its significance and potential.

Conventional in its organization, the book treats in turn the Security Council, the General Assembly, ECOSOC, the World Court and the International Law Commission, the Secretariat, and the Budget. The penultimate chapter is a perceptive discussion of the political climate surrounding the United Nations' operations with particular emphasis on North-South issues, which the author regards as constituting "the most important confrontation in the modern international community."

The final chapter offers modest suggestions for reform, keeping in mind that the United Nations, in the absence of superior power in relation to its members, "must therefore depend . . . on the development of its influence." In the political realm this means that the United Nations cannot be expected to impose solutions through instant resolution; rather, its role is to promote "a balance of interests" and "accommodations" through encouragement of negotiation and diplomacy. In what the author calls the practical realm, he counsels continuing and increasing emphasis on global problems of development, population, environment, the deep seabed, etc., whereby "the UN could then be placed in its proper context: as part of a complex system of international government that already affects every major area of human activity." Included in this wider context would be the redress of disparities between nations that "are infinitely more glaring, and the cause of infinitely greater hardship, than those which exist within states."

EDWARD H. BUEHRIG

*Indiana University at Bloomington*

*Le Nazioni Unite* (3d ed.). By Benedetto Conforti. (Padua: CEDAM, 1979. Pp. xvi, 299. Index: L.9,800.) Is it worth the effort to study the structure and competence of the United Nations from a juridical point of view? Is it fruitful to examine the substantive and procedural rules to which the organs should adhere, given the fact that political considerations tend more and more to dominate the Organization, especially in the General Assembly, which often seems to want to act in an unrestrained and fanciful way? These questions are posed by Benedetto Conforti in the introduction of this excellent study of the United Nations.

His answer obviously is yes; he rightly believes that there would be great value in elaborating the actions of the United Nations that have deviated from its legal principles and in demonstrating a concomitant ability to develop new rules of international behavior. Although rigidly organized, Conforti's work is not a formalistic study, but rather a painstaking effort to examine the dynamics of the constitution of the Organization in the light of its practice since 1945.

In the introduction and the four chapters that deal with the membership, the organs, the purposes, and the actions of the United Nations, the author has not only provided a detailed description of the Charter provisions and their origins, but also the sequential practice of the Organization when faced with problems of interpretation, the lack of adequate legislative history, judicial reference, or administrative precedent. For example, Conforti elaborates the juridical requirements for admission to the Organization, then examines in detail the subsequent practice with regard to mini-states, neutral states, conditional admission, readmission, suspension of membership, changes of government, governments in exile, and acceptance of credentials. Another illustration of the scope and careful detail of this work is the chapter on the organs of the United Nations in which Conforti first describes the structure and powers of the Security Council and then examines in scrupulous order the voting procedures, the use of the veto, abstention, the "double veto," approval by consensus, and finally, the participation of nonmembers in the Council.

A rich bibliography conveniently precedes every section in each of the chapters, which is of substantial value to any student of these subjects. In sum, this is a remarkably well-organized, keenly analytical book on the United Nations, illuminating its constitution and the political practice that has inexorably interpreted, amended, or created international legal norms. With its fine detail and judicious exposition, the work would be a worthy addition to the library of all serious scholars of the United Nations.

GERARD J. MANGONE  
*University of Delaware*

*Netherlands Yearbook of International Law. Vol. IX.* T. M. C. Asser Institute, The Hague. Published under the auspices of the Interuniversity Institute for International Law. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979. Pp. 438. Index.) As in prior years, this useful overview of Dutch materials on international law includes six categories of items: signed articles, a synopsis of Dutch state practice, a list of treaties to which the Netherlands is a party, a digest of Dutch judicial decisions, a bibliography of Dutch scholarly literature, and a summary of Dutch municipal legislation with international impact.

The articles cover "How is international law made?"; the Netherlands Antilles and the Warsaw Convention of 1929 on air transport; the legal nature of rights granted by the 1966 Covenant on Economic, Social, and Cultural Rights; and developments relating to humanitarian rules in armed conflicts.

Interesting policy statements relate to transnational corporations (pp. 204-05) and most-favored-nation clauses (pp. 237-44). In recommending approval of the Covenant on Civil and Political Rights to Parliament, a number of reservations were noted, including one permitting removal of obstreperous defendants from the courtroom (pp. 218-19). In commenting on a German proposal against taking hostages, the Dutch representative objected to the word "innocent" before "hostages" in the draft: "The implication that there are other hostages than innocent hostages should be avoided" (p. 233).

Among judicial decisions involving the Covenant on Human Rights were holdings that the right to freedom of expression did not prevent limitations upon the granting of broadcasting licenses (pp. 303-04, 309); and that an Irishman robbing a post office to get money to buy weapons to drive the English from Northern Ireland could not escape extradition because of poor health resulting from a hunger strike (pp. 293-95). Similarly, a German who killed a policeman in Utrecht could not escape punishment on the theory that he was a belligerent combatant in a class war directed not only against his own country but against every nation in the world where such a class war is going on (pp. 348-51). Nor was it inhuman punishment to suspend a drunk driver's license for 5 years after an accident causing serious injuries even if it meant that he would lose his job as a truck driver for the rest of his life, "given his age and the current pattern of unemployment" (p. 310). Likewise, it did not constitute inhuman punishment to fail to release a war crimes prisoner whose death sentence was commuted to life imprisonment even though he had been confined since 1945 (pp. 332-37). In another war crimes case, a Dutch national who killed 20 or 30 civilians in Poland in 1941 was sentenced to 15 years' imprisonment (pp. 337-48).

EDWARD DUMBAULD  
*U.S. Senior District Judge*

*The Creation of States in International Law.* By James Crawford. (Oxford: Clarendon Press, 1979. Pp. xxvii, 498. Index. \$48.) James Crawford belongs to this distinguished group of Australian international lawyers who have contributed so much to international law in general and Anglo-American law in particular. Judging from the scholarly thoroughness by which the book under review was researched and written, one can predict with certainty that Crawford will fill decisively the vacuum left by the recent great loss of Professor D. P. O'Connell.

The book covers exhaustively the whole subject of creation of states in international law. It starts with a conceptual analysis of statehood in early and modern international law. As is to be expected, it supports the declaratory rather than constitutive theory of recognition. The analysis of the criteria of statehood follows traditional lines but includes an interesting chapter on the special status of Taiwan, the Vatican City and the Holy See,

the free city of Danzig, and Cyprus. The concept and criteria of statehood are followed by an examination of the international processes that lead to the creation of new states. Such processes include the original acquisition of statehood by native communities, the creation and status of dependent states (*e.g.*, protectorates and protected states), and the formation of states by devolution, secession, and the termination of mandates, international trusteeships, and other forms of dependence. Any modern book on statehood must devote a separate chapter to the category of 'divided states' and to the special problems to which they give rise. The book deals succinctly, but fully, with the two Germanys and the status of Berlin, the two Koreas, and the two Vietnams. As mentioned above, Taiwan and its relation to the People's Republic of China are discussed in the chapter on special status of certain territorial areas.

Nothing is said in the book about the 'Palestinians' aspirations to the creation of an independent Palestine. While the problem is essentially political, it could have been included as a future speculative area of application of the international law principles on statehood. Is the failure to discuss the problem an indication that the author subscribes to the British rather than the American approach to a purist (nonpolitical) public international law?

GEORGE A. ZAPHIRIOU

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*Collected Legislation of the Union of Soviet Socialist Republics and the Constituent Union Republics.* By William E. Butler. (Dobbs Ferry: Oceana Publications, Inc., 1979. Looseleaf binder 1 of four projected binders. \$75 per binder.) William E. Butler has embarked upon a massive project: to translate the bulk of Soviet legislation needed by practitioners and academics who cannot read Russian. The volume under review is the first of several which he promises to update periodically. Butler is widely known for his compendia of Soviet legislation, bibliography, and teaching materials in Soviet law that issue regularly from the Faculty of Laws of University College, London. He has exhibited unparalleled skill in translating and interpreting not only Soviet municipal law, but international public and private law as well. This first volume of the series is a notable achievement, as it covers not only constitutional fundamentals but also laws on economic, environmental, and national security, foreign trade, legal institutions, and treaty matters. Each translation is accompanied by citations to sources of originals and to Butler's previous writing on the topic, where appropriate.

Since Soviet lawmakers have promised for the near term a systematized publication in some 80 volumes of previously scattered sources and Butler expects to keep up with a goodly selection of these, the enormity of his task is self-evident. He and his publishers are deserving of praise for undertaking the project, which promises to help not only those illiterate in Russian but even the specialists who will welcome this convenient source against which to check their own versions.

JOHN N. HAZARD

*Board of Editors*

*The West Bank and Gaza: Toward the Making of a Palestinian State.* By Emile A. Nakleh. (Washington, D.C.: American Enterprise Institute, 1979. Pp. 64.



\$3.25.) Professor Nakleh's fieldwork in the West Bank and Gaza in the period before and then briefly after the Camp David Accords leads him to believe that a moderate and realistic sense of accommodation with Israel pervades the West Bank elite. But prerequisites for building this disposition into meaningful settlement, according to Nakleh, include termination of the occupation and an Israeli commitment to ultimate Palestinian sovereignty of the area. The author describes in some detail the network of West Bank and Gaza voluntary self-help associations which have expanded since 1967; they could provide the infrastructure of a new Palestinian Government's social and welfare ministries. Despite the stimulus that occupation may have had on the formation of these organizations, Nakleh contends, on the basis of his field research, that Israeli occupation has impeded effective local government and autonomy.

Sharpness of detail in this book has been purchased at substantial cost: the views of several critical groups are not considered. The work does not explore PLO views or perspectives of refugees outside the occupied areas. Nor apparently were interviews conducted with the Israeli elite. These focal restrictions cannot but have some effect on the realism of the enterprise. This is a moderate and optimistic essay which will be useful to those working academically and professionally in this area.

MICHAEL REISMAN  
*Board of Editors*

*Der vertragliche Schutz ethnischer, sprachlicher und religiöser Minderheiten im Völkerrecht.* By Erich H. Pircher. (Bern: Verlag Stämpfli, 1979. Pp. 336. Sw.F.65.) While, during the period between the two world wars, the question of minorities—or to be more precise the question of the international protection of minorities—was dealt with extensively in legal literature, it did not receive, following the Second World War, the attention that it deserved. Lately there appears to be a renewal of interest in the subject, and this time regarding states throughout the world, rather than restricted, as previously, to the geographical confines of Eastern and southeastern Europe.

The purpose of the volume under review, which was written as a doctoral thesis at the University of Zürich, is to provide a comprehensive survey of the bilateral and multilateral international instruments which aimed in the past—or aim today—at the protection of ethnic, linguistic, and religious minorities, and to furnish a concise analysis of the relevant provisions embodied in these instruments.

After a short introduction, in which the terms "minority," "ethnic," etc., are discussed and defined, the author examines the instruments in question and classifies them under four sections: (1) instruments concluded from the Reformation till the First World War; (2) instruments concluded during the period of the League of Nations (under the auspices of the League and outside it); (3) the treaties on exchange of populations concluded during the Second World War; and (4) the instruments adopted after the Second World War in the framework of the United Nations, the International Labor Organization, and UNESCO, as well as the treaties signed outside these organizations.

Some of the instruments explicitly refer to minority groups as legally recognized entities, or to their members as individuals; several of those

instruments are intended to ensure the minorities, in addition to the rights accorded to the population as a whole, the special right to enjoy their own culture, to profess and practice their own religion, and to use their own language ("direct protection" in the author's terminology). The other instruments do not mention minorities; they aim at the protection of fundamental human rights and freedoms, including equality and nondiscrimination, guaranteed to all citizens without reference to their membership in a majority or in a minority ("indirect protection" in the author's nomenclature).

The author remarks in his preface that the "work deals . . . less with theoretical legal questions, but much more with the norms of positive law" (*positivrechtliche Aspekte*). This being the approach adopted by the author, no doctrinal innovation should be sought in the book. It is a well-documented and well-organized informative analysis of the numerous bilateral and multilateral international instruments drafted in the field of the protection of minorities from the Peace of Augsburg of 1555 until the present day.

NATHAN FEINBERG

*The Hebrew University, Jerusalem, Emeritus*

*Recht über See. Festschrift. Rolf Stödter zum 70. Geburtstag am 22. April 1979.* Edited by Hans Peter Ipsen and Karl-Hartmann Necker. (Heidelberg: R. v. Decker's Verlag, G. Schenck, 1979. Pp. xxiv, 400. DM 118.) Professor Stödter's career is not that of the average academician; he has been active and responsible in the German Shipowners Association, in the Hamburg and the International Chambers of Commerce, and in many other business organizations, and he is a shipowner himself. A volume of speeches and articles published shortly before this *Festschrift* shows the variety of his interests and competences (*Am Tor der Welt, Reden und Aufsätze über Wirtschaftspolitik und Schiffahrtspolitik*, 1979).

So it is natural that the volume reviewed here covers a wide field of maritime law, private and public. Among the contributions the following will interest the public international lawyer.

Rudolf Bernhardt (pp. 155-66) tackles the difficult problem of customary law, its rise and its fall, with regard to the law of the sea. He concludes that the 12-mile territorial sea and the continental shelf must be accepted as positive new law, but that the 200-mile economic zone and the interdiction of individual deep sea mining cannot be accepted yet. A parallel to this article is that of Ulrich Scheuner (pp. 287-313) on new trends in the law of maritime warfare. Hans Jürgen Stöcker (pp. 315-53) and Count Vitzthum (pp. 355-92) write more directly on themes of the United Nations Conference on the Law of the Sea. Stöcker utters misgivings from the viewpoint of commercial shipping, and Count Vitzthum from that of deep sea mining.

The position of the European Community with regard to problems of maritime law is discussed by Hans Peter Ipsen (pp. 167-207), and a special point, namely the possible participation of the European Community in the Helsinki Convention of March 22, 1974 on environmental protection in the Baltic Sea, is raised by Claus Arndt (pp. 133-46).

Diplomatic protection of ships is explained by Ingo von Münch (pp. 231-50), and Herbert Krüger inquires into the constitutions of overseas

states for dispositions concerning world economic order and sea traffic (pp. 209–30).

F. MÜNCH  
Heidelberg

*Die Hoheitsverhältnisse am Bodensee unter besonderer Berücksichtigung der Schifffahrt.* By Claudius Graf-Schelling. (Zürich: Schulthess Polygraphischer Verlag, 1978. Pp. xx, 124. Sw.F.39.) In his well-documented dissertation the author succeeds in describing as clearly as possible the rather intricate legal situation of Lake Constance in public international law. Although Lake Constance has been an object of public international law since at least 1648 (the year Switzerland left the old German Reich), and despite some hundred years of state practice and writing, some legal uncertainties have not been removed.

The book is divided into three chapters. In the first one the author explores the legal setting of navigation on the lake starting with the early Middle Ages and concludes with a thorough discussion of the history and contents of the new treaty system. This "system" consists of three separate treaties that regulate navigation on the lake itself, on the so-called Untersee, (the Rhine between Konstanz and Schaffhausen), and on the so-called Alte Rhein. The treaty was signed on June 1, 1973, by the Federal Republic of Germany, Switzerland (parties to all three treaties), and Austria (party to only the first, the "main" treaty) (pp. 3–27). In the second and longest chapter (pp. 28–103), the author offers a succinct and pertinent analysis of the status of Lake Constance as far as territorial sovereignty is concerned. He makes it quite clear that even today neither treaty law, nor custom, nor general principles of law give a definite answer to this basic question, and that all the theories developed fall short of the necessary acceptance by the practice of the riparian states. The third and final chapter (pp. 104–16) is devoted to a short outlook *de lege ferenda*, i.e., to the possibilities and the shape of another, more comprehensive treaty settlement, including a solution to the question of territorial sovereignty as well.

Even if there is nothing really new about the arguments presented and the results reached, Graf-Schelling's study is by far the most comprehensive, the most elaborate, and the most thought-out piece of research done so far on Lake Constance. All scholars working on this subject can take advantage of its obvious reliability.

WILHELM A. KEWENIG  
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*Le Droit à la Santé en tant que droit de l'homme. Colloque, La Haye, 27-29 juillet 1978.* Edited by René-Jean Dupuy. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979. Pp. xiii, 500.) This book reproduces the material of a workshop on "The Right to Health as a Human Right," organized by the Hague Academy of International Law and the United Nations University in 1978. Representing an interdisciplinary approach, the meeting, at which over 40 people assembled, included jurists, physicians, economists, sociologists, and even one theologian from the Vatican.

The book, partly in French and partly in English, is composed of three parts: on the fundamental concepts of the right to health; on international

action for the implementation of the right to health; and on the right to health and protection of the human environment. Obviously, only part of the material is legal, and therefore of interest here.

In this realm one has to draw attention to M. Bothe's paper on *Les concepts fondamentaux du droit à la santé. Le point de vue juridique*. An erudite, short introduction to both comparative national and international protection of the right to health, it also calls for a few remarks. Written, as it is, by a German jurist, one wonders why the phenomenon of *Drittwirkung* is not even touched upon when the "negative aspect" of the right to health is discussed. One is a bit disturbed by the rather vague reference to "les expériences choquantes de la seconde guerre mondiale" (p. 16). On page 17 there is a reference, among other things, to the Constitution of Sweden allegedly not including "social clauses," yet the 1974 Swedish Constitution contains pertinent brief provisions in its chapter I, paragraph 2. Further, one does not understand why, when comparing the International Covenant on Economic, Social and Cultural Rights with the European Social Charter, there is reference (pp. 20, 21) to the latter as allegedly providing "*en plus, le droit à la sécurité sociale, à l'assistance sociale et médicale,*" etc. (*italics added*), while, in fact, these rights are also included "for everyone," within the broad formulation of Article 9 of the Covenant.

One other paper should at least be mentioned: the one submitted by the Division of Human Rights in the UN Secretariat and presented by its Director Th. C. van Boven, dealing with the international universal protection of the right to health. It offers a very handy stocktaking of the respective international legal material and of certain other relevant efforts within the UN system.

In sum, the book represents a useful new endeavor and may serve as a standard reference for the next decade—or longer.

RICHARD SZAWLOWSKI  
Vancouver, British Columbia

*Los Recursos Naturales Compartidos entre Estados y el Derecho Internacional*. By Julio A. Barberis. (Madrid: Editorial Tecnos, 1979. Pp. 181. Index.) Barberis's book is a well-organized, compact study of the rules of modern international law concerning "shared resources." In this term are included international rivers, mineral resources that lie within the territory of more than one state, migratory creatures, and the world's atmosphere.

Three principal norms have become the international law of shared resources, according to the author. These are: (1) an obligation not to cause damage to another state or states similarly situated; (2) a rule of equitable and reasonable exploitation of the resource; and (3) the requirement of an interchange of information and previous consultation. Barberis says that these basic rules have their sources in a variety of treaties, which he cites; in custom, of which he gives examples; and in resolutions he cites that have been passed by various international organizations.

In his study of each of the four principal shared resources, the author shows a parallel development of these norms. In the section on international rivers, for example, coverage is given both to contamination problems and to equitable and reasonable use of a scarce resource, which brings him to

the rule of communication (interchange of information and previous consultation). The treatment given to mineral resources and migratory creatures is similar. In the section on the atmosphere, he covers the development of rules concerning contamination, noise, and climatic modification. A concluding chapter has a descriptive discussion of the law of shared resources in general.

Barberis's work will be useful to foreign offices, developers, practitioners, and educators. It is recommended for their libraries as a good reference work on modern developments in the field.

FREDERIC A. WEED  
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### BOOKS RECEIVED\*

#### *International Trade & Finance*

- Gardner, Richard N. *Sterling-Dollar Diplomacy in Current Perspective. The Origins and the Prospects of our International Economic Order.* (New, expanded edition with revised introduction.) New York: Columbia University Press, 1980. Pp. xlix, 423. Index. \$25, cloth; \$7.50, paper.
- Glick, Leslie Alan. *Trading with Saudi Arabia. A Guide to the Shipping, Trade, Investment, and Tax Laws of Saudi Arabia.* Montclair, N.J.: Allanheld Osmun & Co.; London: Croom Helm, 1980. Pp. xv, 595. Appendixes. \$55.
- Preliminary Chapter on the People's Republic of China* (2d ed.). Part of the loose-leaf work *Taxes and Investment in Asia and the Pacific*. Amsterdam: International Bureau of Fiscal Documentation, 1979. Dfl.95.
- Mansfield, Peter (ed.). *The Middle East. A Political and Economic Survey* (5th ed.). Oxford: Oxford University Press, 1980. Pp. ix, 579. Index. \$29.95.
- Meyer-Wöbse, Gerhard. *Rechtsfragen des Exports von Kernanlagen in Nichtkernwaffenstaaten.* (Vol. 62 in the series *Studien zum Internationalen Wirtschaftsrecht und Atomenergierrecht.*) Cologne: Carl Heymanns Verlag, 1979. Pp. xxi, 120.
- The World Bank. *World Development Report, 1979.* New York: Oxford University Press, 1979. Pp. ix, 188. \$9.95, cloth; \$3.50, paper.

#### *Human Rights*

- Council of Europe. *Yearbook of the European Convention on Human Rights/Annuaire de la Convention Européenne des Droits de l'Homme*, Vol. 21. The Hague, Boston, and London: Martinus Nijhoff, 1979. Pp. xvii, 844. Indexes. Gld.295; \$155.25.
- Finnis, John. *Natural Law and Natural Rights.* Oxford: Clarendon Press, 1980. Pp. xv, 425. Index. \$39, cloth; \$19.50, paper.
- Reinhard, Hans. *Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht.* (Vol. 74 in the series *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht.*) Berlin, Heidelberg, and New York: Springer-Verlag, 1980. Pp. xiii, 373. DM 86; \$48.20.
- Zanghì, Claudio (ed.). *La Protezione Internazionale dei Diritti dell'Uomo.* Rome: Servizi Informazioni e Proprietà letteraria, 1979. Pp. 359.

#### *International Organizations*

- Blanpain, Roger. *The OECD Guidelines for Multinational Enterprises and Labour Relations 1976-1979. Experience and Review.* Denter: Kluwer, 1979. Pp. 309. Index. Dfl.88.40.
- Higgins, Rosalyn. *United Nations Peacekeeping 1946-1967. Documents and Commentary, Vol. 3: Africa.* Issued under the auspices of the Royal Institute of International Affairs. Oxford: Oxford University Press, 1980. Pp. xiii, 472. Index. \$87.

\* Mention here neither assures nor precludes later review.

*Taxation, Patents, and Copyright Law*

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## OFFICIAL DOCUMENTS

### CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA *v.* IRAN)

### INTERNATIONAL COURT OF JUSTICE

### JUDGMENT\*

*Present: President* SIR HUMPHREY WALDOCK; *Vice-President* ELIAS; *Judges* FORSTER, GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, TARAZI, ODA, AGO, EL-ERIAN, SETTE-CAMARA, BAXTER; *Registrar* AQUARONE.

In the case concerning United States Diplomatic and Consular Staff in Tehran,

*between*

the United States of America,

represented by

The Honorable Roberts B. Owen, Legal Adviser, Department of State,  
as Agent;

H. E. Mrs. Geri Joseph, Ambassador of the United States of America  
to the Netherlands,  
as Deputy Agent;

Mr. Stephen M. Schwebel, Deputy Legal Adviser, Department of State,  
as Deputy Agent and Counsel;

Mr. Thomas J. Dunnigan, Counsellor, Embassy of the United States  
of America,  
as Deputy Agent;

assisted by

Mr. David H. Small, Assistant Legal Adviser, Department of State, Mr.  
Ted. L. Stein, Attorney-Adviser, Department of State, Mr. Hugh V.  
Simon, Jr., Second Secretary, Embassy of the United States of America,  
as Advisers,

*and*

the Islamic Republic of Iran,

THE COURT,

composed as above,

*delivers the following Judgment:*

1. On 29 November 1979, the Legal Advisor of the Department of State of the United States of America handed to the Registrar an Application

\* Dated May 24, 1980. Judge Lachs appended a separate opinion, and Judges Morozov and Tarazi appended dissenting opinions to the Judgment of the Court. The text reprinted here is taken from the Court's mimeographed version; it has since been printed as [1980] ICJ REP. 3.



instituting proceedings against the Islamic Republic of Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals.

2. Pursuant to Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, of the Rules of Court, the Application was at once communicated to the Government of Iran. In accordance with Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, the Secretary-General of the United Nations, the Members of the United Nations, and other States entitled to appear before the Court were notified of the Application.

3. On 29 November 1979, the same day as the Application was filed, the Government of the United States filed in the Registry of the Court a request for the indication of provisional measures under Article 41 of the Statute and Article 73 of the Rules of Court. By an Order dated 15 December 1979, and adopted unanimously, the Court indicated provisional measures in the case.

4. By an Order made by the President of the Court dated 24 December 1979, 15 January 1980 was fixed as the time-limit for the filing of the Memorial of the United States, and 18 February 1980 as the time-limit for the Counter-Memorial of Iran, with liberty for Iran, if it appointed an Agent for the purpose of appearing before the Court and presenting its observations on the case, to apply for reconsideration of such time-limit. The Memorial of the United States was filed on 15 January 1980, within the time-limit prescribed, and was communicated to the Government of Iran; no Counter-Memorial was filed by the Government of Iran, nor was any agent appointed or any application made for reconsideration of the time-limit.

5. The case thus became ready for hearing on 19 February 1980, the day following the expiration of the time-limit fixed for the Counter-Memorial of Iran. In circumstances explained in paragraphs 41–42 below, and after due notice to the Parties, 18 March 1980 was fixed as the date for the opening of the oral proceedings; on 18, 19 and 20 March 1980, public hearings were held, in the course of which the Court heard the oral argument of the Agent and Counsel of the United States; the Government of Iran was not represented at the hearings. Questions were addressed to the Agent of the United States by Members of the Court both during the course of the hearings and subsequently, and replies were given either orally at the hearings or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

6. On 6 December 1979, the Registrar addressed the notifications provided for in Article 63 of the Statute of the Court to the States which according to information supplied by the Secretary-General of the United Nations as depositary were parties to one or more of the following Conventions and Protocols:

- (a) the Vienna Convention on Diplomatic Relations of 1961;
- (b) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes;
- (c) the Vienna Convention on Consular Relations of 1963;

(d) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes;

(e) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

7. The Court, after ascertaining the views of the Government of the United States on the matter, and affording the Government of Iran the opportunity of making its views known, decided pursuant to Article 53, paragraph 2, of the Rules of Court that copies of the pleadings and documents annexed should be made accessible to the public with effect from 25 March 1980.

8. In the course of the written proceedings the following submissions were presented on behalf of the Government of the United States of America:

in the Application:

"The United States requests the Court to adjudge and declare as follows:

(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts, violated its international legal obligations to the United States as provided by

- Articles 22, 24, 25, 27, 29, 31, 37 and 47 of the Vienna Convention on Diplomatic Relations,
- Articles 28, 31, 33, 34, 36 and 40 of the Vienna Convention on Consular Relations,
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and
- Articles II(4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran,
- and
- Articles 2(3), 2(4) and 33 of the Charter of the United Nations;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates";

in the Memorial:

"The Government of the United States respectfully requests that the Court adjudge and declare as follows:

(a) that the Government of the Islamic Republic of Iran, in permitting, tolerating, encouraging, adopting, and endeavouring to exploit, as well as in failing to prevent and punish, the conduct described in the Statement of the Facts, violated its international legal obligations to the United States as provided by:

- Articles 22, 24, 25, 26, 27, 29, 31, 37, 44 and 47 of the Vienna Convention on Diplomatic Relations;
- Articles 5, 27, 28, 31, 33, 34, 35, 36, 40 and 72 of the Vienna Convention on Consular Relations;
- Articles II(4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran; and
- Articles 2, 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(b) that, pursuant to the foregoing international legal obligations:

(i) the Government of the Islamic Republic of Iran shall immediately ensure that the premises at the United States Embassy, Chancery and Consulates are restored to the possession of the United States authorities under their exclusive control, and shall ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law;

(ii) the Government of the Islamic Republic of Iran shall ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or who are or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law;

(iii) the Government of the Islamic Republic of Iran shall, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran;

(iv) the Government of the Islamic Republic of Iran shall, in affording the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled, including immunity from any form of criminal jurisdiction, ensure that no such personnel shall be obliged to appear on trial or as a witness, deponent, source of information, or in any other role, at any proceedings, whether formal or informal, initiated by or with the acquiescence of the Iranian Government, whether such proceed-

ings be denominated a 'trial', 'grand jury', 'international commission' or otherwise;

(v) the Government of the Islamic Republic of Iran shall submit to its competent authorities for the purpose of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and premises of the United States Embassy and Consulates in Iran;

(c) that the United States of America is entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation by the Islamic Republic of Iran for the violations of the above international legal obligations which it owes to the United States, in a sum to be determined by the Court at a subsequent stage of the proceedings."

9. At the close of the oral proceedings, written submissions were filed in the Registry of the Court on behalf of the Government of the United States of America in accordance with Article 60, paragraph 2, of the Rules of Court; a copy thereof was transmitted to the Government of Iran. Those submissions were identical with the submissions presented in the Memorial of the United States.

10. No pleadings were filed by the Government of Iran, which also was not represented at the oral proceedings, and no submissions were therefore presented on its behalf. The position of that Government was, however, defined in two communications addressed to the Court by the Minister for Foreign Affairs of Iran; the first of these was a letter dated 9 December 1979 and transmitted by telegram the same day (the text of which was set out in full in the Court's Order of 15 December 1979, *I.C.J. Reports* 1979, pages 10-11); the second was 17 March 1980, the text of which followed closely that of the letter of 9 December 1979 and reads as follows:

[*Translation from French*]

"I have the honour to acknowledge receipt of the telegram concerning the meeting of the International Court of Justice to be held on 17 March 1980 at the request of the Government of the United States of America, and to set forth for you below, once again, the position of the Government of the Islamic Republic of Iran in that respect:

The Government of the Islamic Republic of Iran wishes to express its respect for the International Court of Justice, and for its distinguished Members, for what they have achieved in the quest for a just and equitable solution to legal conflicts between States, and respectfully draws the attention of the Court to the deep-rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran.

The Government of the Islamic Republic of Iran considers that the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it, and in the most significant fashion, a case confined to what is called the question of the 'hostages of the American Embassy in Tehran'.

For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years.

With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction. Furthermore, since provisional measures are by definition intended to protect the interest of the parties, they cannot be unilateral, as they are in the request submitted by the American Government."

The matters raised in those two communications are considered later in this Judgment (paragraphs 33-38 and 81-82).

11. The position taken up by the Iranian Government in regard to the present proceedings brings into operation Article 53 of the Statute, under which the Court is required *inter alia* to satisfy itself that the claims of the Applicant are well founded in fact. As to this article the Court pointed out in the *Corfu Channel* case that this requirement is to be understood as applying within certain limits:

"While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded." (*I.C.J. Reports 1949*, p. 248.)

In the present case, the United States has explained that, owing to the events in Iran of which it complains, it has been unable since then to have access to its diplomatic and consular representatives, premises and archives in Iran; and that in consequence it has been unable to furnish detailed factual evidence on some matters occurring after 4 November 1979. It mentioned in particular the lack of any factual evidence concerning the treatment and conditions of the persons held hostage in Tehran. On this point, however, without giving the names of the persons concerned, it has submitted copies of declarations sworn by six of the 13 hostages who had been released after two weeks of detention and returned to the United States in November 1979.

12. The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries. They have been presented to the Court by the United States in its Memorial,

in statements of its Agents and Counsel during the oral proceedings, and in written replies to questions put by Members of the Court. Annexed or appended to the Memorial are numerous extracts of statements made by Iranian and United States officials, either at press conferences or on radio or television, and submitted to the Court in support of the request for provisional measures and as a means of demonstrating the truth of the account of the facts stated in the Memorial. Included also in the Memorial is a "Statement of Verification" made by a high official of the United States Department of State having "overall responsibility within the Department for matters relating to the crisis in Iran". While emphasizing that in the circumstances of the case the United States has had to rely on newspaper, radio and television reports for a number of the facts stated in the Memorial, the high official concerned certifies that to the best of his knowledge and belief the facts there stated are true. In addition, after the filing of the Memorial, and by leave of the Court, a large quantity of further documents of a similar kind to those already presented were submitted by the United States for the purpose of bringing up to date the Court's information concerning the continuing situation in regard to the occupation of the Embassy and detention of the hostages.

13. The result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both Iranian and United States authorities. So far as newspaper, radio and television reports emanating from Iran are concerned, the Court has necessarily in some cases relied on translations into English supplied by the Applicant. The information available, however, is wholly consistent and concordant as to the main facts and circumstances of the case. This information, as well as the United States Memorial and the records of the oral proceedings, has all been communicated by the Court to the Iranian Government without having evoked from that Government any denial or questioning of the facts alleged before the Court by the United States. Accordingly, the Court is satisfied that, within the meaning of Article 53 of the Statute, the allegations of fact on which the United States bases its claims in the present case are well founded.

14. Before examining the events of 4 November 1979, directly complained of by the Government of the United States, it is appropriate to mention certain other incidents which occurred before that date. At about 10.45 a.m. on 14 February 1979, during the unrest in Iran following the fall of the Government of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, an armed group attacked and seized the United States Embassy in Tehran, taking prisoner the 70 persons they found there, including the Ambassador. Two persons associated with the Embassy staff were killed; serious damage was caused to the Embassy and there were some acts of pillaging of the Ambassador's residence. On this occasion, while the Iranian authorities had not been able to prevent the incursion, they acted promptly in response to the urgent appeal for assistance made by the Embassy during the attack. At about 12 noon, Mr. Yazdi, then a Deputy Prime Minister, arrived at the Embassy accompanied by a member of the national police, at least one official and a contingent of Revolutionary Guards; they quelled the disturbance and returned control of the compound to American diplomatic officials. On 11 March 1979 the United States Ambassador received a letter dated 1 March from the Prime Minister, Dr. Bazargan,

expressing regrets for the attack on the Embassy, stating that arrangements had been made to prevent any repetition of such incidents, and indicating readiness to make reparation for the damage. Attacks were also made during the same period on the United States Consulates in Tabriz and Shiraz.

15. In October 1979, the Government of the United States was contemplating permitting the former Shah of Iran, who was then in Mexico, to enter the United States for medical treatment. Officials of the United States Government feared that, in the political climate prevailing in Iran, the admission of the former Shah might increase the tension already existing between the two States, and *inter alia* result in renewed violence against the United States Embassy in Tehran, and it was decided for this reason to request assurances from the Government of Iran that adequate protection would be provided. On 21 October 1979, at a meeting at which were present the Iranian Prime Minister, Dr. Bazargan, the Iranian Minister for Foreign Affairs, Dr. Yazdi, and the United States Chargé d'affaires in Tehran, the Government of Iran was informed of the decision to admit the former Shah to the United States, and of the concern felt by the United States Government about the possible public reaction in Tehran. When the United States Chargé d'affaires requested assurances that the Embassy and its personnel would be adequately protected, assurances were given by the Foreign Minister that the Government of Iran would fulfill its international obligation to protect the Embassy. The request for such assurances was repeated at a further meeting the following day, 22 October, and the Foreign Minister renewed his assurances that protection would be provided. The former Shah arrived in the United States on 22 October. On 30 October, the Government of Iran, which had repeatedly expressed its serious opposition to the admission of the former Shah to the United States, and had asked the United States to permit two Iranian physicians to verify the reality and the nature of his illness, requested the United States to bring about his return to Iran. Nevertheless, on 31 October, the Security Officer of the United States Embassy was told by the Commander of the Iranian National Police that the police had been instructed to provide full protection for the personnel of the Embassy.

16. On 1 November 1979, while a very large demonstration was being held elsewhere in Tehran, large numbers of demonstrators marched to and fro in front of the United States Embassy. Under the then existing security arrangements the Iranian authorities normally maintained 10 to 15 uniformed policemen outside the Embassy compound and a contingent of Revolutionary Guards nearby; on this occasion the normal complement of police was stationed outside the compound and the Embassy reported to the State Department that it felt confident that it could get more protection if needed. The Chief of Police came to the Embassy personally and met the Chargé d'affaires, who informed Washington that the Chief was "taking his job of protecting the Embassy very seriously". It was announced on the radio, and by the prayer leader at the main demonstration in another location in the city, that people should not go to the Embassy. During the day, the number of demonstrators at the Embassy was around 5,000, but protection was maintained by Iranian security forces. That evening, as the crowd dispersed, both the Iranian Chief of Protocol and the Chief of Police expressed relief to the Chargé d'affaires that everything had gone well.

17. At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United

States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy's premises. The invading group (who subsequently described themselves as "Muslim Student Followers of the Imam's Policy", and who will hereafter be referred to as "the militants") gained access by force to the compound and to the ground floor of the Chancery building. Over two hours after the beginning of the attack, and after the militants had attempted to set fire to the Chancery building and to cut through the upstairs steel doors with a torch, they gained entry to the upper floor; one hour later they gained control of the main vault. The militants also seized the other buildings, including the various residences, on the Embassy compound. In the course of the attack, all the diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy compound; subsequently other United States personnel and one United States private citizen seized elsewhere in Tehran were brought to the compound and added to the number of hostages.

18. During the three hours or more of the assault, repeated calls for help were made from the Embassy to the Iranian Foreign Ministry, and repeated efforts to secure help from the Iranian authorities were also made through direct discussions by the United States Chargé d'affaires, who was at the Foreign Ministry at the time, together with two other members of the mission. From there he made contact with the Prime Minister's Office and with Foreign Ministry officials. A request was also made to the Iranian Chargé d'affaires in Washington for assistance in putting an end to the seizure of the Embassy. Despite these repeated requests, no Iranian security forces were sent in time to provide relief and protection to the Embassy. In fact when Revolutionary Guards ultimately arrived on the scene, despatched by the Government "to prevent clashes", they considered that their task was merely to "protect the safety of both the hostages and the students", according to statements subsequently made by the Iranian Government's spokesman, and by the operations commander of the Guards. No attempt was made by the Iranian Government to clear the Embassy premises, to rescue the persons held hostage, or to persuade the militants to terminate their action against the Embassy.

19. During the morning of 5 November, only hours after the seizure of the Embassy, the United States Consulates in Tabriz and Shiraz were also seized; again the Iranian Government took no protective action. The operation of these consulates had been suspended since the attack in February 1979 (paragraph 14 above), and therefore no United States personnel were seized on these premises.

20. The United States' diplomatic mission and consular posts in Iran were not the only ones whose premises were subjected to demonstrations during the revolutionary period in Iran. On 5 November 1979, a group invaded the British Embassy in Tehran but was ejected after a brief occupation. On 6 November 1979 a brief occupation of the Consulate of Iraq at Kermanshah occurred but was brought to an end on instructions of the Ayatollah Khomeini; no damage was done to the Consulate or its contents. On 1 January 1980 an attack was made on the Embassy in Tehran of the USSR by a large mob, but as a result of the protection given by the Iranian authorities to the Embassy, no serious damage was done.



21. The premises of the United States Embassy in Tehran have remained in the hands of militants; and the same appears to be the case with the consulates at Tabriz and Shiraz. Of the total number of United States citizens seized and held as hostages, 13 were released on 18–20 November 1979, but the remainder have continued to be held up to the present time. The release of the 13 hostages was effected pursuant to a decree by the Ayatollah Khomeini addressed to the militants, dated 17 November 1979, in which he called upon the militants to “hand over the blacks and the women, if it is proven they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran”.

22. The persons still held hostage in Iran include, according to the information furnished to the Court by the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of “member of the diplomatic staff” within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of “member of the administrative and technical staff” within the meaning of that Convention; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Mission.

23. Allegations have been made by the Government of the United States of inhumane treatment of hostages; the militants and Iranian authorities have asserted that the hostages have been well treated, and have allowed special visits to the hostages by religious personalities and by representatives of the International Committee of the Red Cross. The specific allegations of ill-treatment have not however been refuted. Examples of such allegations, which are mentioned in some of the sworn declarations of hostages released in November 1979, are as follows: at the outset of the occupation of the Embassy some were paraded bound and blindfolded before hostile and chanting crowds; at least during the initial period of their captivity, hostages were kept bound, and frequently blindfolded, denied mail or any communication with their government or with each other, subjected to interrogation, threatened with weapons.

24. Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.

25. The United States Chargé d'affaires in Tehran and the two other members of the diplomatic staff of the Embassy who were in the premises of the Iranian Ministry of Foreign Affairs at the time of the attack have not left the Ministry since; their exact situation there has been the subject of conflicting statements. On 7 November 1979, it was stated in an announcement by the Iranian Foreign Ministry that “as the protection of foreign nationals is the duty of the Iranian Government”, the Chargé d'affaires was “staying in” the Ministry. On 1 December 1979, Mr. Sadegh Ghotbzadeh, who had become Foreign Minister, stated that

“... it has been announced that, if the U.S. Embassy's chargé d'affaires and his two companions, who have sought asylum in the Iranian Ministry of Foreign Affairs, should leave this ministry, the ministry would not accept any responsibility for them”.

According to a press report of 4 December, the Foreign Minister amplified this statement by saying that as long as they remained in the ministry he was personally responsible for ensuring that nothing happened to them, but that

“ . . . as soon as they leave the ministry precincts they will fall back into the hands of justice, and then I will be the first to demand that they be arrested and tried”.

The militants made it clear that they regarded the Chargé and his two colleagues as hostages also. When in March 1980 the Public Prosecutor of the Islamic Revolution of Iran called for one of the three diplomats to be handed over to him, it was announced by the Foreign Minister that

“Regarding the fate of the three Americans in the Ministry of Foreign Affairs, the decision rests first with the imam of the nation [i.e., the Ayatollah Khomeini]; in case there is no clear decision by the imam of the nation, the Revolutionary Council will make a decision on this matter.”

26. From the outset of the attack upon its Embassy in Tehran, the United States protested to the Government of Iran both at the attack and at the seizure and detention of the hostages. On 7 November a former Attorney-General of the United States, Mr. Ramsey Clark, was instructed to go with an assistant to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini. The text of that message has not been made available to the Court by the Applicant, but the United States Government has informed the Court that it thereby protested at the conduct of the Government of Iran and called for release of the hostages, and that Mr. Clark was also authorized to discuss all avenues for resolution of the crisis. While he was en route, Tehran radio broadcast a message from the Ayatollah Khomeini dated 7 November, solemnly forbidding members of the Revolutionary Council and all the responsible officials to meet the United States representatives. In that message it was asserted that “the U.S. Embassy in Iran is our enemies’ centre of espionage against our sacred Islamic movement”, and the message continued:

“Should the United States hand over to Iran the deposed shah . . . and give up espionage against our movement, the way to talks would be opened on the issue of certain relations which are in the interest of the nation”.

Subsequently, despite the efforts of the United States Government to open negotiations, it became clear that the Iranian authorities would have no direct contact with representatives of the United States Government concerning the holding of the hostages.

27. During the period which has elapsed since the seizure of the Embassy a number of statements have been made by various governmental authorities in Iran which are relevant to the Court’s examination of the responsibility attributed to the Government of Iran in the submissions of the United States. These statements will be examined by the Court in considering these submissions (paragraphs 59 and 70–74 below).

28. On 9 November, 1979, the Permanent Representative of the United States to the United Nations addressed a letter to the President of the Security Council, requesting urgent consideration of what might be done to secure the release of the hostages and to restore the “sanctity of diplomatic

personnel and establishments". The same day, the President of the Security Council made a public statement urging the release of the hostages, and the President of the General Assembly announced that he was sending a personal message to the Ayatollah Khomeini appealing for their release. On 25 November 1979, the Secretary-General of the United Nations addressed a letter to the President of the Security Council referring to the seizure of the United States Embassy in Tehran and the detention of its diplomatic personnel, and requesting an urgent meeting of the Security Council "in an effort to seek a peaceful solution to the problem". The Security Council met on 27 November and 4 December 1979; on the latter occasion, no representative of Iran was present, but the Council took note of a letter of 13 November 1979 from the Supervisor of the Iranian Foreign Ministry to the Secretary-General. The Security Council then adopted resolution 457 (1979), calling on Iran to release the personnel of the Embassy immediately, to provide them with protection and to allow them to leave the country. The resolution also called on the two Governments to take steps to resolve peacefully the remaining issues between them, and requested the Secretary-General to lend his good offices for the immediate implementation of the resolution, and to take all appropriate measures to that end. It further stated that the Council would "remain actively seized of the matter" and requested the Secretary-General to report to it urgently on any developments with regard to his efforts.

29. On 31 December 1979, the Security Council met again and adopted resolution 461 (1979), in which it reiterated both its calls to the Iranian Government and its request to the Secretary-General to lend his good offices for achieving the object of the Council's resolution. The Secretary-General visited Tehran on 1-3 January 1980, and reported to the Security Council on 6 January. On 20 February 1980, the Secretary-General announced the setting up of a commission "to undertake a fact-finding mission" to Iran. The Court will revert to the terms of reference of this commission and the progress of its work in connection with a question of admissibility of the proceedings (paragraphs 39-40 below).

30. Prior to the institution of the present proceedings, in addition to the approach made by the Government of the United States to the United Nations Security Council, that Government also took certain unilateral action in response to the actions for which it holds the Government of Iran responsible. On 10 November 1979, steps were taken to identify all Iranian students in the United States who were not in compliance with the terms of their entry visas, and to commence deportation proceedings against those who were in violation of applicable immigration laws and regulations. On 12 November 1979, the President of the United States ordered the discontinuation of all oil purchases from Iran for delivery to the United States. Believing that the Government of Iran was about to withdraw all Iranian funds from United States banks and to refuse to accept payment in dollars for oil, and to repudiate obligations owed to the United States and to United States nationals, the President on 14 November 1979 acted to block the very large official Iranian assets in the United States or in United States control, including deposits both in banks in the United States and in foreign branches and subsidiaries of United States banks. On 12 December 1979, after the institution of the present proceedings, the United States informed the Iranian Chargé d'affaires in Washington that the number of personnel assigned to the Iranian Embassy and consular posts in the United States was to be restricted.

31. Subsequently to the indication by the Court of provisional measures, and during the present proceedings, the United States Government took other action. A draft resolution was introduced into the United Nations Security Council calling for economic sanctions against Iran. When it was put to the vote on 13 January 1980, the result was 10 votes in favour, 2 against, and 2 abstentions (one member not having participated in the voting); as a permanent member of the Council cast a negative vote, the draft resolution was not adopted. On 7 April 1980 the United States Government broke off diplomatic relations with the Government of Iran. At the same time, the United States Government prohibited exports from the United States to Iran—one of the sanctions previously proposed by it to the Security Council. Steps were taken to prepare an inventory of the assets of the Government of Iran frozen on 14 November 1979, and to make a census of outstanding claims of American nationals against the Government of Iran, with a view of “designing a program against Iran for the hostages, the hostage families and other U.S. claimants” involving the preparation of legislation “to facilitate processing and paying of these claims” and all visas issued to Iranian citizens for future entry into the United States were cancelled. On 17 April 1980, the United States Government announced further economic measures directed against Iran, prohibited travel there by United States citizens, and made further plans for reparations to be paid to the hostages and their families out of frozen Iranian assets.

32. During the night of 24–25 April 1980 the President of the United States set in motion, and subsequently terminated for technical reasons, an operation within Iranian territory designed to effect the rescue of the hostages by United States military units. In an announcement made on 25 April, President Carter explained that the operation had been planned over a long period as a humanitarian mission to rescue the hostages, and had finally been set in motion by him in the belief that the situation in Iran posed mounting dangers to the safety of the hostages and that their early release was highly unlikely. He stated that the operation had been under way in Iran when equipment failure compelled its termination; and that in the course of the withdrawal of the rescue forces two United States aircraft had collided in a remote desert location in Iran. He further stated that preparations for the rescue operations had been ordered for humanitarian reasons, to protect the national interests of the United States, and to alleviate international tensions. At the same time, he emphasized that the operation had not been motivated by hostility towards Iran or the Iranian people. The texts of President Carter’s announcement and of certain other official documents relating to the operation have been transmitted to the Court by the United States Agent in response to a request made by the President of the Court on 25 April. Amongst these documents is the text of a report made by the United States to the Security Council on 25 April, “pursuant to Article 51 of the Charter of the United Nations”. In that report, the United States maintained that the mission had been carried out by it “in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy”. The Court will refer further to this operation later in the present Judgment (paragraphs 93 and 94 below).

33. It is to be regretted that the Iranian Government has not appeared before the Court in order to put forward its arguments on the questions of law and of fact which arise in the present case; and that, in consequence,

the Court has not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant's case. The Court will, therefore, first address itself to the considerations put forward by the Iranian Government in its letters of 9 December 1979 and 16 March 1980, on the basis of which it maintains that the Court ought not to take cognizance of the present case.

34. The Iranian Government in its letter of 9 December 1979 drew attention to what it referred to as the "deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters". The examination of the "numerous repercussions" of the revolution, it added, is "a matter essentially and directly within the national sovereignty of Iran". However, as the Court pointed out in its Order of 15 December 1979,

"... a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction" (*I.C.J. Reports 1979*, page 16, paragraph 25).

In its later letter of 16 March 1980 the Government of Iran confined itself to repeating the observations on this point which it had made in its letter of 9 December 1979, without putting forward any additional arguments or explanations. In these circumstances, the Court finds it sufficient here to recall and confirm its previous statement on the matter in its Order of 15 December 1979.

35. In its letter of 9 December 1979 the Government of Iran maintained that the Court could not and should not take cognizance of the present case for another reason, namely that the case submitted to the Court by the United States, is "confined to what is called the question of the 'hostages of the American Embassy in Tehran' ". It then went on to explain why it considered this to preclude the Court from taking cognizance of the case:

"For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United

States over the last 25 years. This dossier includes, *inter alia*, all the crimes perpetrated in Iran by the American Government, in particular the *coup d'état* of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran."

36. The Court, however, in its Order of 15 December 1979, made it clear that the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot be considered as something "secondary" or "marginal", having regard to the importance of the legal principles involved. It also referred to a statement of the Secretary-General of the United Nations, and to Security Council resolution 457 (1979), as evidencing the importance attached by the international community as a whole to the observance of those principles in the present case as well as its concern at the dangerous level of tension between Iran and the United States. The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important. It further underlined that, if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-claim.

37. The Iranian Government, notwithstanding the terms of the Court's Order, did not file any pleadings and did not appear before the Court. By its own choice, therefore, it has forgone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention in regard to the "overall problem". Even in its later letter of 16 March 1980, the Government of Iran confined itself to repeating what it had said in its letter of 9 December 1979, without offering any explanations in regard to the points to which the Court had drawn attention in its Order of 15 December 1979: It has provided no explanation of the reasons why it considers that the violations of diplomatic and consular law alleged in the United States' Application cannot be examined by the Court separately from what it describes as the "overall problem" involving "more than 25 years of continual interference by the United States in the internal affairs of Iran". Nor has it made any attempt to explain, still less define, what connection, legal or factual, there may be between the "overall problem" of its general grievances against the United States and the particular events that gave rise to the United States' claims in the present case which, in its view, precludes the separate examination of those claims by the Court. This was the more necessary because legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or

the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.

38. It follows that the considerations and arguments put forward in the Iranian Government's letters of 9 December 1979 and 16 March 1980 do not, in the opinion of the Court, disclose any ground on which it should conclude that it cannot or ought not to take cognizance of the present case.

39. The Court, however, has also thought it right to examine, *ex officio*, whether its competence to decide the present case, or the admissibility of the present proceedings, might possibly have been affected by the setting up of the Commission announced by the Secretary-General of the United Nations on 20 February 1980. As already indicated, the occupation of the Embassy and detention of its diplomatic and consular staff as hostages was referred to the United Nations Security Council by the United States on 9 November 1979 and by the Secretary-General on 25 November. Four days later, while the matter was still before the Security Council, the United States submitted the present Application to the Court together with a request for the indication of provisional measures. On 4 December, the Security Council adopted resolution 457 (1979) (the terms of which have already been indicated in paragraph 28 above), whereby the Council would "remain actively seized of the matter" and the Secretary-General was requested to report to it urgently on developments regarding the efforts he was to make pursuant to the resolution. In announcing the setting up of the Commission on 20 February 1980, the Secretary-General stated its terms of reference to be "to undertake a fact-finding mission to Iran to hear Iran's grievances and to allow for an early solution of the crisis between Iran and the United States"; and he further stated that it was to complete its work as soon as possible and submit its report to him. Subsequently, in a message cabled to the President of the Court on 15 March 1980, the Secretary-General confirmed the mandate of the Commission to be as stated in his announcement of 20 February, adding that the Governments of Iran and the United States had "agreed to the establishment of the Commission on that basis". In this message, the Secretary-General also informed the Court of the decision of the Commission to suspend its activities in Tehran and to return to New York on 11 March 1980 "to confer with the Secretary-General with a view to pursuing its tasks which it regards as indivisible". The message stated that while, in the circumstances, the Commission was not in a position to submit its report, it was prepared to return to Tehran, in accordance with its mandate and the instructions of the Secretary-General, when the situation required. The message further stated that the Secretary-General would continue his efforts, as requested by the Security Council, to search for a peaceful solution of the crisis, and would remain in contact with the parties and the Commission regarding the resumption of its work.

40. Consequently, there can be no doubt at all that the Security Council was "actively seized of the matter" and that the Secretary-General was under an express mandate from the Council to use his good offices in the matter when, on 15 December, the Court decided unanimously that it was competent to entertain the United States' request for an indication of provisional measures, and proceeded to indicate such measures. As already mentioned the Council met again on 31 December 1979 and adopted resolution 461

(1979). In the preamble to this second resolution the Security Council expressly took into account the Court's Order of 15 December 1979 indicating provisional measures; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise. Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that:

"In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

41. In the present instance the proceedings before the Court continued in accordance with the Statute and Rules of Court and, on 15 January 1980, the United States filed its Memorial. The time-limit fixed for delivery of Iran's Counter-Memorial then expired on 18 February 1980 without Iran's having filed a Counter-Memorial or having made a request for the extension of the time-limit. Consequently, on the following day the case became ready for hearing and, pursuant to Article 31 of the Rules, the views of the Applicant State were requested regarding the date for the opening of the oral proceedings. On 19 February 1980 the Court was informed by the United States Agent that, owing to the delicate stage of negotiations bearing upon the release of the hostages in the United States Embassy, he would be grateful if the Court for the time being would defer setting a date for the opening of the oral proceedings. On the very next day, 20 February, the Secretary-General announced the establishment of the above-mentioned Commission, which commenced its work in Tehran on 23 February. Asked on 27 February to clarify the position of the United States in regard to the future procedure, the Agent stated that the Commission would not address itself to the claims submitted by the United States to the Court. The United States, he said, continued to be anxious to secure an early judgment on the merits, and he suggested 17 March as a convenient date for the opening of the oral proceedings. At the same time, however, he added that consideration of the well-being of the hostages might lead the United States to suggest a later date. The Iranian Government was then asked, in a telex message of 28 February, for any views it might wish to express as to the date for the opening of the hearings, mention being made of 17 March as one possible date. No reply had been received from the Iranian Government when, on 10 March, the Commission, unable to complete its mission, decided to suspend its activities in Tehran and to return to New York.

42. On 11 March, that is immediately upon the departure of the Commission from Tehran, the United States notified the Court of its readiness to proceed with the hearings, suggesting that they should begin on 17 March. A



further telex was accordingly sent to the Iranian Government on 12 March informing it of the United States' request and stating that the Court would meet on 17 March to determine the subsequent procedure. The Iran Government's reply was contained in the letter of 16 March to which the Court has already referred (paragraph 10 above). In that letter, while making no mention of the proposed oral proceedings, the Iranian Government reiterated the reasons advanced in its previous letter of 9 December 1979 for considering that the Court ought not to take cognizance of the case. The letter contained no reference to the Commission, and still less any suggestion that the continuance of the proceedings before the Court might be affected by the existence of the Commission or the mandate given to the Secretary-General by the Security Council. Having regard to the circumstances which the Court has described, it can find no trace of any understanding on the part of either the United States or Iran that the establishment of the Commission might involve a postponement of all proceedings before the Court until the conclusion of the work of the Commission and of the Security Council's consideration of the matter.

43. The Commission, as previously observed, was established to undertake a "fact-finding mission to Iran to hear Iran's grievances and to *allow* for an early solution of the *crisis* between Iran and the United States" (emphasis added). It was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States; nor was its setting up accepted by them on any such basis. On the contrary, he created the Commission rather as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis existing between the two countries; and this, clearly, was the basis on which Iran and the United States agreed to its being set up. The establishment of the Commission by the Secretary-General with the agreement of the two States cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court. Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes. As was pointed out in the *Aegean Sea Continental Shelf* case, the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued *pari passu*. In that case, in which also the dispute had been referred to the Security Council, the Court held expressly that "the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function" (*I.C.J. Reports 1978*, page 12).

44. It follows that neither the mandate given by the Security Council to the Secretary-General in resolutions 457 and 461 of 1979, nor the setting up of the Commission by the Secretary-General, can be considered as constituting any obstacle to the exercise of the Court's jurisdiction in the present case. It further follows that the Court must now proceed, in accordance with Article 53, paragraph 2, of the Statute, to determine whether it has jurisdiction to decide the present case and whether the United States' claims are well founded in fact and in law.

45. Article 53 of the Statute requires the Court, before deciding in favour of an Applicant's claim, to satisfy itself that it has jurisdiction, in accordance with Articles 36 and 37, empowering it to do so. In the present case the principal claims of the United States relate essentially to alleged

violations by Iran of its obligations to the United States under the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations. With regard to these claims the United States has invoked as the basis for the Court's jurisdiction Article I of the Optional Protocols concerning the Compulsory Settlement of Disputes which accompany these Conventions. The United Nations publication *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* lists both Iran and the United States as parties to the Vienna Conventions of 1961 and 1963, as also to their accompanying Protocols concerning the Compulsory Settlement of Disputes, and in each case without any reservation to the instrument in question. The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions. Moreover, the Iranian Government has not maintained in its communications to the Court that the two Vienna Conventions and Protocols are not in force as between Iran and the United States. Accordingly, as indicated in the Court's Order of 15 December 1979, the Optional Protocols manifestly provide a possible basis for the Court's jurisdiction, with respect to the United States' claims under the Vienna Conventions of 1961 and 1963. It only remains, therefore, to consider whether the present dispute in fact falls within the scope of their provisions.

46. The terms of Article I, which are the same in the two Protocols, provide:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

The United States' claims here in question concern alleged violations by Iran of its obligations under several Articles of the Vienna Conventions of 1961 and 1963 with respect to the privileges and immunities of the personnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran. In so far as its claims relate to two private individuals held hostage in the Embassy, the situation of these individuals falls under the provisions of the Vienna Convention of 1961 guaranteeing the inviolability of the premises of embassies, and of Article 5 of the 1963 Convention concerning the consular functions of assisting nationals and protecting and safeguarding their interests. By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions.

47. The occupation of the United States Embassy by militants on 4 November 1979 and the detention of its personnel as hostages was an event of a kind to provoke an immediate protest from any government, as it did from the United States Government, which despatched a special emissary to Iran to deliver a formal protest. Although the special emissary, denied all contact with Iranian officials, never entered Iran, the Iranian Government was left in no doubt as to the reaction of the United States to the taking over of its Embassy and detention of its diplomatic and consular staff as hostages. Indeed, the Court was informed that the United States was meanwhile making its views known to the Iranian Government through its Chargé

d'affaires, who has been kept since 4 November 1979 in the Iranian Foreign Ministry itself, where he happened to be with two other members of his mission during the attack on the Embassy. In any event, by a letter of 9 November 1979, the United States brought the situation in regard to its Embassy before the Security Council. The Iranian Government did not take any part in the debates on the matter in the Council, and it was still refusing to enter into any discussions on the subject when, on 29 November 1979, the United States filed the present Application submitting its claims to the Court. It is clear that on that date there existed a dispute arising out of the interpretation or application of the Vienna Conventions and thus one falling within the scope of Article I of the Protocols.

48. Articles II and III of the Protocols, it is true, provide that within a period of two months after one party has notified its opinion to the other that a dispute exists, the parties may agree either: (a) "to resort not to the International Court of Justice but to an arbitral tribunal", or (b) "to adopt a conciliation procedure before resorting to the International Court of Justice". The terms of Articles II and III however, when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention in question. Articles II and III provide only that, as a substitute for recourse to the Court, the parties *may agree* upon resort either to arbitration or to conciliation. It follows, first, that Articles II and III have no application unless recourse to the arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. Secondly, it follows that only then may the provisions in those Articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure.

49. In the present instance, neither of the parties to the dispute proposed recourse to either of the two alternatives, before the filing of the Application or at any time afterwards. On the contrary, the Iranian authorities refused to enter into any discussion of the matter with the United States, and this could only be understood by the United States as ruling out, *in limine*, any question of arriving at an agreement to resort to arbitration or conciliation under Article II or Article III of the Protocols, instead of recourse to the Court. Accordingly, when the United States filed its Application on 29 November 1979, it was unquestionably free to have recourse to Article I of the Protocols, and to invoke it as a basis for establishing the Court's jurisdiction with respect to its claims under the Vienna Conventions of 1961 and 1963.

50. However, the United States also presents claims in respect of alleged violations by Iran of Articles II, paragraph 4, XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, which entered into force on 16 June 1957. With regard to these claims the United States has invoked paragraph 2 of Article XXI of the Treaty as the basis for the Court's jurisdiction. The claims of the United States under this Treaty overlap in considerable measure with its claims under the two Vienna Conventions and more especially the Convention of 1963. In this respect, therefore, the

dispute between the United States and Iran regarding those claims is at the same time a dispute arising out of the interpretation or application of the Vienna Conventions which falls within Article I of their Protocols. It was for this reason that in its Order of 15 December 1979 indicating provisional measures the Court did not find it necessary to enter into the question whether Article XXI, paragraph 2, of the 1955 Treaty might also have provided a basis for the exercise of its jurisdiction in the present case. But taking into account that Article II, paragraph 4, of the 1955 Treaty provides that "Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party . . .", the Court considers that at the present stage of the proceedings that Treaty has importance in regard to the claims of the United States in respect of the two private individuals said to be held hostage in Iran. Accordingly, the Court will now consider whether a basis for the exercise of its jurisdiction with respect to the alleged violations of the 1955 Treaty may be found in Article XXI, paragraph 2, of the Treaty.

51. Paragraph 2 of that Article reads:

"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

As previously pointed out, when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a "dispute . . . not satisfactorily adjusted by diplomacy" within the meaning of Article XXI, paragraph 2, of the 1955 Treaty; and this dispute comprised, *inter alia*, the matters that are the subject of the United States' claims under that Treaty.

52. The provision made in the 1955 Treaty for disputes as to its interpretation or application to be referred to the Court is similar to the system adopted in the Optional Protocols to the Vienna Conventions which the Court has already explained. Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties *agree* to settlement by some other means. In the present instance, as in the case of the Optional Protocols, the immediate and total refusal of the Iranian authorities to enter into any negotiations with the United States excluded *in limine* any question of an *agreement* to have recourse to "some other pacific means" for the settlement of the dispute. Consequently, under the terms of Article XXI, paragraph 2, the United States was free on 29 November 1979 to invoke its provisions for the purpose of referring its claims against Iran under the 1955 Treaty to the Court. While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident, as the United States contended in its Memorial, that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement.

53. The point has also been raised whether, having regard to certain counter-measures taken by the United States vis-à-vis Iran, it is open to the United States to rely on the Treaty of Amity, Economic Relations, and Consular Rights in the present proceedings. However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself. In any event, any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.

54. No suggestion has been made by Iran that the 1955 Treaty was not in force on 4 November 1979 when the United States Embassy was overrun and its nationals taken hostage, or on 29 November when the United States submitted the dispute to the Court. The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was needed. Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

55. The United States has further invoked Article 13 of the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, as a basis for the exercise of the Court's jurisdiction with respect to its claims under that Convention. The Court does not, however, find it necessary in the present Judgment to enter into the question whether, in the particular circumstances of the case, Article 13 of that Convention provides a basis for the exercise of the Court's jurisdiction with respect to those claims.

56. The principal facts material for the Court's decision on the merits of the present case have been set out earlier in this Judgment. Those facts have to be looked at by the Court from two points of view. First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable. The events which are the subject of the United States' claims fall into two phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United States Embassy by militants on 4 November 1979, the overrunning of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives and the conduct of the Iranian authorities in the

face of those occurrences. The attack and the subsequent overrunning, bit by bit, of the whole Embassy premises, was an operation which continued over a period of some three hours without any body of police, any military unit or any Iranian official intervening to try to stop or impede it from being carried through to its completion. The result of the attack was considerable damage to the Embassy premises and property, the forcible opening and seizure of its archives, the confiscation of the archives and other documents found in the Embassy and, most grave of all, the seizure by force of its diplomatic and consular personnel as hostages, together with two United States nationals.

58. No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.

59. Previously, it is true, the religious leader of the country, the Ayatollah Khomeini, had made several public declarations inveighing against the United States as responsible for all his country's problems. In so doing, it would appear, the Ayatollah Khomeini was giving utterance to the general resentment felt by supporters of the revolution at the admission of the former Shah to the United States. The information before the Court also indicates that a spokesman for the militants, in explaining their action afterwards, did expressly refer to a message issued by the Ayatollah Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini had declared that it was "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah, and to condemn this great plot" (that is, a plot to stir up dissension between the main streams of Islamic thought). In the view of the Court, however, it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy. To do so would, indeed, conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy. Again, congratulations after the event, such as those reportedly telephoned to the militants by the Ayatollah Khomeini on the actual evening of the attack, and other subsequent statements of official approval, though highly significant in another context shortly to be considered, do not alter the initially independent and unofficial character of the militants' attack on the Embassy.

60. The first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants not having an official character, and successful because of lack of sufficient protection.

61. The conclusion just reached by the Court, that the initiation of the attack on the United States Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises of a diplomatic mission, Article 22 of the 1961 Convention continues in paragraph 2:

*"The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."* (Emphasis added.)

So, too, after proclaiming that the person of a diplomatic agent shall be inviolable, and that he shall not be liable to any form of arrest or detention, Article 29 provides:

*"The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."* (Emphasis added.)

The obligation of a receiving State to protect the inviolability of the archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be "inviolable at any time and wherever they may be". Under Article 25, it is required to "accord full facilities for the performance of the functions of the mission", under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory", and under Article 27 to "permit and protect free communication on the part of the mission for all official purposes". Analogous provisions are to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs (Article 31, paragraph 3, Articles 40, 33, 28, 34 and 35). In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

64. The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its

conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

65. A similar pattern of facts appears in relation to consulates. In February 1979, at about the same time as the first attack on the United States Embassy, attacks were made by demonstrators on its Consulates in Tabriz and Shiraz; but the Iranian authorities then took the necessary steps to clear them of the demonstrators. On the other hand, the Iranian authorities took no action to prevent the attack of 5 November 1979, or to restore the Consulates to the possession of the United States. In contrast, when on the next day militants invaded the Iraqi Consulate in Kermanshah, prompt steps were taken by the Iranian authorities to secure their withdrawal from the Consulate. Thus in this case, the Iranian authorities and police took the necessary steps to prevent and check the attempted invasion or return the premises to their rightful owners.

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy, or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4,



of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure "the most constant protection and security" to each other's nationals in their respective territories.

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities:

- (a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the security of such other persons as might be present on the said premises;
- (b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part;
- (c) had the means at their disposal to perform their obligations;
- (d) completely failed to comply with these obligations.

Similarly, the Court is led to conclude that the Iranian authorities were equally aware of their obligations to protect the United States Consulates at Tabriz and Shiraz, and of the need for action on their part, and similarly failed to use the means which were at their disposal to comply with their obligations.

69. The second phase of the events which are the subject of the United States' claims comprises the whole series of facts which occurred following the completion of the occupation of the United States Embassy by the militants, and the seizure of the Consulates at Tabriz and Shiraz. The occupation having taken place and the diplomatic and consular personnel of the United States' mission having been taken hostage, the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.

70. No such step was, however, taken by the Iranian authorities. At a press conference on 5 November the Foreign Minister, Mr. Yazdi, conceded that "according to international regulations the Iranian Government is dutybound to safeguard the life and property of foreign nationals". But he made no mention of Iran's obligation to safeguard the inviolability of foreign embassies and diplomats; and he ended by announcing that the action of the students "enjoys the endorsement and support of the government, because America herself is responsible for this incident". As to the Prime Minister, Mr. Bazargan, he does not appear to have made any statement on the matter before resigning his office on 5 November.

71. In any event expressions of approval of the take-over of the Embassy, and indeed also of the Consulates at Tabriz and Shiraz, by militants came immediately from numerous Iranian authorities, including religious, judicial, executive, police and broadcasting authorities. Above all, the

Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the detention of the Embassy staff as hostages. At a reception in Qom on 5 November, the Ayatollah Khomeini left his audience in no doubt as to his approval of the action of the militants in occupying the Embassy, to which he said they had resorted "because they saw that the shah was allowed in America". Saying that he had been informed that the "centre occupied by our young men . . . has been a lair of espionage and plotting", he asked how the young people could be expected "simply to remain idle and witness all these things". Furthermore he expressly stigmatized as "rotten roots" those in Iran who were "hoping we would mediate and tell the young people to leave this place". The Ayatollah's refusal to order "the young people" to put an end to their occupation of the Embassy, or the militants in Tabriz and Shiraz to evacuate the United States Consulates there, must have appeared the more significant when, on 6 November, he instructed "the young people" who had occupied the Iraqi Consulate in Kermanshah that they should leave it as soon as possible. The true significance of this was only reinforced when, next day, he expressly forbade members of the Revolutionary Council and all responsible officials to meet the special representatives sent by President Carter to try and obtain the release of the hostages and evacuation of the Embassy.

72. At any rate, thus fortified in their action, the militants at the Embassy at once went one step farther. On 6 November they proclaimed that the Embassy, which they too referred to as "the U.S. centre of plots and espionage", would remain under their occupation and that they were watching "most closely" the members of the diplomatic staff taken hostage whom they called "U.S. mercenaries and spies".

73. The seal of official governmental approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini. His decree began with the assertion that the American Embassy was "a centre of espionage and conspiracy" and that "those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect". He went on expressly to declare that the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran. This statement of policy the Ayatollah qualified only to the extent of requesting the militants holding the hostages to "hand over the blacks and the women, if it is proven that they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran". As to the rest of the hostages, he made the Iranian Government's intentions all too clear:

"The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation."

74. The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah

Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated the continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been "done by our nation". Moreover, in the prevailing circumstances the situation of the hostages was aggravated by the fact that their detention by the militants did not even offer the normal guarantees which might have been afforded by police and security forces subject to the discipline and the control of official superiors.

75. During the six months which have elapsed since the situation just described was created by the decree of the Ayatollah Khomeini, it has undergone no material change. The Court's Order of 15 December 1979 indicating provisional measures, which called for the immediate restoration of the Embassy to the United States and the release of the hostages, was publicly rejected by the Minister for Foreign Affairs on the following day and has been ignored by all Iranian authorities. On two occasions, namely on 23 February and on 7 April 1980, the Ayatollah Khomeini laid it down that the hostages should remain at the United States Embassy under the control of the militants until the new Iranian parliament should have assembled and taken a decision as to their fate. His adherence to that policy also made it impossible to obtain his consent to the transfer of the hostages from the control of the militants to that of the Government or of the Council of the Revolution. In any event, while highly desirable from the humanitarian and safety points of view, such a transfer would not have resulted in any material change in the legal situation, for its sponsors themselves emphasized that it must not be understood as signifying the release of the hostages.

76. The Iranian authorities' decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.

77. In the first place, these facts constituted breaches additional to those already committed of paragraph 2 of Article 22 of the 1961 Vienna Convention on Diplomatic Relations which requires Iran to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of its peace or impairment of its dignity. Paragraphs 1 and 3 of that Article have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent or to undertake any search, requisition, attachment or like measure on the premises. Secondly, they constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent and any attack on his person, freedom or dignity. Thirdly, the Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention and of pertinent provisions of the 1963 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for diplomatic and consular staff, as well as of Article 24 of the former Convention and Article 33 of the latter, which provide for

the absolute inviolability of the archives and documents of diplomatic missions and consulates. This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof. Finally, the continued detention as hostages of the two private individuals of United States nationality entails a renewed breach of the obligations of Iran under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.

78. Inevitably, in considering the compatibility or otherwise of the conduct of the Iranian authorities with the requirements of the Vienna Conventions, the Court has focussed its attention primarily on the occupation of the Embassy and the treatment of the United States diplomatic and consular personnel within the Embassy. It is however evident that the question of the compatibility of their conduct with the Vienna Conventions also arises in connection with the treatment of the United States Chargé d'affaires and two members of his staff in the Ministry of Foreign Affairs on 4 November 1979 and since that date. The facts of this case establish to the satisfaction of the Court that on 4 November 1979 and thereafter the Iranian authorities have withheld from the Chargé d'affaires and the two members of his staff the necessary protection and facilities to permit them to leave the Ministry in safety. Accordingly it appears to the Court that with respect to these three members of the United States' mission the Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the 1961 Vienna Convention on Diplomatic Relations. It further appears to the Court that the continuation of that situation over a long period has, in the circumstances, amounted to detention in the Ministry.

79. The Court moreover cannot conclude its observations on the series of acts which it has found to be imputable to the Iranian State and to be patently inconsistent with its international obligations under the Vienna Conventions of 1961 and 1963 without mention also of another fact. This is that judicial authorities of the Islamic Republic of Iran and the Minister for Foreign Affairs have frequently voiced, or associated themselves with, a threat first announced by the militants, of having some of the hostages submitted to trial before a court or some other body. These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." Again, if there were an attempt to compel the hostages to bear witness, a suggestion renewed at the time of the visit to Iran of the Secretary-General's Commission, Iran would without question be violating paragraph 2 of that same Article of the 1961 Vienna Convention which provides that "A diplomatic agent is not obliged to give evidence as a witness".

80. The facts of the present case, viewed in the light of the applicable rules of law, thus speak loudly and clearly of successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963, as well as under the Treaty of 1955. Before drawing from this finding the conclusions which flow from it in terms of

the international responsibility of the Iranian State vis-à-vis the United States of America, the Court considers that it should examine one further point. The Court cannot overlook the fact that on the Iranian side, in often imprecise terms, the idea has been put forward that the conduct of the Iranian Government, at the time of the events of 4 November 1979 and subsequently, might be justified by the existence of special circumstances.

81. In his letters of 9 December 1979 and 16 March 1980, as previously recalled, Iran's Minister for Foreign Affairs referred to the present case as only "a marginal and secondary aspect of an overall problem". This problem, he maintained, "involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms". In the first of the two letters he indeed singled out amongst the "crimes" which he attributed to the United States an alleged complicity on the part of the Central Intelligence Agency in the coup d'état of 1953 and in the restoration of the Shah to the throne of Iran. Invoking these alleged crimes of the United States, the Iranian Foreign Minister took the position that the United States' Application could not be examined by the Court divorced from its proper context, which he insisted was "the whole political dossier of the relations between Iran and the United States over the last 25 years".

82. The Court must however observe, first of all, that the matters alleged in the Iranian Foreign Minister's letters of 9 December 1979 and 16 March 1980 are of a kind which, if invoked in legal proceedings, must clearly be established to the satisfaction of the tribunal with all the requisite proof. The Court, in its Order of 15 December 1979, pointed out that if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States' claims. The Iranian Government, however, did not appear before the Court. Moreover, even in his letter of 16 March 1980, transmitted to the Court some three months after the issue of that Order, the Iranian Foreign Minister did not furnish the Court with any further information regarding the alleged criminal activities of the United States in Iran, or explain on what legal basis he considered these allegations to constitute a relevant answer to the United States' claims. The large body of information submitted by the United States itself to the Court includes, it is true, some statements emanating from Iranian authorities or from the militants in which reference is made to alleged espionage and interference in Iran by the United States centred upon its Embassy in Tehran. These statements are, however, of the same general character as the assertions of alleged criminal activities of the United States contained in the Foreign Minister's letters, and are unsupported by evidence furnished by Iran before the Court. Hence they do not provide a basis on which the Court could form a judicial opinion on the truth or otherwise of the matters there alleged.

83. In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran's conduct and thus a defence to the United States' claims in the present case. The Court, however, is unable to accept that they can

be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide

“Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.”

Paragraph 3 of Article 41 of the 1961 Convention further states “The premises of the mission must not be used in any manner incompatible with the functions of the mission . . .”; an analogous provision, with respect to consular premises is to be found in Article 55, paragraph 2 of the 1963 Convention.

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates:

“1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.”

The 1963 Convention contains, in Article 23, paragraphs 1 and 4, analogous provisions in respect to consular officers and consular staff. Paragraph 1 of Article 9 of the 1961 Convention, and paragraph 4 of Article 23 of the 1963 Convention, take account of the difficulty that may be experienced in practice of proving such abuses in every case or indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3(1)(d) of the 1961 Convention, of “ascertaining by all lawful means conditions and developments in the receiving State” may be considered as involving such acts as “espionage” or “interference in internal affairs”. The way in which Article 9, paragraph 1, takes account of any such difficulty is by providing expressly in its opening sentence that the receiving State may “at any time and without having to explain its decision” notify the sending State that any particular member of its diplomatic mission is “*persona non grata*” or “not acceptable” (and similarly Article 23, paragraph 4, of the 1963 Convention provides that “the receiving State is not obliged to give to the

sending State reasons for its decision"). Beyond that remedy for dealing with abuses of the diplomatic function by individual members of a mission, a receiving State has in its hands a more radical remedy if abuses of their functions by members of a mission reach serious proportions. This is the power which every receiving State has, at its own discretion, to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission.

86. The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean—and this the Applicant Government expressly acknowledges—that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime. But such eventualities bear no relation at all to what occurred in the present case.

87. In the present case, the Iranian Government did not break off diplomatic relations with the United States; and in response to a question put to him by a Member of the Court, the United States Agent informed the Court that at no time before the events of 4 November 1979 had the Iranian Government declared, or indicated any intention to declare, any member of the United States diplomatic or consular staff in Tehran *persona non grata*. The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff.

88. In an address given on 5 November 1979, the Ayatollah Khomeini traced the origin of the operation carried out by the Islamic militants on the previous day to the news of the arrival of the former Shah of Iran in the United States. That fact may no doubt have been the ultimate catalyst of the resentment felt in certain circles in Iran and among the Iranian population against the former Shah for his alleged misdeeds, and also against the United States Government which was being publicly accused of having restored him to the throne, of having supported him for many years and of planning to go on doing so. But whatever be the truth in regard to those matters, they could hardly be considered as having provided a justification for the attack on the United States Embassy and its diplomatic mission. Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offence felt by them because of the admission of the Shah to the United States, that feeling of offence could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries. Still less could a mere refusal or failure on the part of the United States to extradite the Shah to Iran be considered to modify the obligations of the Iranian authorities, quite apart from any legal difficulties, in internal or international law, there might be in acceding to such a request for extradition.

89. Accordingly, the Court finds that no circumstances exist in the present case, which are capable of negating the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter. This finding does not however exclude the possibility that some of the circumstances alleged, if duly established, may later be found to have some relevance in determining the consequences of the responsibility incurred by the Iranian State with respect to that conduct, although they could not be considered to alter its unlawful character.

90. On the basis of the foregoing detailed examination of the merits of the case, the Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since however Iran's breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.

91. At the same time the Court finds itself obliged to stress the cumulative effect of Iran's breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself



manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. "There is no more fundamental prerequisite for the conduct of relations between States", the Court there said, "than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose". The institution of diplomacy, the Court continued, has proved to be "an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means" (*I.C.J. Reports 1979*, page 19).

92. It is a matter of deep regret that the situation which occasioned those observations has not been rectified since they were made. Having regard to their importance the Court considers it essential to reiterate them in the present Judgment. The frequency with which at the present time the principles of international law governing diplomatic and consular relations are set at naught by individuals or groups of individuals is already deplorable. But this case is unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the government of the receiving State itself. Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.

93. Before drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24–25 April 1980, an account of which has been given earlier in this Judgment (paragraph 32). No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their

immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran. When, as previously recalled, this case had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47 I.B. of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.

94. At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation.

95. For these reasons,

THE COURT,

1. By thirteen votes<sup>1</sup> to two<sup>2</sup>,

*Decides* that the Islamic Republic of Iran, by the conduct which the Court has set out in this Judgment, has violated in several respects, and is still violating, obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law;

2. By thirteen votes<sup>1</sup> to two<sup>2</sup>,

*Decides* that the violations of these obligations engage the responsibility of the Islamic Republic of Iran towards the United States of America under international law;

3. Unanimously,

*Decides* that the Government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of 4 November 1979 and what followed from these events, and to that end:

(a) must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other

<sup>1</sup> President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Grcs, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

<sup>2</sup> Judges Morozov and Tarazi.

United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961 Vienna Convention on Diplomatic Relations);

(b) must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport;

(c) must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran;

4. Unanimously,

*Decides* that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness;

5. By twelve votes<sup>3</sup> to three<sup>4</sup>,

*Decides* that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events;

6. By fourteen votes<sup>5</sup> to one<sup>6</sup>,

*Decides* that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, one thousand nine hundred and eighty, in three copies, one of which will be placed in the archives of the Court, and the others transmitted to the Government of the United States of America and the Government of the Islamic Republic of Iran, respectively.

<sup>3</sup> *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

<sup>4</sup> *Judges* Lachs, Morozov and Tarazi.

<sup>5</sup> *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

<sup>6</sup> *Judge* Morozov.

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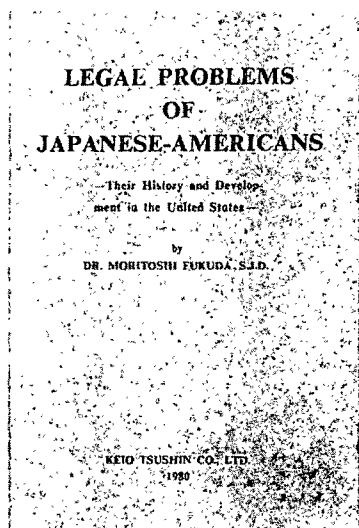
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Justice Shigemitsu Dando of the Supreme Court of Japan, who contributed the foreword for this book writes—"A book of this sort must play, without doubt, a great role as a bridge connecting the legal circles of our two countries."

The author was born in Japan and has acquired a complete legal education in two different cultural and legal systems—Japan and the United States. This has significantly helped his understanding of the concept of civil law and common law, as well as the culture, history and psychology of the two countries. The author was awarded the Doctor of the Science of Law (S.J.D.) degree in May 1978 from the University of Michigan Law School.



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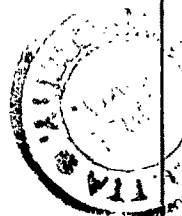
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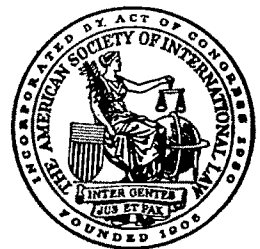


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## RETALIATION OR ARBITRATION—OR BOTH? THE 1978 UNITED STATES-FRANCE AVIATION DISPUTE

*By Lori Fisler Damrosch\**

It began as a very small dispute. Pan American World Airways planned to introduce a service from San Francisco to Paris with a stop in London, using a Boeing 747 aircraft from San Francisco to London and a smaller Boeing 727 aircraft from London to Paris. The change to a smaller plane would have enabled the most efficient and economic use of Pan Am's fleet. In aviation as in railroad terminology, a change along a route to equipment of a different size is called a "change of gauge."<sup>1</sup>

In accordance with French law, Pan Am filed a schedule on February 20, 1978 with the French aeronautical authorities, showing inauguration of the service with change of gauge effective May 1, 1978. The French aeronautical authorities informed Pan Am, however, that, in France's view, the proposed change of gauge at London was not authorized by the United States-France Air Transport Services Agreement (the Agreement).<sup>2</sup> According to the French, the Agreement authorized change of gauge in the territory of the parties subject to conditions specified in the Agreement;<sup>3</sup> but because the Agreement made no mention of change of gauge in third countries, a United States carrier could not undertake such an operation on a route to France unless France gave its consent in the particular case. The French authorities made clear that Pan Am should not expect to obtain such consent unless the United States Government was willing to negotiate with France for an appropriate quid pro quo.

\* The author is an attorney with the United States Department of State, and was Deputy Agent for the United States in the arbitration discussed in this article. The views expressed are her own and not necessarily those of the Department of State.

<sup>1</sup> Stoffel, *American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age*, 26 J. AIR L. & COMM. 119, 133 (1959); Lissitzyn, *Change of Aircraft on International Air Transport Routes*, 14 J. AIR L. & COMM. 57 (1947).

<sup>2</sup> 61 Stat. 3445, TIAS No. 1679, as subsequently extended and amended (see 1 UST 593, TIAS No. 2106; 2 UST 1033, TIAS No. 2257; 2 UST 1037, TIAS No. 2258; 10 UST 1791, TIAS No. 4336; 13 UST 1860, TIAS No. 5135; 20 UST 2684, TIAS No. 6727).

<sup>3</sup> The Agreement does not use the term "change of gauge." Section VI of the Annex to the Agreement reads:

(a) For the purpose of the present Section, the term "transshipment" shall mean the transportation by the same carrier of traffic beyond a certain point on a given route by different aircraft from those employed on the earlier stages of the same route.

(b) Transshipment when justified by economy of operation will be permitted at all points mentioned in the attached Schedules in territory of the two Contracting Parties.

(c) However, no transshipments will be made in the territory of either Contracting Party which would alter the long range characteristics of the operation or which would be inconsistent with the standards set forth in this Agreement and its Annex and particularly Section IV of this Annex.

Pan Am, and the United States Government, disagreed with the French interpretation. The Agreement's specific provision on change of equipment in the territory of the parties established the conditions under which such operations could take place in those territories, but there were no comparable provisions on third-country change of gauge. Indeed, the United States had always viewed change of gauge as an operational matter left to the managerial discretion of each carrier, unless specific provisions of a bilateral agreement imposed restrictions on the exercise of this discretion. Allowing each carrier to use the most efficient type and size of aircraft in light of differing traffic demands along the segments of a route would promote the declared policy of the United States and France expressed in the Agreement: "to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles."<sup>4</sup> In the view of the United States, the text and context of the Agreement, including its negotiating history and a long record of practice under it and similar agreements, led to the conclusion that a third-country change of gauge which did not otherwise violate any conditions imposed by the Agreement was perfectly acceptable. Special consent was not necessary, and accordingly an attempt to prohibit an operation merely because it involved a third-country change of gauge would violate the Agreement.

Intergovernmental consultations and exchanges of diplomatic correspondence in March and April proved fruitless. France demanded an economic concession of equivalent value to the proposed change of gauge, but the United States refused to consider any payment for the exercise of a right that it believed its carriers already enjoyed under the Agreement.<sup>5</sup> Though the issue remained unresolved, Pan Am went ahead and commenced the service with change of gauge as planned, in spite of warnings that France would consider such action a violation of both international law and French domestic law.

On the first day of the new service, May 1, 1978, the French authorities delayed disembarkation of the flight at Orly Airport and questioned the pilot. On the second day they issued a citation. On the third, they refused to allow the passengers to disembark or the waiting passengers to embark; the plane had to return to London. Pan Am then had no choice but to suspend the service: it also commenced an action in French courts to seek a reversal of the French decision denying its right to operate. With each day that went by, it suffered economic losses from its inability to offer the service it had been advertising throughout the spring—and in the meantime Air France was providing direct air service between Paris and Los Angeles.

The United States immediately protested the French actions against Pan

<sup>4</sup> See section IV of the Annex to the Agreement.

For a recent overview of the development of the policies reflected in aviation agreements negotiated by the United States, see Atwood, *International Aviation: How Much Competition, and How?* (book review), 32 STANFORD L. REV. 1061 (1980).

<sup>5</sup> The proposed change of gauge did not involve the carriage of local traffic between London and Paris, which would have been a new and valuable right subject to bargaining.

Am and proposed on May 4 that an expedited arbitration proceeding could be adopted to resolve the dispute if France persisted in its interpretation of the Agreement.<sup>6</sup> With no satisfactory response received, the U.S. Civil Aeronautics Board ruled on May 9 that France had violated the Agreement.<sup>7</sup> Upon making this finding, the Board set in motion a procedure under part 213 of its Economic Regulations<sup>8</sup> that ultimately could have resulted, on or after July 12, in the retaliatory suspension of all French flights from Paris to Los Angeles. Under the first phase of this procedure the

<sup>6</sup> The Agreement as amended provides in Article X that

any dispute between the Contracting Parties relative to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation shall be submitted for an advisory report to a tribunal of three arbitrators. . . . The Contracting Parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report.

Under arbitral clauses of this type, the principle of recourse to arbitration is agreed in advance, but the modalities of submitting a specific dispute to arbitration must be worked out through the negotiation of an intergovernmental agreement known as a *compromis*. Such an agreement may include, *inter alia*, provisions on selection of the arbitrators, seat of the tribunal, questions to be posed, procedures to be followed, the schedule for the proceedings, and the terms governing the conduct of the parties over the disputed issue during the pendency of the proceedings.

<sup>7</sup> Civil Aeronautics Board Order 78-5-45, Docket 32651.

<sup>8</sup> 14 C.F.R. pt. 213. Part 213, originally proposed by the Civil Aeronautics Board in 1961 to provide a means for controlling the capacity of foreign air carriers if foreign governments controlled the capacity of U.S. carriers, was adopted in somewhat different form in 1970. The version in effect at the time of the U.S.-France dispute authorized the Board to require foreign air carriers to file schedules upon a finding that the public interest so required. In the case of foreign carrier operations subject to an air transport agreement between the United States and a foreign government, the Board could not require filing of schedules unless it found that the carrier's government had impaired, limited, terminated, or denied U.S. operating rights under the agreement or otherwise failed to prevent the denial of fair and equal opportunity to exercise those rights. By entry of a subsequent order, subject to stay or disapproval by the President, the Board could prevent the inauguration of proposed schedules or require the discontinuance of existing schedules.

In 1979 Congress amended section 402(f) of the Federal Aviation Act to include a specific statutory provision on the model of part 213. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, §9, 94 Stat. 35. Under the new provision, retaliatory measures may be entered summarily and without hearing, subject to the approval of the President. The Senate Commerce Committee's report explains the provision as follows:

Experience under Part 213 has demonstrated that an effective retaliatory power can and does act as a persuasive deterrent against foreign government restrictions. Moreover, the right of the United States to take proportional countermeasures in response to restrictive action by a foreign government in violation of a bilateral agreement (even when such countermeasures would, in the absence of the foreign government violation, themselves constitute a violation of the agreement) has recently been sustained by an international arbitration tribunal as consistent with recognized international law principles. *Award of Arbitral Tribunal in the International Arbitration between the United States and France*, December 9, 1978.

S. REP. NO. 96-329, 96th Cong., 1st Sess. 5-6 (1979). The report also notes the view of the committee that implementation of a retaliatory measure when a foreign government has breached an agreement is consistent with the Board's mandate under section 1102 of the Federal Aviation Act to act consistently with obligations assumed by the United States in intergovernmental agreements.

French carriers (Air France and Union de Transports Aériens) were subjected to a requirement not generally imposed on carriers serving the United States: they were required to file their existing schedules within 7 days and proposed schedules 30 days prior to implementation. The second phase began when the Civil Aeronautics Board entered an order served June 12, which directed the suspension of all Air France flights to Los Angeles within 30 days.<sup>9</sup> Because the French service to Los Angeles was one of the French rights guaranteed by the Agreement, the only basis under international law for suspending it was the alleged prior French breach of the Agreement. On July 11, the day before the suspension was to become effective, a *compromis* of arbitration was signed; in accordance with the *compromis*, the part 213 orders were vacated the same day.<sup>10</sup>

The parties put two questions to the tribunal.<sup>11</sup> First, does a U.S.-designated carrier have the right to change gauge at London on the West Coast-Paris route? Second, did the United States have the right to take the actions it took under part 213? On December 9, 1978, the arbitral tribunal ruled that a U.S.-designated carrier does have the right to change gauge, and that the United States did have the right to take its part 213 action.<sup>12</sup>

The first of these questions is of interest primarily to the aviation community.<sup>13</sup> Underlying the second question, however, are issues going to the heart of the international legal order. How are states to resolve their disputes? When are retaliatory sanctions appropriate for an alleged breach of

<sup>9</sup> Civil Aeronautics Board Order 78-6-82, Docket 32651, 43 Fed. Reg. 25,846 (June 15, 1978). The order was subject to stay or disapproval of the President within 10 days, but was neither stayed nor disapproved; indeed, the interested executive branch agencies (the Departments of State and Transportation) supported the decision to proceed to the implementation of part 213 countermeasures.

<sup>10</sup> Civil Aeronautics Board Order 78-7-33, Docket 32651.

<sup>11</sup> The relevant portion of the *compromis* reads:

The tribunal is requested to decide the following two questions in accordance with applicable international law and in particular with the provisions of the Agreement:

(A) Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey)?

The tribunal's decision of this question shall be binding.

(B) Under the circumstances in question, did the United States have the right to undertake such action as it undertook under Part 213 of the Civil Aeronautics Board's Economic Regulations?

The tribunal shall issue an advisory report with respect to this question in accordance with Article X of the Agreement, which shall not be binding.

The *compromis* fixed an expedited schedule for the briefing of the case and requested the tribunal to render its decision no later than December 10, 1978. It also established interim arrangements to permit Pan Am to operate its service with change of gauge on exactly one-half the days between the inception of the dispute and December 10. See *infra*, note 54 and accompanying text.

<sup>12</sup> Case Concerning the Air Services Agreement of 27 March 1946, Arbitral Award of 9 December 1978, 54 ILR 304 (1979) [hereinafter cited as Award].

<sup>13</sup> See A. LOWENFELD, AVIATION LAW, ch. II, §5.3 (2d ed. 1980).

an intergovernmental agreement, and under what conditions? If two states have committed themselves in an agreement to submitting disputes concerning its interpretation or application to arbitration, what, if any, unilateral measures may they take before the tribunal is constituted? To what extent may they use the threat or the actual application of such measures to influence the outcome of the negotiations over the terms for submitting the dispute to arbitration or the terms of interim operations pending the outcome of arbitration?

This paper explores some of these issues, using the change-of-gauge arbitration as a case study. In particular, it analyzes the relationship between self-help measures of retaliation and neutral dispute settlement procedures, and discusses how the availability of each can affect the application of the other.

## I. RULES ON RESPONSES TO BREACH OF TREATY

### *Materiality*

The Vienna Convention on the Law of Treaties<sup>14</sup> is the logical starting place for an inquiry into the state of the law on permissible responses to a perceived breach of treaty.<sup>15</sup> Under Article 60, a material breach by one party to a treaty entitles the other party to terminate the treaty or suspend its operation in whole or in part. A material breach is defined as a repudiation not sanctioned by other provisions of the Vienna Convention, or a violation of a provision essential to the accomplishment of the object or purpose of the treaty.<sup>16</sup>

With many articles of the Vienna Convention it is relatively easy to ascertain whether the drafters intended to codify existing international

<sup>14</sup> UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969). The Vienna Convention entered into force on January 27, 1980, but has not been ratified by the United States. However, many of its provisions are considered to be declaratory of customary international law. See Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AJIL 51 (1974), and *United States Ratification of the Vienna Treaty Convention*, 73 *id.* 470 (1979). The final preambular paragraph of the convention provides that "rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention."

<sup>15</sup> The word "treaty" is here used in the sense defined by Article 2 (a) of the Vienna Convention on the Law of Treaties: "an international agreement concluded between States in written form and governed by international law, . . . whatever its particular designation." Domestic law considerations, such as whether ratification of the agreement has received the advice and consent of the Senate, are not relevant to this usage of the term.

<sup>16</sup> The relevant provisions of Article 60 of the Vienna Convention read:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

. . . .

3. A material breach of a treaty, for the purposes of this article, consists in  
 (a) a repudiation of the treaty not sanctioned by the present Convention; or  
 (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

law or, alternatively, to create a new rule to take effect between the parties only upon the convention's entry into force. Article 60 does not fall clearly into either of these categories. On the one hand, the International Law Commission noted the lack of consensus among jurists over some of the key concepts addressed in the article and the paucity of state practice to illuminate the issues.<sup>17</sup> On the other hand, the Commission appeared to assume that the basic principle underlying Article 60 was, in the words of Judge Anzilotti's famous dissent in *Diversion of Water from the Meuse*, "so just, so equitable, so universally recognized, that it must be applied in international relations also."<sup>18</sup>

Yet Article 60, whether or not it enunciates existing principles of international law on the points it addresses, cannot—or at least should not—be considered an exclusive statement of the rights under customary international law of a party injured by a breach of treaty. Most important, the article omits any discussion of less than material breaches. By this omission the drafters might have intended to preclude any sanction for nonmaterial breaches. Alternatively, they might have intended only to confirm the right to terminate or suspend a treaty in response to a material breach, and to preclude these drastic measures unless a breach was material, without prejudice to the availability of other lesser responses to lesser breaches. The former interpretation would in effect eliminate any deterrent for a vast category of treaty violations, and runs contrary to good sense.

By reading between the lines of the International Law Commission's commentary, it is fortunately possible to conclude that the Commission did not intend to foreclose appropriate responses to breaches not covered by Article 60's materiality standard. The Commission indirectly recognized that rights of reprisal would be available under international law wholly apart from any codification of the law of treaties.<sup>19</sup> It is not at all clear why the Commission failed to confirm these rights explicitly in the text of the draft articles. In view of the sound policy reasons for preserving a deterrent to minor as well as major treaty breaches, the references to materiality in the text should be read not as excluding entirely the right to respond to minor breaches, but simply as a means to ensure that minor breaches are not used as a pretext for denouncing a treaty which has become inconvenient or for suspending performance of more than proportional obligations.<sup>20</sup>

<sup>17</sup> Reports of the International Law Commission on its Seventeenth and Eighteenth Sessions, 21 UN GAOR, Supp. (No. 9) 82–84, UN Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 253–55, UN Doc. A/CN.4/Ser.A/1966/Add.1.

<sup>18</sup> PCIJ, ser. A/B, No. 70, at 50 (1937). See also A. D. McNAIR, *THE LAW OF TREATIES* 570–78 (1961); M. WHITEMAN, 14 *DIGEST OF INTERNATIONAL LAW* 468–78 (1970); *RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES* §158; Esgain, *The Spectrum of Responses to Treaty Violations*, 26 OHIO STATE L.J. 1 (1965). For confirmation of the right to suspend performance in the specific case of breach of an air services agreement, see B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 482 (1962).

<sup>19</sup> The Commission noted that the right to invoke termination or suspension arises "independently of any right of reprisal." [1966] 2 Y.B. INT'L L. COMM'N 255.

<sup>20</sup> The American Law Institute's *Restatement (Second) of the Foreign Relations Law of the United*

The tribunal in the U.S.-France arbitration did not discuss the issue of materiality, though both sides had argued it. France claimed that its denial of the right to change gauge (which in its view did not constitute a breach) was certainly not a violation of a provision "essential to the accomplishment of the object or purpose of the treaty" within the meaning of Article 60, and hence could not supply the legal basis for a U.S. suspension of obligations owed to France. The United States asserted, on the other hand, that the French conduct (which forced Pan Am to abandon an economic method of operation) had effectively grounded Pan Am in violation of the Agreement's essential purpose of providing air services. As a subsidiary point, the United States argued that even a minor breach could justify proportional countermeasures. In finding for the United States on the retaliation issue, the tribunal did not refer to the Vienna Convention or to any purported materiality rule, and thus may well have considered that the right to take proportional countermeasures exists regardless of the materiality of the breach. Let us assume so.

### *Proportionality*

One point to which the tribunal did devote some attention was the question of the proportionality between the alleged breach and the U.S. response. This was an issue the parties had briefed in some detail, not because they differed on the appropriate legal rule,<sup>21</sup> but because they strongly disagreed over the application of the rule to the facts of the case.

France argued that there can be no proportionality between the denial of a right to institute a new and disputed service and the interruption of an undisputed service conducted over many years. Further, in France's view the economic consequences of the Pan Am service and the Air France service were grossly disproportionate.

The United States would have been hard pressed to deny the second point. It thus argued that since the French action had effectively denied Pan Am the right to operate a West Coast-Paris service, it was appropriate to deny the French carrier its rights on a symmetrical route. The tribunal took a slightly different tack:

In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account

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*States* confirms in section 158 the right to suspend performance of treaty obligations toward the breaching party as long as the suspension and the violation (apparently whether material or not) involve corresponding provisions or are otherwise reasonably related. Lord McNair notes that retaliatory suspension of a corresponding provision is a common sanction for minor treaty breaches, though he comments that "[t]he precise juridical status of this practice is not clear, and little authority exists." A. D. McNAIR, *supra* note 18, at 573. See also RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), Tentative Draft No. 1, April 1, 1980, §345, following Article 60 of the Vienna Convention.

<sup>21</sup> The tribunal described the rule as "well-known." Award, para. 83.

of the suspension of the projected services with the losses which the French companies would have suffered as a result of the countermeasures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.<sup>22</sup>

This passage is interesting on several counts. First, it permits states to apply countermeasures that would be disproportionate in an economic sense, in order to enforce a principle. Second, it implies that considerations of principle are all the more weighty when third countries are watching. Figuring third-country reactions into the proportionality formula is novel but sensible, especially in the aviation context. Because of the worldwide network of essentially similar agreements, the way two states interpret and apply their bilateral agreement can have repercussions far beyond the particular case.<sup>23</sup> And apart from questions of aviation practice or policy, a deliberate and effective response to a treaty violation can have, as the tribunal indicated, "an exemplary character directed at other countries": in other words, "the character of a sanction."<sup>24</sup> An overly niggardly approach to proportionality could conceivably detract from the importance of the retaliatory sanction as a deterrent to potential treaty violators. Under this reasoning, the injured party should have an adequate degree of flexibility in assessing the appropriate level of response and should not be subjected to *ex post facto* censure for having failed to achieve precise equivalence.

#### *Existence of Breach*

Though the literature on the law of treaties includes ample discussion of the concepts of materiality and proportionality, another aspect of the problem—the need for a breach as a predicate to retaliation—is hardly discussed at all. One explanation for the dearth of comment may be that the treatise writers have assumed that the condition of a prior breach was so obviously central to the theory of retaliation that it hardly need be discussed. How could a retaliatory breach be justified unless the conduct provoking retaliation was itself a breach?<sup>25</sup>

<sup>22</sup> *Ibid.*

<sup>23</sup> The United States had made an extensive showing of practice under agreements with third countries to support its position on the change-of-gauge issue. The tribunal did not find it necessary to rely on the evidence of third-country practice, and concluded only that this evidence "does not appear inconsistent" with the approach suggested by more direct sources of interpretation. Award, para. 71.

<sup>24</sup> Award, para. 78.

<sup>25</sup> A retaliatory act that is not itself illegal falls into the category of *retorsion*: an unfriendly act for an unfriendly act. L. OPPENHEIM, 2 INTERNATIONAL LAW 136 (7th ed. H. Lauterpacht, 1952). A retaliatory breach of treaty, however, corresponds to a measure of reprisal under customary international law: the victim state's conduct in derogation from its own international obligations is justified as a response to a prior illegal act.



If the treatise writers have been assuming that only an underlying breach can justify a retaliatory breach, it is time to question that assumption.

The U.S.-France change-of-gauge dispute might have been decided the other way; presumably the French expected the opposite outcome, and the arbitrator of French nationality in an articulate dissent points out the logic of the French position. If either of his colleagues<sup>26</sup> had found the French argument just a shade more persuasive and had cast a different vote on the change-of-gauge issue, would that change in result on the question of treaty interpretation have changed the result on the question of retaliation? If the assumption of the need for an underlying breach is correct, the answer would have to be yes.

For tactical reasons the United States was reluctant to admit even *arguendo* that France might not have committed the first breach, and thus refrained from articulating an explicit theory that the tribunal could have used to approve a retaliatory breach if it found that France had not breached the Agreement. Such a theory can indeed be articulated, and it may well prove more satisfactory than the heretofore unchallenged assumption that only a prior breach can justify a responsive breach.

There are essentially three approaches to the problem: first, that no retaliatory measures should be taken until after an arbitral tribunal has established the existence of a prior breach; second, that retaliatory measures may be implemented pending arbitration at the risk of liability to the other party if the tribunal eventually holds that there has been no breach; and third, that retaliatory measures may be implemented pending arbitration, with liability to the other party or the measure of appropriate reparations to be determined by the retaliating party's good faith rather than by whether it guessed wrong in predicting the tribunal's decision.

The first of these has been advocated by Philip Jessup, who wrote in 1948 that it would be "highly suitable for an international tribunal to pass judgment on the merits of the claim" before an aggrieved state takes retaliatory action.<sup>27</sup> However desirable this approach might be in an ideal world, its shortcomings in today's world are obvious. Tribunals are not always in place to hear disputes or to indicate interim measures of protection; indeed, even when a preexisting agreement calls for arbitration, establishment of the tribunal takes time,<sup>28</sup> and there may be protracted negotiations over the terms of the *compromis* and the regime to govern the conduct of the parties pending the tribunal's decision. If the party allegedly committing the initial breach could enjoy the benefits of its breach without the fear of retaliatory responses during this possibly lengthy period, it would have every incentive

<sup>26</sup> The *compromis* provided for the United States and France each to select one arbitrator; they were Thomas Ehrlich and Paul Reuter, respectively. The third arbitrator, chosen by agreement of the parties, was Willem Riphagen, a Dutch international law scholar.

<sup>27</sup> P. JESSUP, A MODERN LAW OF NATIONS 152 (1948). See also Borchard, *Declaratory Judgments in International Law*, 29 AJIL 488, 490-91 (1935).

<sup>28</sup> For a discussion of some of the opportunities for delay in the progress of a dispute through arbitration, see Larsen, *Arbitration of the United States-France Air Traffic Rights Dispute*, 30 J. AIR L. & COMM. 231, 237-38 (1964); Larsen, *The United States-Italy Air Transport Arbitration: Problems of Treaty Interpretation and Enforcement*, 61 AJIL 496, 502-03 (1967).

to delay submission of the dispute to arbitration and conclusion of the arbitral proceedings. Because of these realities of international dispute settlement, there is apparently no instance in which a party seeking to terminate its own performance under a treaty on account of the other party's breach has sought prior authorization from an international tribunal.<sup>29</sup>

The second approach was adopted in the 1935 Harvard Draft Convention on the Law of Treaties, which would have permitted provisional suspension of performance of treaty obligations pending a declaration of rights by an international tribunal, with the proviso that "provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority."<sup>30</sup> Though the drafters of the Harvard convention recognized that insistence on obtaining a prior arbitral

<sup>29</sup> B. SINHA, UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATIONS BY OTHER PARTY 210 (1966). But see the discussion by the International Court of Justice approving the action of the United Nations General Assembly in invoking South Africa's breach of its international obligations as a ground for terminating South Africa's League of Nations mandate over South West Africa. Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] ICJ REP. 16, 46-47.

<sup>30</sup> The Harvard draft convention with commentary is reprinted in 29 AJIL Supp. 662 (1935). The relevant provision, Article 27, is discussed in *id.* at pp. 1077-96 and reads:

(a) If a State fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting within a reasonable time after the failure, may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty *vis-à-vis* the State charged with failure.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

The Harvard draft reflected the approach taken by Lauterpacht a few years earlier in discussing self-help remedies in international law. He noted that self-help is not a normal juridical institution, but only a temporary authorization to act in the name of the law. Its use, in the final analysis, must be justified before the law:

Le "self-help" doit, en fin de compte, se justifier devant la loi, et tout excès ou abus de force entraînera un châtement. Dans les sociétés où la loi est souveraine, l'individu qui se rend justice à lui-même est strictement responsable devant la loi. . . .

La thèse d'après laquelle la reconnaissance du "self-help" par le droit national, dans des cas peu nombreux et peu significatifs, justifierait son adoption comme règle générale dans le domaine des relations internationales se heurte donc à de sérieuses objections. Il est également fort grave de placer sur le même plan le "self-help" provisoire, réglementé et justifiable devant les tribunaux, et le "self-help" destiné à faire valoir d'une manière définitive et normale des droits réels ou supposés, sans en référer ensuite à un organisme indépendant chargé de rendre un jugement.

Lauterpacht, *La Théorie des différends non justiciables en droit international*, 34 RECUEIL DES COURS 499, 527-28 (1930 IV).

Thirty-five years later, the International Law Commission, in discussing the draft of the Vienna Convention, noted that some of the Commission's members considered that the right to terminate or suspend a treaty for breach should be made subject to control by compulsory reference to the International Court of Justice. [1966] 2 Y.B. INT'L L. COMM'N 262.

judgment would be unrealistic, they made clear that a party engaging in provisional suspension would do so "at its own risk"; if the tribunal failed to sustain its contentions, the suspending state would itself be in the position of wrongful breach.

Therefore, under the rule here proposed, it will behoove States not to undertake unilaterally to suspend performance of their treaty obligations *vis-à-vis* a State which they allege to be guilty of breach of the treaty unless they are fairly certain that their allegations are sound and susceptible of being proved to the satisfaction of a competent international tribunal or authority.<sup>31</sup>

Putting states at their peril for a wrong guess may well be inadvisable given the present stage of development of international jurisprudence. There is little continuity among persons acting as arbitrators or judges, no appellate body to harmonize the decisions of ad hoc tribunals, not much of a rule of *stare decisis*, and indeed, considerable uncertainty—as compared to national jurisprudence—concerning the very content of the rules to be applied. In short, there is little to facilitate predictability. How, then, can states be "fairly certain" that an as yet unconstituted tribunal will vindicate their predictions?

It seems preferable to adopt a rule allowing a state to implement counter-measures without risk of later liability when it acts upon a good faith belief that it is the victim of a breach, even though that belief later turns out to be erroneous in light of the results of an arbitration. Good faith could be assessed in light of two sorts of considerations. The first, and probably most important, would be the seriousness of the arguments (though ultimately found unpersuasive) that the retaliating state had adduced in support of its position that the other state committed the prior breach: the closer the case on the issue of underlying breach, the stronger the case for a finding of good faith. The second would be indications of a sincere interest in achieving a prompt and fair resolution of the issue: willingness to consult or to seek third-party assistance through mediation, conciliation, or arbitration would count favorably in this regard.

In contrast, it would be appropriate to hold internationally responsible a retaliating state that advances an insubstantial legal theory concerning the other party's alleged breach, or (though it makes out a plausible but ultimately unavailing argument on underlying breach) that has engaged in dilatory behavior or unwarranted pressure tactics instead of serious efforts to resolve the dispute. Under this approach, states would be enjoined to proceed with caution and in moderation when reacting to a perceived breach, and would be held answerable for frivolous or abusive behavior, but would not be penalized for a good faith but mistaken prediction of the course of development of the law.<sup>32</sup>

<sup>31</sup> Harvard draft convention, *supra* note 30, 29 AJIL Supp. at 1095–96.

<sup>32</sup> As a variant on this approach, the Harvard draft approach could be used to enter a finding that retaliation "was not justified" in the absence of prior breach, but good faith would be taken into account in determining whether it would be appropriate for the retaliating party to pay reparation to the other party for any damage caused by the retaliatory acts.

There are, of course, some dangers in this approach. To the extent that it relaxes traditional standards for retaliatory breach, it runs some risk of encouraging (or at least failing to deter) conduct that deviates from solemnly agreed treaty norms. And, to this same extent, it at least arguably impairs the values promoted by the *pacta sunt servanda* rule. But, on the other hand, by stressing the need for a retaliating party to demonstrate its good faith in seeking to resolve the dispute, this approach may well promote resort to neutral dispute settlement mechanisms.

The tribunal in the U.S.-France dispute used language that supports the approach now under discussion (as contrasted with the Jessup or Harvard draft approaches), though it is not entirely clear that that is what the tribunal had in mind. Significantly, the tribunal seems to have separated the question of legality of countermeasures from the question of whether there was an underlying breach: it stated that it is "quite obvious that the lawfulness of the action [of the United States] must be considered regardless of the answer to the question of substance concerning the alleged violation of the 1946 Agreement by the French Government."<sup>33</sup> (The votes cast and separate opinion entered by the arbitrator of French nationality indicate that he had divorced the two questions in his analysis: he dissented from the finding in favor of the United States on the change-of-gauge question but voted for the United States on the question of the legality of the countermeasures.) Further, throughout the discussion of the justification for countermeasures, the tribunal consistently refers to the "alleged breach" or "alleged violation" as giving rise to the other party's right to take responsive action.<sup>34</sup> Finally, good faith seems to have been a highly significant factor in the tribunal's consideration: it appears to have given great weight both to the U.S. conviction that denial of the right to change gauge raised an issue of principle,<sup>35</sup> and to the U.S. good faith efforts to submit the dispute to arbitration and expedite the conclusion of the arbitral proceedings.<sup>36</sup>

The tribunal also devoted considerable attention to the question of whether it is legitimate to invoke countermeasures where there is a pre-existing commitment to third-party dispute settlement, and concluded that the presence of an arbitration clause in the Agreement did not preclude the United States from implementing countermeasures during the period until the tribunal was constituted and in a position to indicate interim measures of

<sup>33</sup> Award, para. 74.

<sup>34</sup> Award, paras. 74 ("alleged violation"); 81 ("a situation . . . which, in one State's view, results in the violation of an international obligation by another State"); 82 ("the obligation allegedly breached," "the alleged violation"); 83 ("the alleged breach"); 84 ("a violation of international law allegedly committed by the State against which [the countermeasures] are directed") (emphasis added).

Cf. Case Concerning United States Diplomatic and Consular Staff in Tehran, Judgment of May 24, 1980, [1980] ICJ REP. 3, 27-28, reprinted in 74 AJIL 746 (1980) (United States countermeasures against Iran were taken "in response to what the United States believed to be grave and manifest violations of international law by Iran . . . [emphasis added]"). But see *id.* at 53-55, 63-65, dissenting opinions of JJ. Morozov and Tarazi, arguing that the United States should not have implemented countermeasures when it was looking to the Court for judicial relief.

<sup>35</sup> Award, paras. 77-78, 83, 90.

<sup>36</sup> Award, paras. 91-98.

protection.<sup>37</sup> It concluded that states cannot be deemed to have renounced their right to take countermeasures during the period before the case is submitted: rather, allowing countermeasures during this period "facilitates States' acceptance of arbitration or judicial settlement procedures."<sup>38</sup> In reaching this conclusion, the tribunal touched on the theme of the second half of this article: how the application of countermeasures during the interim period can affect the terms on which a case is submitted to arbitration.

## II. RETALIATORY MEASURES AND SUBMISSION TO ARBITRATION

The tribunal's approach raises two interrelated issues. Can retaliation or the threat of retaliation facilitate previously agreed dispute settlement mechanisms, rather than subvert them? Should international law preclude states from resorting to self-help when third-party remedies are either available or pending?

### *Does Retaliation Undercut or Facilitate Arbitral Resolution?*

France could hardly have refused to agree to "the principle of recourse to arbitration,"<sup>39</sup> with or without a U.S. threat of retaliation, since Article X of the Agreement as amended requires arbitration of "any dispute . . . relative to the interpretation or application of this Agreement . . . which cannot be settled through consultation."<sup>40</sup> An arbitration clause of this type, concluded in advance of any dispute at a time when the parties are presumably satisfied with the overall balance struck by the agreement, can greatly facilitate submission of future disputes to arbitration.

Conceivably, such a preexisting dispute settlement clause could be invoked for an abstract legal question of treaty interpretation, before disputed application causes injury to either party. International law scholars have advocated the use of declaratory judgment procedures as a means of preventing injury, and international tribunals have indicated that they believe resolution of this sort of question can under appropriate circumstances be consistent with their judicial function.<sup>41</sup>

Had an anticipatory declaratory judgment procedure been a realistic possibility, the U.S.-France treaty interpretation dispute concerning change of gauge might conceivably have been put to arbitration as early as March 1978, after the French authorities had stated their position that the Pan Am change-of-gauge service would violate the Agreement but before any injury

<sup>37</sup> Award, paras. 80, 84-99.

<sup>38</sup> Award, para. 95.

<sup>39</sup> France so agreed by diplomatic note on May 13, 1978, less than 10 days after the United States proposed binding and expedited arbitration and 4 days after the first part 213 order was entered. Award, para. 6.

<sup>40</sup> This provision took its present form when the Agreement was amended by exchange of notes in 1951. 2 UST 1033, TIAS No. 2257. See note 6 *supra*.

<sup>41</sup> See Borchard, *Declaratory Judgments in International Law*, 29 AJIL 488 (1935); cf. Case Concerning the Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections), [1963] ICJ REP. 15, 37-38.

had been inflicted.<sup>42</sup> However, the option of arbitrating an issue holds little appeal in the absence of significant injury, either actually incurred or very imminently threatened. Even if pride were not at stake in the risk of an adverse judgment, international arbitration costs the litigants money, and the preparation of the case requires a significant commitment of lawyers' time. It is not realistic to think that states will volunteer to arbitrate an issue unless they can see something tangible to be gained, such as monetary reparation or removal of an obstacle to enforcement of a right. Where injury is only a future possibility, perception of the likelihood of such a gain is not likely.

If only one party has been injured, the expectation of possible gain from arbitration is likely to be asymmetrical in the early stages of a treaty dispute. One party believes itself the victim of unlawful action; the other party enjoys the status quo and has little incentive to participate in facilitating an arbitration that might change that status quo. The aggrieved party can suggest that adjudication will help keep relations amicable; or it can point to a preexisting arbitration treaty or arbitration clause in the treaty in dispute; or, where appropriate, it can invoke the compulsory jurisdiction of the International Court of Justice. But since it is of course rare to find a tribunal already in place at the inception of the dispute with jurisdiction to change the status quo by entering and enforcing interim protective orders, the claimant state will almost always be at a severe disadvantage. It will need the respondent state's cooperation in proceeding to establish the tribunal that will have the authority to change the status quo.

In the U.S.-France dispute, no tribunal was in place. In fact, it was far from clear in May that the dispute would ever reach arbitration. France wanted to settle the dispute through "*négociation*," which is the word used for "consultation" in the French text of Article X.<sup>43</sup> This insistence on

<sup>42</sup> See M. HUDSON, *INTERNATIONAL TRIBUNALS* 120 (1944); G. SCHWARZENBERGER, 1 *INTERNATIONAL LAW* 586 (1957) ("The fact that international awards and judgments may be of a declaratory character proves that legal interest in international law does not depend on the actual sufferance of damage. . . . [T]he mere danger of an infringement of international rights suffices for this purpose."); compare the views of the United States and the United Kingdom on the arbitrability of an incipient controversy over Panama Canal tolls, as set forth in G. HACKWORTH, 6 *DIGEST OF INTERNATIONAL LAW* 59 (1943). In the *Corfu Channel* case ([1949] ICJ REP. 35), a declaratory judgment was deemed to be appropriate satisfaction for the violation of Albania's sovereignty though Albania had suffered no injury. However, in the *Cameroons* case, the Court did emphasize that the Court

may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.

[1963] ICJ REP. 33-34. Thus, though consummated injury may not be a requirement for submission of a dispute to adjudication, a concrete controversy is.

<sup>43</sup> The French text of the relevant provision reads: "tout différend entre les Parties contractantes relatif à l'interprétation ou à l'application dudit Accord ou de son annexe qui ne pourrait être réglé par voie de négociations directes sera soumis pour avis consultatif à un Tribunal arbitral de trois membres. . . ."

*négociation* may well have been prompted in part by a sense that for proper jurisprudential reasons the parties should do everything possible to narrow the issues before submitting them to arbitration, and if possible resolve them.<sup>44</sup> But the United States feared that France might have had other motives: delay worked in favor of France since France benefited from the status quo as it had defined it when it barred the Pan Am service. By prolonging the status quo, perhaps France could induce the United States to "negotiate" a concession, particularly since Pan Am was losing valuable summer revenues each day that the change-of-gauge service was barred.

The United States was not inclined to negotiate a concession for a right that it believed it already enjoyed under the Agreement. Thus, upon finding that France had denied this right, the Civil Aeronautics Board began the part 213 process.<sup>45</sup>

One result of the U.S. action was that France had substantially more interest in a speedy resolution of the dispute than before the entry of the first part 213 order. Thus, the threat of retaliation served as a substitute for effective international judicial mechanisms to enforce a preexisting commitment to arbitrate. In arguing in favor of its part 213 action, the United States spoke of the measures as restoring the balance that had been upset when France unilaterally prevented the operation of the change-of-gauge service.

The part 213 action contributed to balance in another way, since it gave France a grievance as well. France, presumably, was convinced of the illegality of Pan Am's third-country change-of-gauge operation, just as the

<sup>44</sup> The jurisprudence of the International Court of Justice and its predecessor, the Permanent Court of International Justice, supports the proposition that in appropriate circumstances a case might even be dismissed if diplomatic consultations had not yet occurred. *See, e.g., Mavrommatis Palestine Concessions*, [1924] PCIJ, ser. A., No. 2, at 15:

The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognises, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiation.

And *see* dissenting opinion of Judges Spender and Fitzmaurice in the South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), [1962] ICJ REP. 310, 563:

[R]equirements about "disputes" and "negotiations" are not mere technicalities. They appear in one form or another in virtually every adjudication clause that has ever been drafted, and for good reason. They are inserted purposely to protect the parties, so far as possible, from international litigation that is unnecessary, premature, inadequately motivated, or merely specious.

*See also* Bourquin, *Dans quelle mesure le recours à des négociations diplomatiques est-il nécessaire avant qu'un différend puisse être soumis à la juridiction internationale?*, in *HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PRÉSIDENT BASDEVANT* 43-55 (1960).

<sup>45</sup> The Board found

that the Government of France has taken action which, over the objections of the United States Government, will impair, limit, terminate, and deny operating rights and deny the fair and equal opportunity of U.S. carriers to exercise the operating rights provided for in the United States-France Air Transport Services Agreement.

Order 78-5-45, *supra* note 7.

United States was convinced of its legality. Neither side could deny that suspension of Air France's Paris-Los Angeles service would have been itself a violation of the Agreement, justifiable under international law only because it responded to an alleged prior breach. Because of France's conviction that it had committed no breach, it saw advantages in arbitrating the legality of the conduct of the United States, and indeed insisted that this question be submitted to the same tribunal that would decide the change-of-gauge issue.<sup>46</sup>

With the field of controversy thus expanded,<sup>47</sup> both sides had something to lose. Each side accordingly looked for ways to lower the risk to itself. Further escalation of retaliatory measures would not have achieved this purpose and might have been counterproductive. Rather, each side tried to find ways to remove from the tribunal's consideration the issue the other side insisted on submitting. France's technique was to claim that the change-of-gauge issue was not yet ripe for adjudication since Pan Am had not exhausted its local remedies in France.<sup>48</sup> The United States took the position that it was inappropriate to arbitrate the legality of threatened counter-measures because neither France nor its carriers had been injured by them,<sup>49</sup> because there was no live dispute after the Civil Aeronautics Board vacated its orders,<sup>50</sup> and because the parties had not had adequate consultations on the issue.<sup>51</sup> In the *compromis* of arbitration each side suc-

<sup>46</sup> Each side qualified its consent to arbitration with a reservation of the right to attempt to persuade the tribunal that it should not proceed to the merits of the question in which that party was defendant. See *infra*, notes 48-52 and accompanying text.

<sup>47</sup> Professor Arie David has shown that disputes over treaty termination have a tendency to expand laterally into other aspects of the parties' relationship, which raises the stakes involved in the resolution of the conflict. A. DAVID, *THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS* (1975). His analysis of the pattern of lateral widening of treaty termination disputes can also be applied to cases of retaliation within a treaty framework. David has pointed out that the adjudicative process, in contrast to the retaliatory process, tends to limit and confine disputes, and thus is inconsistent with the lateral widening phenomenon he sees as usually essential to the resolution of treaty termination conflicts. For this reason, among others, he doubts the utility of adjudication in resolving vital disputes and relegates it to "matters of relatively minor importance." *Id.* at 186-89, 201.

<sup>48</sup> Pan Am had commenced an action in a French administrative tribunal to have set aside the decision denying it the right to operate the service with change of gauge. This action was still pending at the time the arbitral award was rendered.

France argued that the U.S. request for arbitration related essentially to a matter of diplomatic protection of one of its nationals, so that the international law rule of exhaustion should be observed. The United States noted, on the other hand, that the case was not one of espousal but rather of direct injury to the right of the United States to conduct air services through a designated carrier. The United States also argued that the exhaustion rule was waived by the arbitration provisions of the Agreement, and that there was in any event no effective remedy available in France. Though it did not adopt all the arguments made by the United States, the tribunal did rule in favor of the United States on this issue.

<sup>49</sup> See note 42 *supra*.

<sup>50</sup> The *Northern Cameroons* case, *supra* note 41, is an example of a dismissal due to the absence of a live controversy between the parties. The classic definition of an international dispute comes from *Mavrommatis Palestine Concessions*: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." [1924] PCIJ, ser. A, No. 2, at 11.

<sup>51</sup> See note 44 *supra*.



ceeded in reserving the right to argue to the tribunal that the question in which it was defendant should not be answered at all.

The United States also presented a series of arguments on the merits aimed at avoiding a link between the two questions in the event of an adverse ruling on the first: that the U.S. part 213 action was not really a retaliatory breach but merely an unimplemented threat; and that the action was in any event justified, pending submission of the dispute to arbitration, in order to restore the balance upset by France's unilateral action.

Conceivably, the tribunal could have accepted each side's preliminary objections and dissolved itself without adjudicating the merits of either issue.<sup>52</sup> However, it proceeded to the merits on both. There are some hints that considerations of maintaining a balance played a role in the decision to answer both questions and to some extent in the answers given.<sup>53</sup>

Interestingly, balance was also a major preoccupation of the parties in their negotiations over the terms of submitting the dispute to arbitration. In particular, the parties included in the *compromis* a provision on "interim arrangements that will maintain strict equality of balance between the position of the Government of the United States that Pan American World Airways should be permitted to change gauge during arbitration, and the position of the Government of France that it should not change gauge during this period."<sup>54</sup> The method adopted for maintaining this balance was to establish a fixed date (December 10, 1978) for the conclusion of the arbitral proceedings and to permit Pan Am to operate its change-of-gauge service on exactly one-half the days between the May 1 date of the commencement of the dispute and the expected December 10 date for its final resolution. Though this compromise achieved abstract balance, it was in fact of no benefit to Pan Am: the mid-July date of conclusion of the *compromis* came

<sup>52</sup> The tribunal noted the "request" of the two parties that it answer both questions posed by the *compromis* (Award, para. 22); but it barely acknowledged the express reservation by each party of the right to argue that the other's question should not be answered. Incidentally, there is precedent in international jurisprudence for an applicant party to raise preliminary objections going to jurisdiction or admissibility of a claim. See *Monetary Gold Removed from Rome in 1943* (Preliminary Question), [1954] ICJ REP. 19, 28-29. In the *Cameroons* case, the Court stated that there may be "an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other the duty of the Court to maintain its judicial character." [1963] ICJ REP. 29. But see Sohn, *The Function of International Arbitration Today*, 108 RECUEIL DES COURS 9, 24 (1963 I): "there are no disputes which by their nature are not suitable for arbitration. If the parties agree that a particular dispute should be submitted to an arbitral tribunal, that tribunal need not enquire whether that dispute is arbitrable."

<sup>53</sup> The French arbitrator in his separate opinion queried whether after the conclusion of the *compromis* France could still claim a sufficient legal interest to ask the second question. He noted, however, that he had answered this question with the tribunal "because a refusal of the Tribunal to answer that question would only have emphasized further an inequality between the Parties visible elsewhere." On the merits of the question, the tribunal noted in sustaining the legality of the U.S. action that the aim of countermeasures is "to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. . . . [T]he United States counter-measures restore in a negative way the symmetry of the initial positions." Award, para. 90 (emphasis added).

<sup>54</sup> *Compromis*, para. 3.

too late for Pan Am to carry the summer travelers it had counted on when it first planned the change-of-gauge service. Thus, even a "balanced" interim regime turned out to favor the breaching party in the U.S.-France dispute, despite the steps taken by the United States to counterbalance France's unilateral action.

The balance metaphor, and the metaphor of first expanding a dispute through the threat of retaliation and then limiting it for arbitral resolution, both fit the U.S.-France dispute well. They lead to the tentative conclusion that retaliation can serve a useful (though not always perfectly successful) function in the dynamic process of attaining arbitral resolution of a dispute.

*Should International Law Preclude Retaliation Pending Arbitration?*

The critical legal issue raised by France on the relationship between retaliation and arbitration is whether a preexisting commitment to arbitrate—in this case the U.S. commitment rather than the French commitment—requires a party to refrain from self-help measures pending the outcome of the proceeding. France contended that resort to retaliatory measures while negotiations were under way on the terms of the *compromis* of arbitration was not consistent with the assumption that both parties would fulfill the arbitration commitment in good faith: the U.S. conduct both anticipated the outcome of the arbitral award and presupposed that arbitration would be ineffective in redressing the U.S. grievance. France further contended that invocation of part 213 was an illegitimate application of pressure that caused France to make concessions it would not otherwise have made on the terms of the *compromis*.<sup>55</sup> The French position has particular appeal when the alleged treaty violator believes in good faith that it has committed no breach. In these circumstances a self-help retaliatory remedy can seem both presumptuous and precipitous.<sup>56</sup>

<sup>55</sup> France claimed that the U.S. application of pressure forced it to make a series of concessions to which it would otherwise not have agreed. These were: (1) submission of the dispute to arbitration before Pan Am had exhausted local remedies; (2) binding arbitration on the change-of-gauge question but only an advisory report on the part 213 question; (3) an expedited schedule for the arbitration; and (4) an interim regime permitting Pan Am to perform the change-of-gauge operation for part of the period of time before the arbitral award was to be rendered.

The United States argued in reply that each of the claimed French "concessions" was in fact illusory. Exhaustion of local remedies was not, under international law a prerequisite to submission of this dispute to arbitration (and indeed the tribunal so held; Award, paras. 25–32). In the negotiations for the *compromis*, France never sought anything other than a binding judgment on the first question and an advisory report on the second. The expedited schedule for the arbitration and an interim regime permitting change of gauge on half of the days from the inception of the dispute to the expected date of entry of the award maintained legal equality of the parties (though in fact, as noted above, text at note 54, Pan Am derived no benefit from this "equal" arrangement).

<sup>56</sup> See, e.g., the dispute between the United States and the Netherlands during 1974 and 1975, discussed in Lowenfeld, *CAB v. KLM: Bermuda at Bay*, 1 AIR L. 2 (1975–76). In that case, the United States adopted a new interpretation of a standard clause as a predicate to retaliation, in circumstances where an arbitral tribunal might well not have ruled in its favor. See also H. A. Wassenbergh, PUBLIC INTERNATIONAL AIR TRANSPORTATION LAW IN A NEW ERA 110 (1976).

The French position on abstention from retaliation pending arbitration has respectable scholarly authority to support it.<sup>57</sup> In 1934 the Institute of International Law took the position that acts of reprisal are illegal where there is a previously agreed provision between the parties for peaceful settlement of disputes.<sup>58</sup> More recently, Roberto Ago asserted this proposition (citing the Institute's resolution as authority) in a report to the International Law Commission on state responsibility,<sup>59</sup> and the Commission itself appears to have accepted the concept, without analyzing its implications.<sup>60</sup> The concept also draws support from its consistency with the concept that pending arbitration or adjudication states should take no steps to aggravate or extend the dispute; this concept has been developed in International Court rulings on applications for interim protective orders,<sup>61</sup> and some commentators have argued that it constitutes a legal obligation of all states that have made commitments to resolve disputes through third-party methods.<sup>62</sup>

The United States, on the other hand, had argued to the tribunal that the

<sup>57</sup> The French based their argument on the proposition that acts of reprisal are not justified where satisfaction can be obtained by other means. As authority they cited the *Naulilaa* arbitration, 2 R. Int'l Arb. Awards 1026-28, and other authorities on the customary international law of reprisals. Arbitration, in the French view, was a means of obtaining satisfaction which should have been exhausted first.

<sup>58</sup> Article 5 of the Institute's resolution read in pertinent part:

Les représailles même non armées sont interdites quand le respect du droit peut être effectivement assuré par des procédures de règlement pacifique.

En conséquence, elles doivent être considérées comme interdites notamment:

1. Lorsqu'en vertu du droit en vigueur entre les parties, l'acte dénoncé comme illicite est de la compétence obligatoire de juges ou d'arbitres ayant compétence aussi pour ordonner, avec la diligence voulue, des mesures provisoires ou conservatoires et que l'Etat défendeur ne cherche pas à éluder cette juridiction ou à en retarder le fonctionnement;

2. Lorsqu'une procédure de règlement pacifique est en cours, dans les conditions envisagées au 1. . . .

INSTITUT DE DROIT INTERNATIONAL, 38 ANNUAIRE 709 (1934). See also 3 RÉPERTOIRE SUISSE DE DROIT INTERNATIONAL PUBLIC 1788 (1975): "La conclusion des traités stipulant l'arbitrage obligatoire pour les différends juridiques exclura les représailles. En effet, on imagine mal des cas où l'autre Etat n'accepterait pas la procédure prévue." The same view is also advocated in Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L. 1 (1972); and in E. DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 182-84 (1932).

<sup>59</sup> UN Doc. A/CN.4/318/Add.3, at n.15 (Feb. 5, 1979) ("An additional condition [for the legality of reprisals], referred to in article 5 of the Resolution of 1934 of the Institute of International Law, would be that there must not be any provision previously agreed between the parties for peaceful settlement . . .").

<sup>60</sup> Report of the International Law Commission on the Work of its Thirty-first Session, 34 UN GAOR, Supp. (No. 10), UN Doc. A/34/10, at 319 n.579 (1979) ("An additional condition is that there must not be any procedures for peaceful settlement previously agreed upon by the parties").

<sup>61</sup> *Electricity Co. of Sofia & Bulgaria*, [1939] PCIJ, ser. A/B, No. 79, at 199; *Anglo-Iranian Oil Co.*, [1951] ICJ REP. 89, 93; *Case Concerning United States Diplomatic and Consular Staff in Tehran (Order)*, [1979] ICJ REP. 7, 21, reprinted in 74 AJIL 266 (1980), 19 ILM 139 (1980).

<sup>62</sup> See E. DUMBAULD, *supra* note 58.

concept of abstention pending arbitration finds no support in state practice and thus has not found its way into the corpus of customary international law, that states must be able to take the steps necessary to preserve their rights and restore the balance of equities before a tribunal is in a position to act, and that (as discussed above) measures such as those taken by the United States can help ensure that the other party's commitment to arbitration is enforced and implemented in a practical, meaningful way.

It is worth considering how this problem will be handled under the Vienna Convention on the Law of Treaties (for the states that are parties and for treaties concluded after the effective date of the convention,<sup>63</sup> since the article in question is apparently not a codification of customary international law). Article 65 of the convention establishes procedures for the termination or suspension of a treaty in the event of breach.<sup>64</sup> A party alleging grounds for termination or suspension, including breach, must notify these grounds to the other party and indicate the responsive measures it proposes to take. Except in cases of special urgency, it may take these measures only after 3 months have elapsed without objection to the proposed response. In the event of objection, the parties are to seek a solution through the means indicated in Article 33 of the United Nations Charter, which, of course, can include arbitration or adjudication.

Apparently, the drafters of the convention intended to limit the sanction of retaliatory suspension of treaty rights within the 3-month period to very urgent cases,<sup>65</sup> but they did not indicate any intent to preclude such measures after this period but before the completion of arbitral or ad-

<sup>63</sup> Article 4 of the convention provides:

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

<sup>64</sup> The relevant provisions of Article 65 read:

1. A party which, under the provisions of the present Convention, invokes . . . a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out . . . the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

<sup>65</sup> In light of the argument made in the text at notes 19–20 *supra*, that the convention was not intended to cover countermeasures for nonmaterial breaches, the Article 65 procedure would presumably not apply to such cases. Rather, by virtue of Article 4 (*supra* note 63) and Article 65, paragraph 1 (*supra* note 64), the rules of customary international law would govern.

judicatory procedures.<sup>66</sup> As the United States commented on the International Law Commission's draft that became Article 65, "there is nothing in [this article] which prohibits the claimant party from terminating or withdrawing from the treaty while one or more of the procedures under Article 33 of the Charter are carried out."<sup>67</sup>

Presumably, states becoming parties to the Vienna Convention and concluding treaties after its entry into force can reserve the right in future treaties to terminate or suspend without waiting 3 months if they believe that course will better suit their purposes. But for those states, like the United States, that are not yet parties, the question is whether customary international law does or should constrain their flexibility to act when they have entered into a prior agreement to submit disputes to third-party resolution. The authorities noted above would say that there is such a constraint. But the inherent flaw in this position is obvious from a recent and vivid example.

On November 4, 1979, in flagrant violation of its obligations under customary international law and four international agreements, each of which has a binding dispute settlement clause, the Government of Iran acquiesced in the takeover of the United States Embassy in Tehran and the seizure of 63 hostages by a group of militant students. On November 14, 1979, the United States ordered the blocking of all assets of the Iranian Government in the United States or held by persons subject to the jurisdiction of the United States.<sup>68</sup> The blocking order, though it had additional motivations and legal justifications, can be characterized under international law as a legitimate response by the United States to Iran's manifest violations of its treaty obligations.

Can it plausibly be argued—as the literal wording of the Institute of International Law's 1934 resolution and other authorities noted above seem to contemplate—that the United States should have refrained from any retaliatory response until after dispute settlement proceedings were exhausted? It is true that on November 29, 1979, the United States filed an application with the International Court of Justice for an adjudication of Iran's international responsibility; and on December 15, 1979, the Court ordered provisional measures of protection at the request of the United States—an order Iran flouted.<sup>69</sup> But even if the Court had had the power to enforce its interim order, the entry of the order came 17 days after the U.S. request for interim relief and 41 days after the commencement of the crisis. Surely the United States did not have to initiate an adjudicatory proceeding and wait for an order to be entered and flouted before it could implement responsive and proportional countermeasures. The Iran

<sup>66</sup> The International Law Commission considered more restrictive formulations, but concluded that the article as drafted "represented the highest measure of common ground that could be found among Governments as well as in the Commission on this question." 21 UN GAOR, Supp. (No. 9), UN Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. INT'L L. COMM'N 169, 262.

<sup>67</sup> UN Doc. A/6827/Add.2 (1967), *reprinted in* 62 AJIL 567, 574 (1968).

<sup>68</sup> Exec. Order No. 12170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 74 AJIL 428 (1980).

<sup>69</sup> [1979] ICJ REP. 7; *see also* [1980] ICJ REP. 3.

example also makes clear that a dispute settlement clause in a treaty that codifies obligations under customary international law should not be regarded as depriving an aggrieved party of its customary international law remedy, retaliatory sanctions.<sup>70</sup>

It is true that the U.S.-Iranian example would probably be considered a "case of special urgency," both under the Vienna Convention and under any customary international rule that might otherwise restrict the victim state's freedom of movement. But other illustrations can also prove the point. Suppose the initial breach does not threaten life or otherwise fall within "extreme urgency," but suppose further that there is no plausible legal justification for the breaching party's conduct. Should the victim state be disadvantaged because it has previously signed a dispute settlement agreement? Must it embark on lengthy and expensive litigation pursuant to that agreement to obtain authorization to suspend its performance in response to the breach? Surely not.

Even where good faith arguments can be made both for and against the existence of a prior breach, the better rule seems to be to permit appropriate, *i.e.*, measured and proportional, self-help measures *pendente lite*, as was done in the U.S.-France case. The dynamics of that case disprove rather than prove the validity of the arguments for a rule constraining the victim state's action. Though the United States did not argue, and the tribunal did not imply, that France might otherwise have failed to live up to its obligation to arbitrate in good faith, the tribunal was persuaded that the U.S. action had a facilitating effect in seeing that the dispute was resolved by arbitration.<sup>71</sup>

The right to retaliate pending arbitration, though important, should not be unqualified. The tribunal in the U.S.-France dispute, while approving the U.S. action during the period before the tribunal came into existence, stated that the "situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears."<sup>72</sup> Furthermore, a qualification implicit in any justification of retaliation is that a responsive countermeasure must be proportional and must cease either when its purpose is achieved or when its continuation would be inconsistent with actions of a functioning tribunal.<sup>73</sup> Another situation at least arguably calling for abstention from retaliatory acts exists when a multilateral treaty establishes an effective

<sup>70</sup> Of course, the U.S.-France Air Transport Services Agreement did not in any respect codify customary international law. However, the distinction between treaties codifying customary international law and treaties *de lege ferenda* has not been made either by the French in their pleadings before the tribunal or in any of the commentary on the question of counter-measures for breach of treaty.

<sup>71</sup> See text at note 38 *supra*.

<sup>72</sup> Award, para. 96.

<sup>73</sup> Other qualifications can also be suggested. The United States recently took the position before the International Court that reprisals against the person of diplomats are always unlawful: even if a receiving state believes a diplomat has acted contrary to the sending state's obligations under the Vienna Convention on Diplomatic Relations, it can only expel the diplomat and cannot retaliate by suspending the convention's rules on diplomatic inviolability.

framework for authorizing and legitimizing retaliation as a sanction for breach. Under Article XXIII of the General Agreement on Tariffs and Trade,<sup>74</sup> for example, if one party considers that another party has not carried out its obligations, it may seek authorization from the contracting parties (acting collectively) to suspend the application of equivalent obligations. As a general matter, however, the existence of a dispute settlement clause in a treaty should not require abstention from retaliation during the period before the victim party can obtain satisfaction from a tribunal.

### III. CONCLUSION

Under traditional doctrine, the legality of a retaliatory breach of treaty is judged by whether it is a proportional response to a prior material breach. Commentators have also suggested that states should refrain from implementing countermeasures until a tribunal rules on the existence of a breach, at least when there is a preexisting commitment to third-party dispute settlement.

But the experience of states must prove or disprove the soundness of propositions urged in legal debate. The actions of the United States and France, and the judgment of the tribunal they created, suggest refinement or reexamination of some of the views put forth in legal literature. Proportionality might appropriately be judged on a flexible scale, with considerations of principle and of impact on the thinking of third countries as factors in the equation. Materiality of breach may not be relevant at all. Indeed, under some circumstances a responsive breach might be justified even absent a prior breach, if the responding party believes in good faith that a breach has occurred. Finally, since the interplay and even escalation of responses before a dispute reaches a tribunal can serve important purposes, that dynamic process should not be stifled by a blanket rule of abstention from self-help measures pending arbitration.

The U.S.-France dispute, as disputes go, was well suited for arbitral resolution. The dispute became concrete on May 1, 1978 and was fully resolved by December 9 of the same year. Of course, it is impossible to speculate on what the timing of resolution might have been if the United States had been precluded from implementing countermeasures pending arbitration. Perhaps the best way to handle that question is not to appear to encourage retaliatory responses, but rather to urge the adoption in advance of procedures for the prompt submission of disputes to tribunals which can be convened and which can act on an expedited timetable. When such procedures are in place on a wider basis, states will have less reason to resort to self-help measures.

<sup>74</sup> 61 Stat. pts. (5) and (6), TIAS No. 1700. Article XXIII was amended by the Protocol Amending the Preamble and Parts II and III of the GATT, 8 UST 1767, 1787, TIAS No. 3930.

# MILITARY INSTALLATIONS, STRUCTURES, AND DEVICES ON THE SEABED

By Tullio Treves\*

## I. INTRODUCTION

### *Functions and Importance of Military Objects on the Seabed*

The legal regulation of military objects on the seabed<sup>1</sup> and in general of military uses of the seabed seems to have ceased to attract the attention of the international community since the conclusion in 1971 of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor (the Seabed Treaty).<sup>2</sup> Attention now seems to be concentrated on other military uses of the sea, especially those concerning the mobility of naval fleets.<sup>3</sup> This shift

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<sup>1</sup> Present and prospective military uses of the seabed, including those involving installations, structures, and devices, are reviewed by: E. LUARD, *THE CONTROL OF THE SEABED* 49-60 (1974); STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE [hereinafter referred to as SIPRI], *YEARBOOK* 1969-70, at 99-154 (1970) and 1974, at 303-25 (1974); Fosma, *The Alternative Futures of Naval Force*, 5 OCEAN DEV. & INT'L L. 181-248 (1978); N. BROWN, *Military Uses of the Ocean Floor*, in *PACEM IN MARIBUS I: THE QUIET ENJOYMENT* 115-21 (Young & Ritchie-Calder eds., 1971); Hirdman, *Weapons in the Deep Sea*, ENVIRONMENT, No. 36, 1971, at 28-42; UN Secretariat, *The Military Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, UN Doc. A/AC.135/28 (1968). Discussions on the legal aspects of the use of these installations, structures, and devices are in: R. J. DUPUY, *L'Océan Partagé* 256-59 (1979); W. GRAF VITZTHUM, *DER RECHTSSTATUS DES MEERESBODENS* 122-35, 283-91 (1972); U. JENISCH, *DAS RECHT ZUR VORNAHME MILITÄRISCHER ÜBUNGEN UND VERSUCHE AUF HÖHER SEE IN FRIEDENSZEITEN* 30-31, 139-49 (1970); D. P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 146-59 (1975); B. RÜSTER, *DIE RECHTSORDNUNG DES FESTLANDSOCKELS* 68-73 (1977); Evensen, *The Military Uses of the Deep Ocean Floor and its Subsoil*, in *SYMPOSIUM ON THE INTERNATIONAL LEGAL REGIME OF THE SEA-BED*, PROCEEDINGS 535-56 (Stucki ed., 1970); Gehring, *Legal Rules Affecting Military Uses of the Sea-bed*, 54 MIL. L. REV. 16E, 215-20 (1971); Petrowski, *Military Use of the Ocean Space and the Continental Shelf*, 7 COLUM. J. TRANSNAT'L L. 279-301 (1968); Krüger-Sprengel, *Militärische Aspekte der Nutzung des Meeresbodens*, in *DIE NÜTZUNG DES MEERESGRÜNDES AUSSERHALB DES FESTLANDSOCKELS (TIEFSSEE)* 48-79 (1970).

<sup>2</sup> The so-called Seabed Treaty, 23 UST 701, was signed in London, Moscow, and Washington on February 11, 1971, and came into force on May 13, 1972.

<sup>3</sup> This results from the trends in the Third UN Conference on the Law of the Sea towards accepting a 12-mile limit for the territorial sea and a 200-mile exclusive economic zone. These trends make it important for naval powers to have guaranteed freedom of navigation through straits and within the economic zone. See, for the U.S. position, Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902 (1980). Cogent analyses of the importance for security of free passage through straits, though with divergent views on the adequacy of the current proposals in the conference's negotiating text to guarantee it, have been recently developed by Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AJIL 48 (1980) and by Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AJIL 77 (1980). The security importance of



in focus is particularly noticeable if one considers the work of the Third United Nations Conference on the Law of the Sea.<sup>4</sup>

Yet the emplacement of objects on the seabed for military purposes continues to play a considerable role in the military use of the sea. Though not explicitly considered, military objects on the seabed certainly are on the minds of the negotiators at the Law of the Sea Conference, and it seems clear that the results of the conference will have an impact on their legal regime.

These objects can be emplaced on the seabed directly or by means of storage and other facilities; they can be placed on board submersibles moving on the seabed, or on rigs and platforms or installations moored to the seabed. They can be carried by facilities designed for military purposes or installations whose main purpose is not military, such as oil rigs and platforms,<sup>5</sup> scientific research installations,<sup>6</sup> and thermal energy conversion plants.<sup>7</sup> Whatever the way they are installed, these objects seem to fall into two categories: weapons<sup>8</sup> and detection and communication devices.<sup>9</sup>

The different functions performed by these two categories of objects seem to evoke different value judgments from the viewpoint of the preservation of peace and security. Thus, listening and other detection or communi-

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free passage through straits has been criticized by Osgood, *U.S. Security Interests and the Law of the Sea*, in *THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES* 11 (Amacher & Sweeney eds., 1976) and, more recently, by Darman, *The Law of the Sea: Rethinking U.S. Interests*, 56 *FOREIGN AFF.* 373 (1978).

<sup>4</sup> The conference (which started in 1973 and at the time of writing had concluded the first part of its ninth session) has proceeded utilizing a series of "informal negotiating texts." The first was prepared in 1975, *THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA*, 4 *OFFICIAL RECORDS* [hereinafter cited as *UNCLOS III*, *OFF. REC.*] 137; the second in 1976, 5 *id.* at 125; the third in 1977, 8 *id.* at 1; the fourth in 1979, *UN Doc. A/CONF.62/WP.10/Rev.1*; the fifth in 1980, *UN Doc. A/CONF.62/WP.10/Rev.2*: this latter text is the *Informal Composite Negotiating Text*, Revision 2 [hereinafter, *ICNT/Rev.2*]. In this paper, references to the conference's negotiating text (unless otherwise indicated) are to the *ICNT/Rev.2*.

<sup>5</sup> M. S. McDUGAL & W. T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 754 (1962); Bosma, *supra* note 1, at 169; Holst, *The Strategic and Security Requirements of North Sea Oil and Gas*, in *THE POLITICAL IMPLICATIONS OF NORTH SEA OIL AND GAS* 131-41 (Sater & Smart eds., 1975); Larson, *Security, Disarmament and the Law of the Sea*, 3 *MARINE POL'Y* 40, 51 (1979). According to British Vice-Admiral Sir Ian McGeoch, underwater military devices are not deployed around oil installations for their defense; *OCEANIC MANAGEMENT, CONFLICTING USES OF THE CELTIC SEA AND OTHER WESTERN UK WATERS* 179 (Sibthorp & Unwin eds., 1977).

<sup>6</sup> Baker & Gruson, *The Coming Race Under the Sea*, in *THE PENTAGON WATCHERS* 335, 351 *ff.* (Rodberg & Glearer eds., 1970); Evensen, *supra* note 1, at 532; Knauss, *The Military Role in the Ocean and its Relation with the Law of the Sea*, in *A NEW GENEVA CONFERENCE, PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE* 77, 84 (Alexander ed., 1972); Tegger Kildow, *Nature of Present Restrictions on Marine Scientific Research*, in *FREEDOM OF OCEANIC RESEARCH* 5, 14-16 (Wooster ed., 1973).

<sup>7</sup> Hollick, *International Political Implications of Ocean Thermal Energy Conversion Systems*, in *OCEAN THERMAL ENERGY CONVERSION* 75, 84-85 (Knight, Nyhart, & Stein eds., 1977).

<sup>8</sup> E. LUARD, *supra* note 1, at 49-53; Bosma, *supra* note 1, at 191-94; *SIPRI Y.B.* 1969-70, at 116-17, 141-48.

<sup>9</sup> T. BURNS, *THE SECRET WAR FOR THE OCEAN DEPTHS* 64-68, 90-102, 152-59 (1978); D. P. O'CONNELL, *supra* note 1, at 72-78; Bosma, *supra* note 1, at 194, 236-37; *SIPRI Y.B.* 1969-70, at 110-11, 120-21, 123, 148-52; *SIPRI Y.B.* 1974, at 305-08, 316-18.

cation devices are considered more acceptable than weapons. Weapons are inherently dangerous, while detection and communication devices are not. This judgment will probably have some bearing on the solution of conflicts among different uses of the seabed. It seems easier to accommodate the emplacement of detection or communication devices to other uses, such as those related to resources,<sup>10</sup> than the emplacement of weapons. Moreover, in the current situation, deterrence between the two major powers appears to be the main guarantee against generalized conflicts, and weapons on the seabed do not seem to contribute to strategic deterrence. Weapons used for nuclear deterrence are placed on submarines, and the 1971 Seabed Treaty clearly indicates the intention of the main nuclear powers to preclude use of the seabed to deploy them.<sup>11</sup>

Listening and other detection and communication devices, though they may perform other functions relevant to military activities,<sup>12</sup> can be seen as linked to nuclear deterrence.<sup>13</sup> Some of these devices provide submarines carrying nuclear missiles with information essential to command, targeting, and navigation.<sup>14</sup> Others are used by the superpowers to detect each other's nuclear submarines and to gather knowledge about their positions, movements, and numbers. This knowledge probably plays an important role in avoiding (or countering) surprise attacks and maintaining the balance of forces, and, ultimately, in the proper exercise of deterrence. Moreover, whatever disarmament or arms limitation measures are taken, detection devices may be a primary means of verification.<sup>15</sup> A divergent opinion, however, has been expressed, which argues that "from the point of view of security, excessive transparency of the oceans may prove harmful" and that surveillance systems should be limited.<sup>16</sup> The deterrent efficacy of submarines carrying ballistic missiles would depend on their ability to stay undetected. While this argument may be correct in theory,<sup>17</sup> in practice the above-mentioned considerations would seem to prevail for two reasons. First, the cogency of the argument against the use of detection devices depends on

<sup>10</sup> Though this kind of accommodation also is not devoid of difficulties. For a recent example of possible conflict between noise-generating ocean thermal energy conversion plants and military acoustic devices, see Washom, *Spatial and Emerging Use Conflicts of Ocean Space*, in OCEAN THERMAL ENERGY CONVERSION, *supra* note 7, at 91, 99.

<sup>11</sup> Art. I.

<sup>12</sup> Especially that of aiding navigation.

<sup>13</sup> See M. W. JANIS, *SEA POWER AND THE LAW OF THE SEA* 9 (1976); Knauss, *supra* note 6, at 78, 79, 84; Zeni, *Defence Needs and Accommodation Among Ocean Users*, in *THE LAW OF THE SEA: INTERNATIONAL RULES AND ORGANIZATIONS FOR THE SEA* 334 (Proceedings, 3d Annual Conference of the Law of the Sea Institute, Alexander ed., 1969).

<sup>14</sup> See McGwire, *Naval Power and Soviet Global Strategy*, 3 INT'L SECURITY 134, 168 (1978).

<sup>15</sup> Craven, *International Security on the Seabed*, in *THE LAW OF THE SEA*, *supra* note 13, at 414, 419.

<sup>16</sup> Goldblat, *Law of the Sea and the Security of the Coastal States*, in *LAW OF THE SEA: CARACAS AND BEYOND* 301, 306 (Christy, Clingan, Gamble, Knight, & Miles eds., 1975). See also SIPRI Y.B. 1974, at 304: "an ASW [antisubmarine warfare] system designed to attack missile-carrying submarines could threaten the second-strike capability of these submarines," and this would be undesirable for the proper functioning of deterrence.

<sup>17</sup> Reisman, *supra* note 3, at 52, considers detection of nuclear missile-carrying submarines "systemically dangerous" under "deterrence theory."

whether these devices can locate all the other power's nuclear weapons submarines, or at least so many of them that their destruction would prevent the surviving ones from constituting a credible deterrent.<sup>18</sup> In view of the continuing race between developing more and more sensitive listening devices and developing more and more sophisticated antidetection technology,<sup>19</sup> this does not seem very likely.<sup>20</sup> Second, submarines carrying ballistic missiles might also be used for first-strike action and for other, nondeterrent naval missions. The possibility of detection might discourage such use and thus might contribute to limiting the use of these submarines to strategic deterrence.

These observations are not expressed in legal terms. They may nevertheless have some relevance to the consideration of legal questions, especially because the objectives of peace and security are both commonly shared and legally relevant, the maintenance of peace and security being the first purpose of the United Nations.<sup>21</sup>

### *The Evolving Legal Framework*

The situation of international law concerning military objects on the seabed is "one of obscurity," as a learned writer recently remarked,<sup>22</sup> or, at least, one requiring close scrutiny. The elusiveness of the subject seems to lie, on the one hand, in a certain reluctance, especially of the major powers, to discuss it explicitly,<sup>23</sup> and, on the other, in the present inclination of international law to focus mainly on the economic uses of the sea. As a consequence, rules concerning military activities and military objects on the seabed are almost never clearly spelled out. They have to be inferred from the most general principles of the law of the sea, such as the sovereignty of the coastal state over its territorial sea and the freedom of the high seas, and from an assessment of what more detailed rules, usually concerning jurisdictional rights and economic uses, do not say.

These difficulties are found in the "traditional" or "old" law of the sea, which consists mainly of customary law and is evidenced in part by the Geneva Conventions of 1958.<sup>24</sup> The concept of the continental shelf, the

<sup>18</sup> See McGwire, *supra* note 14, at 167.

<sup>19</sup> Bosma, *supra* note 1, at 194-96; SIPRI, TACTICAL AND STRATEGIC ANTI-SUBMARINE WARFARE 31 (1974); Craven, *supra* note 15, at 417.

<sup>20</sup> See Osgood, *supra* note 3, at 17-18.

<sup>21</sup> UN Charter, Art. I, para. 1.

<sup>22</sup> D. P. O'CONNELL, *supra* note 1, at 151.

<sup>23</sup> Booth, *The Military Implications of the Changing Law of the Sea*, in LAW OF THE SEA: NEGLECTED ISSUES 328-97 (Proceedings, 12th Annual Conference of the Law of the Sea Institute, Gamble ed., 1979) says, at p. 340, that the negotiating text "has adopted the tactic of silence" on military matters, an area, he observes, "where the prospects for disagreement are strong, and the prospects for legal clarity are weak."

<sup>24</sup> Geneva Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958, 516 UNTS 205; Geneva Convention on the High Seas of April 29, 1958, 450 UNTS 11; Geneva Convention on Fisheries and the Conservation of the Living Resources of the High Seas of April 29, 1958, 559 UNTS 285; and Geneva Convention on the Continental Shelf of April 29, 1958, 499 UNTS 311.

most recent addition to the traditional international law of the sea, immediately raises the problem of determining a regime for objects placed for noneconomic purposes in an area of the seabed where the coastal state enjoys rights that are defined in terms of economic activities.<sup>25</sup>

The same kind of difficulty arises within the framework of the "new" law of the sea now being shaped by recent practice and the Third United Nations Conference on the Law of the Sea. This new law of the sea is characterized by the emergence of new zones of national jurisdiction, such as the exclusive economic zone and archipelagic waters, by new definitions of existing concepts, such as the continental shelf and the territorial sea, and by the entirely new concept of the International Seabed Area as "the common heritage of mankind." In the new jurisdictional areas, apart perhaps from archipelagic waters, and in the International Seabed Area, rights and duties of states are defined functionally, in terms of nonmilitary activities. Thus, the difficulties already mentioned as regards the continental shelf are multiplied in the new law of the sea.

In solving these difficulties, a more general problem has to be faced, which arises from the very notion of the new law of the sea.<sup>26</sup> The expression seems to have two meanings in current international practice and literature. The first refers to the rules embodied in the convention that is the expected outcome of the Third Law of the Sea Conference and whose blueprint is the negotiating texts produced by it thus far.<sup>27</sup> The second is the customary law in the process of being formed by recent state practice, a practice that influences, and is in turn influenced by, the behavior of states at the conference.

Once these two notions of the new law of the sea are clearly distinguished, the most important task is to determine the degree of correspondence between them. In other words, how much does the convention under negotiation reflect customary law?

The problem poses the usual difficulties in assessing the significance of state practice in order to discover the contents of international customary law; but these difficulties are compounded by the need to assess the impact of the specific and new phenomenon constituted by the Third United Nations Conference on the Law of the Sea.

The work of the conference cannot be set aside in considering state practice, and its relevance seems to be growing as it nears completion. This conclusion seems to emerge from a comparison of the International Court of Justice's decision of 1974 in the *Fisheries Jurisdiction* case and the *Anglo-French* arbitral award of 1977 on the delimitation of the continental shelf.<sup>28</sup>

<sup>25</sup> Geneva Continental Shelf Convention, Art. 2, para. 1. The problems mentioned are studied *infra* in sec. IV.

<sup>26</sup> On this notion, see especially de Lacharrière, *La réforme du droit de la mer et le rôle de la Conférence des Nations Unies*, 84 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [RGDIP] 216 (1980); and McWhinney, *The Codifying Conference as an Instrument of Law-Making: From the "Old" Law of the Sea to the "New,"* 3 SYR. J. INT'L L. & COMM. 301 (1975).

<sup>27</sup> This is the meaning explicitly accepted, e.g., by Riphagen, *La Navigation dans le nouveau droit de la mer*, 84 RGDIP 144 (1980).

<sup>28</sup> *Fisheries Jurisdiction* (United Kingdom v. Iceland) (Merits), Judgment, [1974] ICJ REP. 3; *The United Kingdom of Great Britain and Northern Ireland and the French Republic*

In 1974, at the very beginning of the conference, and before the publication of the first negotiating text, the World Court indicated that it was "aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a Third Conference on the Law of the Sea the further codification and progressive development of this branch of the law as it [was] of various proposals and documents produced in this framework." It emphasized, however, that these endeavors and proposals "must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than expressing principles of existing law."<sup>29</sup> In 1977, after various sessions of the conference and the publication of the first negotiating texts, the Anglo-French arbitral tribunal recognized "the importance of the evolution of the law of the sea which is now in progress" and went so far as to acknowledge "the possibility that a development of customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations." Evidence of such assent could be sought (though it was not found by the arbitral tribunal) in the "records of the Third United Nations Conference on the Law of the Sea" and in "the practice of States outside the Conference."<sup>30</sup>

The passages just quoted from the 1977 arbitral award not only indicate the importance of considering the conference in assessing the present status of the law, but also give some guidance in determining which aspects of the conference are the most relevant for this purpose: recent state practice, both inside and outside the conference, seems to be decisive. The compromises and provisional rules formulated so far in the negotiations are considered as far less significant, though not irrelevant.<sup>31</sup>

This distinction does not diminish the importance of the conference to the development of customary law. On the contrary, it throws light on two aspects of the conference's activities with different impact on customary law. On the one hand, the conference is a powerful accelerating factor in the development of state practice. Not only does it provide a forum for state opinion, but it influences unilateral as well as treaty action of states on the outside.<sup>32</sup> On the other hand, the conference's "package deal" approach,

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*Delimitation of the Continental Shelf* Decision of 30 June 1977, HMSO Cmnd. 7438, Misc. No. 15 (1978), reprinted in 18 ILM 398 (1979).

<sup>29</sup> [1974] ICJ REP. 25, para. 53.

<sup>30</sup> Decision of 30 June 1977, *supra* note 28, para. 47. Comments on this paragraph are in Brown, *The Anglo-French Continental Shelf Case*, 16 S. DIEGO L. REV. 461, 525-27 (1979); and in Queneudec, *L'Affaire de la délimitation du plateau continental entre la France et le Royaume-Uni*, 83 RGDIP 1, 18-20 (1979).

<sup>31</sup> As it appears from the fact that the arbitral tribunal considered rules of the 1976 Revised Informal Negotiating Text, though emphasizing that they "have not yet been adopted by the Conference" and that they "are still a matter of discussion"; Decision of 30 June 1977, *supra* note 28, para. 96.

<sup>32</sup> It may be sufficient to indicate that the conference's negotiating texts have been followed closely by many states in their domestic laws on the economic zone (*see, e.g.*, the Mexican law of Dec. 4, 1975, reprinted in 15 ILM 382 (1976)) and that fisheries agreements have been concluded "taking into account the work of the Third United Nations Conference on the Law of the

combined with decisionmaking by consensus,<sup>33</sup> results in making the acceptance by some states of certain rules in the negotiating text conditional on the acceptance by other states of other, sometimes totally unrelated, rules. While the first aspect of the conference's activities directly impinges on the formation of customary law, the second does not, because the behavior of states is strictly related to the negotiating process. It would seem safe to conclude that the more the rules in the negotiating texts are confirmed by state practice, the more they are indicative of customary law, while great caution is required before accepting the idea that rules resulting from the package approach reflect or anticipate the precise content of customary law.

This conclusion, however, needs further qualification. First, even when practice confirms the trends in the conference, there is a difference between the customary rules emerging from this practice and the written rules embodied in the negotiating text. While the principle may be the same, it would not be wise to presume that the customary rule corresponds in every detail and shade of meaning to the written rule. Indeed, it is in the nature of written rules to cover details and convey shades of meaning that unwritten rules cannot express. This seems to apply in particular to the new law of the sea, when one considers the amount of detail in the provisions of the negotiating text.

Second, rules contained in the negotiating text can take the form in subsequent state practice of models or legitimizing arguments, whatever their origin in the negotiations at the conference. Because of the conference's long duration, some rules emerging from the compromise imposed by the package approach may be confirmed by state practice, while others, also agreed upon in the package, are not. In this way, negotiating packages can be unbound by practice and by the customary rules it generates.<sup>34</sup> Of course, states can try to avoid this consequence by consistently opposing the application of the emerging rule to themselves.<sup>35</sup> In adopting this attitude, however, they run a risk. Although they may succeed in making the emerging customary rule inapplicable to themselves, they may provoke actions by other states that would strengthen the very rule they oppose.<sup>36</sup>

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Sea and resulting State practice"; Fisheries Agreement between Canada and the European Economic Community, initialed on July 28, 1978 and provisionally applicable since 1979, preamble, in *IL REGIME DELLA PESCA NELLA COMUNITÀ ECONOMICA EUROPEA* 248 (Leita & Scovazzi eds., 1979). Moreover, agreements for the delimitation of the continental shelf have been concluded which do not take into account the limits set out in the Geneva Convention on the Continental Shelf and consider as "continental shelf" to be delimited the whole seabed lying between the two states, provided that the distance between the coasts does not exceed 400 miles; Italy-Spain Agreement of 19 February 1974, in *ATLANTE DEI CONFINI SOTTOMARINI/ATLAS OF THE SEABED BOUNDARIES* 75 (Conforti & Francalanci eds., 1979). See also de Lacharrière, *supra* note 26, at 244-46.

<sup>33</sup> On these aspects: Treves, *Devices to Facilitate Consensus: The Experience of the Law of the Sea Conference*, 2 *ITALIAN Y.B. INT'L L.* 39 (1976).

<sup>34</sup> De Lacharrière, *supra* note 26, at 247-49, 251.

<sup>35</sup> See the ICJ's Judgment of December 18, 1951 on the Fisheries case (United Kingdom v. Norway), [1951] *ICJ REP.* 116, 131.

<sup>36</sup> An example might be the initiative taken by the U.S. Government in 1979 in ordering the

Third, when there is insufficient practice following a rule negotiated at the conference to affirm that it has become customary, the rule might still be considered an *agrément* reached by some states within the framework of the conference. Of course, this conclusion cannot be drawn in every case, but it may be indicated when the states most active in negotiating the rule were those most directly involved, and when their subsequent practice has conformed strictly to the rule.

### *Peaceful Purposes*

Before examining the legal situation of military objects in the various areas of the seabed, it may be useful to consider the concept of the use of the sea "exclusively for peaceful purposes."<sup>37</sup> This concept is contained in the Declaration of Principles of 1970,<sup>38</sup> as well as in various provisions of the negotiating texts of the Law of the Sea Conference.<sup>39</sup> Since the earliest mention of it in the context of the law of the sea, the expression "peaceful purposes" has undergone an evolution in meaning which, though never reaching total clarification, has considerably narrowed its scope.

The concept was first debated, focusing exclusively on activities on the seabed, in the UN General Assembly's Seabed Committee.<sup>40</sup> In that context,

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navy and air force "to undertake a policy of deliberately sending ships and planes into or over the disputed waters of nations that claim a territorial limit of more than the three miles accepted by the U.S. and 21 other nations" (The New York Times, Aug. 10, 1979, at 1). In the discussions at the Law of the Sea Conference which followed the appearance of this news in the daily press, the United States, though declaring the reports "distorted," emphasized that the 12-mile limit would be acceptable only within a general package deal and coupled with transit passage through international straits (UN Docs. A/CONF.62/92 and A/CONF.62/SR.118 (1979)). The Group of Coastal States firmly emphasized the conformity of the 12-mile limit to customary international law (UN Docs. A/CONF.62/90 and A/CONF.62/SR.118). This position was explicitly supported by some other states and was opposed by none (UN Doc. A/CONF.62/SR.118). Thus, the U.S. initiative may have had an effect contrary to the intentions that originated it (*see* the observations of de Lacharrière, *supra* note 26, at 244). Considering, however, that it seems unlikely that transit passage through straits will be seriously challenged at the conference, the kind of compromise sought by the United States seems to have already been reached.

<sup>37</sup> On this principle, see particularly: W. GRAF VITZTHUM, *supra* note 1, at 288-90; U. JENISCH, *supra* note 1, at 65-66; E. LUARD, *supra* note 1, at 97-100; Dupuy, *L'Affectation exclusive du lit des mers et des océans à une utilisation pacifique*, in LE FOND DES MERS 29-49 (Colliard, Dupuy, Polvêche, & Vaissière eds., 1971); Krüger-Sprengel, *supra* note 1, at 54-55; A. Myrdal, *Preserving the Oceans for Peaceful Purposes*, 133 RECUEIL DES COURS 5-15 (1971 II); *see also* the interventions by Hirdman, De Soto, and Gorove in A NEW GENEVA CONFERENCE, *supra* note 6, at 90, 95, 97.

<sup>38</sup> GA Res. 2749 (XXV), Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Sub-soil thereof, beyond the Limits of National Jurisdiction, paras. 5 and 8.

<sup>39</sup> The concept of the peaceful uses of the seas is mentioned in the following articles of the ICNT/Rev.2: 88, 141, 143, 147, 155, 240, 242, and 246.

<sup>40</sup> *See especially*, for the discussion in 1968, UN Docs. A/AC.135/SR.14, 16, 17, and A/AC.135/20, 24, 26, 27, and A/AC.135/WG.1/SR.8. For the discussion in 1969, A/AC.138/SR.5, 6, 8, 10, 12, 13. For 1970, especially A/AC.138/SR.22 and the debates in the General Assembly on the adoption of the Declaration of Principles (*supra* note 38), A/C.1/PV.1798-1799. Useful summaries of these discussions are in E. D. BROWN, *ARMS CONTROL IN HYDROSPACE, LEGAL ASPECTS* 26, 46-49, 53-64 (Woodrow Wilson International Center for Scholars, Ocean Series

numerous states, including the Soviet Union, favored demilitarization of the seabed, and consequently maintained that no military use of the seabed could be considered peaceful.<sup>41</sup> In taking this view, these states could invoke the precedent of the 1959 Antarctic Treaty. After affirming that "Antarctica shall be used for peaceful purposes only," this treaty states that "there shall be prohibited *inter alia* any measures of military nature."<sup>42</sup> Other states on the Seabed Committee rejected this position. They asserted that the decisive factor was whether the purpose of the military activities was defensive<sup>43</sup> or, and this was the position taken especially by the United States, whether they were consistent with the Charter of the United Nations.<sup>44</sup>

The importance of this debate was reduced and its tensions eased when the two major powers agreed in another forum, the Geneva Disarmament Committee, to negotiate a Treaty for the Banishment of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed.<sup>45</sup> This agreement facilitated the inclusion of the peaceful purposes principle in the 1970 Declaration of Principles without further qualification or clarification of meaning.<sup>46</sup> The conclusion of the Seabed Treaty in 1971 and the provision in it calling for further negotiations "in the field of disarmament for the prevention of an arms race on the seabed"<sup>47</sup> suggest that the contracting parties felt they had done what was possible, for the time being, towards giving legal content to the idea of peaceful purposes.<sup>48</sup> The precedent of the 1967 Outer Space Treaty could be recalled.<sup>49</sup> Though affirming the principle of the use of the moon and other celestial bodies "exclusively for peaceful purposes," this treaty does not forbid, as the Antarctic Treaty does, "any measures of military nature," but only specific military activities. Moreover, opening the way for the kind of prohibition contained in the 1971 Seabed

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301, 1971); and in L. MIGLIORINO, *FONDI MARINI E ARMI DI DISTRUZIONE DI MASSA* 15-18 (1980).

<sup>41</sup> See the interventions by the USSR in UN Docs. A/AC.135/SR.16 (1968), A/AC.135/WG.1/SR.8 (1968), A/C.1/PV.1592 (1968), A/AC.138/SR.6,10,12,22,56 (1969), and A/C.1/PV.1798 (1970). See also those of Bulgaria (A/AC.135/SR.16), Poland (*ibid.*), Libya (*ibid.*), Peru (A/AC.135/SR.17), Malta (A/C.1/PV.1589), and Trinidad and Tobago (A/AC.138/SR.50).

<sup>42</sup> Antarctic Treaty, signed at Washington on Dec. 1, 1959, 12 UST 794, TIAS No. 4780, 402 UNTS 71, Art. I.

<sup>43</sup> See the intervention in the 1968 debates of the British delegate, Mr. Auckland: UN Doc. A/AC.135/SR.17.

<sup>44</sup> See the U.S. interventions in UN Docs. A/AC.135/SR.17, A/C.1/PV.1590 (1968), and A/AC.138/SR.6,12 (1969). See also the British intervention in A/C.1/PV.1594 and the Norwegian one in A/AC.135/SR.17.

<sup>45</sup> See L. MIGLIORINO, *supra* note 40, at 18-23.

<sup>46</sup> Whatever its position in the debates, the concrete proposals of the USSR did not go beyond this in the Seabed Committee: see the Soviet proposal in UN Doc. A/AC.135/20 of June 20, 1968. See also the observations by M. W. JANIS, *supra* note 13, at 34-35.

<sup>47</sup> Art. V.

<sup>48</sup> See the interventions by the United States (UN Docs. A/AC.138/SR.18 and A/C.1/PV.1799), by the USSR (A/AC.138/SR.12), and by Sweden (A/AC.138/SR.46).

<sup>49</sup> Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, of Jan. 27, 1967, entered into force on Oct. 10, 1967, 610 UNTS 205, 18 UST 2410, TIAS No. 6347.



Treaty, it prohibits the emplacement in orbit of nuclear weapons and other weapons of mass destruction.<sup>50</sup>

During the Third United Nations Law of the Sea Conference, the subject has been debated only during the fourth session of 1976.<sup>51</sup> The contrast between the states that opposed all forms of military uses of the seas and those that affirmed that military uses compatible with the UN Charter were peaceful was registered again.<sup>52</sup> On the whole, however, the positions were more moderate and the tone of the debate more subdued.<sup>53</sup> The fact that the discussion no longer focused on the seabed but on the wider topic of the peaceful uses of "ocean space" certainly contributed to this change of tone. But, most remarkably, this change was caused by the change in attitude of the USSR. The Soviet delegate did not state his country's support for the demilitarization of ocean space. Rather, he emphasized that the solution to the problem "of strengthening peace on the seas . . . was beyond the scope of the work facing the Conference on the Law of the Sea."<sup>54</sup> In this, the Soviet position came very close to that of the United States.<sup>55</sup>

In the negotiating text, the principle of the use of ocean space for peaceful purposes is not affirmed as a general rule but in provisions regarding various areas of the sea and seabed. Thus, its geographical scope is limited. It applies to the International Seabed Area, the high seas, and, through the reference to the provisions on the high seas contained in Article 58, paragraph 2, the economic zone.<sup>56</sup> It does not extend to internal waters, the territorial sea, and archipelagic waters. It seems to apply to the continental shelf beyond 200 miles even though this part of the seabed is not included in the economic zone or the Area;<sup>57</sup> because the coastal state's rights over it are related to the conduct of economic activities, for all other purposes the continental shelf beyond 200 miles must be considered a part of the bed of the high seas to which, as we have seen, the principle applies.

In addition to this specification of the geographical scope of the principle, the negotiating text seems to confirm the trend towards a narrowing of its meaning. Indeed, one article permits states to declare that they do not accept the competence of the dispute settlement organs provided for by the convention for "disputes concerning military activities."<sup>58</sup> As there is no doubt that some of the activities conducted in areas where the peaceful purposes principle applies could be submitted to dispute settlement or-

<sup>50</sup> Art. IV.

<sup>51</sup> UNCLOS III, 5 OFF. REC. 54-68 (66th to 68th meeting of the Plenary).

<sup>52</sup> The positions in the debate were ably summarized by the Iranian delegate, Mr. Bavand: 5 *id.* at 65-66. For a review, see L. MIGLIORINO, *supra* note 40, at 110-15.

<sup>53</sup> A clear example seems to be the intervention of Tunisia: UNCLOS III, 5 OFF. REC. 67.

<sup>54</sup> *Id.* at 58. <sup>55</sup> *Id.* at 62.

<sup>56</sup> See the articles of the ICNT/Rev.2 listed *supra* at note 39. Arts. 240(a) and 242 are, however, general provisions on marine scientific research, with no restriction of geographical scope.

<sup>57</sup> Compare Art. 76 with Art. 1(1) of the ICNT/Rev.2.

<sup>58</sup> ICNT/Rev.2 Art. 298, para. 1(b). Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4 OCEAN DEV. & INT'L L.J. 51 (1977).

gans,<sup>59</sup> it follows that military activities can be conducted in these areas and that, consequently, military activities in themselves cannot be considered not peaceful.

The meaning of the principle is not further clarified by the negotiating text. Yet, when incorporated in a treaty, as it eventually will be, the principle could have legal consequences. The use of certain areas of the sea for non-peaceful purposes will become illegal. However, because the principle is still undefined, the effect of the provisions containing it will depend on whether there are rules that make a specific interpretation of "peaceful purposes" binding on the interested parties. This can happen either when one of these parties may impose its interpretation on another or when the interpretation of a third party is made binding on all interested parties. In the negotiating text, the first situation is only possible, if at all, under the rules on scientific research. According to one article,<sup>60</sup> if the coastal state decides that a research project to be conducted in its economic zone or on its continental shelf is not "exclusively for peaceful purposes," it is not bound to grant its consent "in normal circumstances" as it would be otherwise. It seems that the researching state can do very little to challenge this interpretation judicially.<sup>61</sup> The second situation would arise whenever a mechanism for third-party, binding dispute settlement is provided. Even though most disputes involving the notion of peaceful purposes fall in principle within the jurisdiction of judges or arbitrators, the already mentioned optional exception to this competence for "disputes concerning military activities" can nullify the possibility that judges or arbitrators will pronounce on the matter. As the main military powers seem inclined to resort to the exception, the chances for judicial or arbitral consideration of peaceful purposes are limited to the rather marginal situation of litigation between states that do not avail themselves of the exception.

The various peaceful purposes clauses in the new Law of the Sea Convention will thus have some, though limited, legal consequences. What about peaceful purposes in the new law of the sea according to current customary law?

The provisions of the negotiating text that give the principle its binding effect are of a kind that needs to be incorporated in a treaty in order to be

<sup>59</sup> See especially Arts. 296, 298, and 187 of ICNT/Rev.2. On the dispute settlement system negotiated at the conference, see Adede, *Law of the Sea: The Scope of the Third-Party Compulsory Procedures for Settlement of Disputes*, 71 AJIL 305 (1977); Pastor Ridruejo, *La solución de controversias en la III Conferencia de las Naciones Unidas sobre el derecho del mar*, 30 REV. ESPAÑOLA DERECHO INT'L 11 (1977); Rosenne, *The Settlement of Disputes in the New Law of the Sea*, IRANIAN REV. INT'L REL., Nos. 10-11, 1978, at 401; Sohn, *Towards a Tribunal for the Oceans*, id., Nos. 5-6, 1975-76, at 247.

<sup>60</sup> ICNT/Rev.2 Art. 246, para. 3.

<sup>61</sup> This depends on the stringent limitations the ICNT/Rev.2 imposes on compulsory third-party settlement in the field of marine scientific research; see Art. 296, para. 2. For an interpretation which (apart from the "military activities" optional exception) would make it possible to submit to third-party compulsory settlement disputes involving the point of whether a research project is conducted "exclusively for peaceful purposes," see Treves, *Principe du consentement et recherche scientifique dans le nouveau droit de la mer*, 84 RGDIP 253, 265 (1980).

effective. This holds true for the rules on the settlement of disputes, and apparently also for the pertinent provision on marine scientific research, at least as far as its very complex details and shades of meaning are concerned.<sup>62</sup> Thus, the principle seems more a part of the United Nations resolution-generated "soft law"<sup>63</sup> than a rule (or a component of rules) of customary law.<sup>64</sup>

Were the substantive rules of the negotiating text in which the concept is contained to be accepted as customary law, their binding effect, except perhaps for the rule on scientific research, would depend on whether a reasonably precise meaning of peaceful purposes is generally recognized. This seems possible if the trend towards a narrowing of the meaning continues and is widely accepted. Three concepts seem likely to serve as guidelines. The first is the compatibility of the purposes with the United Nations Charter, a concept that has been upheld since the outset by the United States and other states. The second may be found in the prohibitions contained in the 1971 Seabed Treaty. They might serve for identifying activities which, even when compatible with the United Nations Charter, can be considered not conducted for peaceful purposes. The third is the idea that listening and communication devices on the seabed can be presumed to be for peaceful purposes. The already emphasized link with nuclear deterrence between the two major powers and the lack of specific objections to their use (apart from jurisdictional reasons), even by countries favorable to demilitarization of the seabed,<sup>65</sup> are indications in this direction.<sup>66</sup>

## II. INTERNAL AND TERRITORIAL WATERS

According to general international law, the coastal state has sovereignty over its internal and territorial waters. This sovereignty extends to the seabed and its subsoil.<sup>67</sup> Accordingly, the coastal state is free to emplace any kind of installations or weapons on or beneath the seabed of its internal

<sup>62</sup> Treves, *Principe*, *supra* note 61, at 266-68.

<sup>63</sup> See, e.g., Dupuy, *Droit déclaratoire et droit programmatore: de la coutume sauvage à la "soft law,"* in SOCIÉTÉ FRANÇAISE DE DROIT INTERNATIONAL, COLLOQUE DE TOULOUSE, L'ÉLABORATION DU DROIT INTERNATIONAL PUBLIC 132-48 (1975).

<sup>64</sup> It would seem that this is the position of D. P. O'Connell (*supra* note 1 at 159) when he observes that "the persistent lip service" which has been given to the peaceful purposes formula has "created a political milieu in which no credit is likely to accrue to any assailant in the seabed, however defensible its motives." U. Jenisch (*supra* note 1 at 66) considers that in contemporary international law the concept of "peaceful purposes" "can only be the basis of confusion."

<sup>65</sup> E.g., Mexico: intervention by J. Castañeda of July 9, 1970, Doc. CCD/PV.477, para. 54, U.S. ARMS CONTROL AND DISARMAMENT AGENCY [hereinafter cited as ACDA], [1970] DOCUMENTS ON DISARMAMENT 307.

<sup>66</sup> E. D. BROWN, *supra* note 40, at 33; M. W. JANIS, *supra* note 13, at 91. See also the intervention of the British delegate, Mr. Auckland, at the Seabed Committee on August 23, 1968: UN Doc. A/AC.135/SR.17.

<sup>67</sup> Geneva Convention on the Territorial Sea, Art. 2; ICNT/Rev.2, Art. 2, para. 2. Marston, *The Evolution of the Concept of Sovereignty over the Bed and Subsoil of the Territorial Sea*, 48 BRIT. Y.B. INT'L L. 320 (1976-77).

and territorial waters,<sup>68</sup> and it has the right to forbid or authorize other states to do so.

These rights apply to territorial seas established in accordance with international law. Though some states claim a wider territorial sea,<sup>69</sup> the maximum limit that now seems to be recognized is 12 miles.<sup>70</sup> Not only is this limit set forth in the negotiating text, but its acceptance has been an important part of the package deal that has led to general acceptance of the concept of the exclusive economic zone.<sup>71</sup> It is unlikely that a need for further compromise will induce the conference to recognize the rights claimed by states that have adopted wider limits.<sup>72</sup> Thus, the existence under domestic law of a territorial sea of more than 12 miles will not serve as a basis for claims to the exclusive use of the seabed beyond the 12-mile limit as flowing from sovereignty over the territorial sea.

Treaty law injects some exceptions into this rather clear picture, particularly the Partial Test Ban Treaty of 1963, the Seabed Treaty of 1971, and the Tlatelolco Treaty of 1967.<sup>73</sup>

Under the Partial Test Ban Treaty,<sup>74</sup> the freedom to use the bed under internal and territorial waters for military purposes is substantially curtailed. The carrying out of "any nuclear weapon test explosion, or any other nuclear explosion" is prohibited;<sup>75</sup> but the prohibition does not include the emplacement or storage of nuclear weapons.

The treaty contains two levels of prohibitions. Nuclear explosions are prohibited altogether if conducted by a state party "at any place under its jurisdiction or control . . . under water, including territorial waters or high seas." If they are conducted "in any other environment," the prohibition is valid only if "the explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted."<sup>76</sup> The prohibition of explosions "under water, including territorial waters or high seas," seems to include not only those in the water column but also those on the surface of the seabed.<sup>77</sup> Explosions under the surface of the seabed (independently of the status of the area where they take place) are prohibited only if they entail the above-mentioned

<sup>68</sup> Provided that it does not create difficulties for the innocent passage of foreign ships.

<sup>69</sup> See the table—based upon information available to the FAO in November 1978—in UN DEPARTMENT OF PUBLIC INFORMATION, A GUIDE TO THE NEW LAW OF THE SEA 49 (Reference Paper No. 18, 1979).

<sup>70</sup> ICNT/Rev.2 Art. 3.

<sup>71</sup> For references to recent practice, see *supra* note 36. See also the observations by Reisman, *supra* note 3, at 59; Moore, *supra* note 3, at 86, 115–16; and B. CONFORTI, APPUNTI DALLE LEZIONI DI DIRITTO INTERNAZIONALE 131–33 (1976).

<sup>72</sup> By accepting, for instance, the Ecuadorian proposal contained in Conf. Doc. C.2/Informal Meetings/11 of April 27, 1979.

<sup>73</sup> For a review of these treaties, see Brown, *The Demilitarization and Denuclearization of Hydrospace*, 4 ANNALS INT'L STUD. 71 (1973).

<sup>74</sup> Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water of August 8, 1963, 480 UNTS 43, 14 UST 1313, TIAS No. 5433.

<sup>75</sup> Art. I, para. 1 (chapeau).

<sup>76</sup> Art. I, para. 1(a) and (b).

<sup>77</sup> L. MIGLIORINO, *supra* note 40, at 10; Evensen, *supra* note 1, at 547.

consequences.<sup>78</sup> Any place under a state's "jurisdiction or control" qualifies the otherwise general geographical scope of the prohibition. While places "under its jurisdiction" include the territory, airspace, and sea areas of a state, as well as ships flying its flag and aircraft and space objects registered by it, places "under its control" seems to indicate control of the explosion in practical or technical terms, so as to include any place beyond the jurisdiction of the state concerned. According to the Legal Adviser of the U.S. Department of State, "for the purposes of the Test Ban Treaty, a party is considered to have temporary control over any place in which it conducts a nuclear test explosion during the time the explosion is conducted."<sup>79</sup>

The 1971 Seabed Treaty<sup>80</sup> has only limited influence on the legal situation of coastal states regarding the emplacement of military installations and devices on the bed of internal and territorial waters. The treaty prohibits emplacing or emplanting "any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons."<sup>81</sup> The concept of "nuclear weapons" can serve as a guideline for interpreting the rather imprecise expression, "other weapons of mass destruction." These would include weapons existing at present, or to be developed in the future, whose effects are comparable to those of nuclear weapons.<sup>82</sup> Chemical, biological, and radioactive weapons have been mentioned.<sup>83</sup> Vehicles that carry nuclear weapons and can move only when in contact with the seabed can be considered included in the prohibition because "emplace," as opposed to "emplant," seems also to cover mobile

<sup>78</sup> This interpretation was upheld by Japan at the 4th meeting of the 1977 Review Conference of the 1971 Seabed Treaty: Doc. SBT/CONF/SR.4, para. 7. E. D. BROWN, *ARMS CONTROL*, *supra* note 40, at 60, and *The Demilitarization*, *supra* note 73, at 11, considers as the "most logical" the interpretation that explosions in the bed of the high seas are in all cases illegal, because this part of the seabed is outside the territorial limits of the state and that, presumably, radioactive debris will be present, at any rate where the explosion has taken place. The logical cogency of this interpretation notwithstanding, it seems to us, as it seems to Brown, that the intention of the parties "was to place the subsoil of the high seas in the same position as the 'underground' of national territories, thus banning only those explosions which caused radioactive pollution of the water or the atmosphere."

<sup>79</sup> M. WHITEMAN, 11 *DIGEST OF INTERNATIONAL LAW* 791 (1968).

<sup>80</sup> See note 2 *supra*.

<sup>81</sup> Art. I, para. 1.

<sup>82</sup> The following definition given by the U.S. negotiator seems adequate:

[I]t has . . . the meaning of embracing nuclear weapons, embracing also chemical and biological weapons and then being open-ended . . . in order to take care of developments which one cannot specify at the present time, some form of weapon which might be invented or developed in the future, which would have devastating effects comparable to those of nuclear or chemical or biological weapons but which one cannot simply describe at the present time.

*Seabed Arms Control Treaty: Hearing on EX. H. 92-1 before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. 13 (1972).

<sup>83</sup> Nuclear mines moored to the seabed seem to be already included in the nuclear weapons concept. See especially E. D. BROWN, *ARMS CONTROL*, *supra* note 40, at 54-56; L. MIGLIORINO, *supra* note 40, at 60-61; Goralczyk, *Legal Problems of the Peaceful Uses of the Sea-bed and the Ocean Floor: Denuclearization*, 5 *POLISH Y.B. INT'L L.* 43, 51-58 (1972-73).

installations.<sup>84</sup> "Dual-purpose" installations, *i.e.*, those designed for storing, testing, or using conventional as well as nuclear weapons, appear to be forbidden, no matter what kind of weapon they contain, because the accent in the provision falls on the purpose they were designed for.<sup>85</sup> In sum, the prohibition in the Seabed Treaty extends to nonnuclear weapons, though it excludes most conventional weapons; but it does not comprehend seabed devices and installations that are not weapons and are not designed for storing, testing, or using them—in particular, listening and other warning devices.<sup>86</sup>

The treaty prohibition applies only to the area of the seabed beyond the outer limit "of the zone referred to in Part II of the Convention on the Territorial Sea and the Contiguous Zone, signed at Geneva on 29 April 1958." This zone "shall be measured in accordance with the provisions of Part I, section II, of that Convention and in accordance with international law."<sup>87</sup> The outer limit has already been set at 12 miles. The section of the Geneva Convention to which reference is made concerns (apart from the rules on delimitation) the baseline from which the 12 miles are to be measured.

The reference to international law does not seem to be directed at states that are not parties to the Geneva Convention because the rules of the latter are incorporated by reference;<sup>88</sup> rather, it seems to refer to baselines whose

<sup>84</sup> A further difficulty may reside in drawing a distinction between vehicles that can move only when in contact with the seabed and vehicles navigating at a very short distance from the seabed and possibly resting on it from time to time. The prevalent position is that the latter vehicles are excluded from the treaty prohibitions. This is also the U.S. view: see the statements of Mr. Leonard at the Conference of the Committee on Disarmament (CCD) on Oct. 7, 1969 (Doc. CCD/PV.440, paras. 24–25, reprinted in ACDA, [1969] DOCUMENTS ON DISARMAMENT 479) and before the U.S. Senate's Committee on Foreign Relations (*Hearing on EX. H. 92–1*, *supra* note 82, at 6; see also p. 12, Sen. Pell and Mr. Irwin). The same view is held by E. D. BROWN, ARMS CONTROL, *supra* note 40, at 58; D. P. O'CONNELL, *supra* note 1, at 157; Goralczyk, *supra* note 83, at 52; Skowronski, *Some Aspects of the Demilitarization of the Sea-bed*, in SCIENTIFIC AND TECHNOLOGICAL REVOLUTION AND THE LAW OF THE SEA 52, 58 (Frankowska ed., 1974).

<sup>85</sup> However, it is difficult to distinguish these dual-purpose installations from installations designed for conventional weapons but that also can accommodate nuclear weapons. The records show only the quite obvious U.S. view that "facilities specifically designed for using nuclear weapons or weapons of mass destruction would not, because they could also use conventional weapons, be exempted from the prohibitions" (Mr. Leonard, Oct. 7, 1969, Doc. CCD/PV.440, para. 24, *supra* note 84, at 479). E. D. BROWN, ARMS CONTROL, *supra* note 40, at 57, rightly observes that "the Treaty seems deficient in this respect."

<sup>86</sup> This is the U.S. position: Mr. Leonard in *Hearing on EX. H. 92–1*, *supra* note 82, at 14–15. Mexico, while taking a strong position for the demilitarization of the seabed, excluded from the objects it wanted banned "those devices of a purely passive or indirect defensive character, such as means of communication, shipping and surveillance" (Castañeda, July 9, 1970, Doc. CCD/PV.477, para. 54, *supra* note 65, at 307).

<sup>87</sup> Art. II. Thus, the zone to which the treaty prohibitions do not apply coincides with the contiguous zone as defined by the Geneva Convention.

<sup>88</sup> The U.S. representative emphasized that the reference to the Geneva Convention "in no way implies that any party to the sea-bed treaty which was not a party to the 1958 Convention would find itself bound by or, so to speak, adhering to that Convention" (Oct. 30, 1969, Doc. CCD/PV.447, para. 14, reprinted in ACDA, [1969] DOCUMENTS, *supra* note 84, at 512). See also the statement of the Argentinian representative at the meeting of the UN General Assembly's First Committee on Dec. 11, 1969: UN Doc. A/C.1/PV.1722, at 37–92.

drawing is not regulated by the Geneva Convention.<sup>89</sup> The most relevant are those for historic waters and bays.<sup>90</sup> This interpretation permits a substantial expansion of the area exempt from the treaty prohibitions. Whatever its width, if a bay can be considered historic, its waters are internal and the 12-mile zone is measured from the closing line; if it cannot, the Geneva Convention's rule setting a 24-mile maximum for the closing line has to be applied.<sup>91</sup> These provisions explain the Soviet Union's interest in the reference to international law now under consideration.<sup>92</sup> The USSR claims that significant sea areas adjacent to its coasts are historic waters and bays.<sup>93</sup> However, these claims have not always been undisputed. While the view prevailing among Western (and not only Western) powers is that the prerequisites for the designation "historic" include the well-known, long-standing, and undisputed exercise of state prerogatives over the claimed waters,<sup>94</sup> the Soviets believe that either historical tradition or a special economic or strategic interest in the waters or bay suffices for them to be considered historic.<sup>95</sup> This difference of opinion emerged during the protests that followed the Soviet Union's decision of 1957 to declare the waters of Peter the Great Bay "internal," even though its historical arguments were extremely thin.<sup>96</sup>

It is certain that the other contracting parties, and particularly the United States, which cosponsored the draft treaty with the USSR, were aware of the Soviet interpretation of the rules of international law on historic bays<sup>97</sup> and of the possibilities of concealment of nuclear weapons the USSR would acquire by taking advantage of the reference to international law in the provision on the measurement of the 12-mile zone. While this awareness

<sup>89</sup> Statement of the U.S. representative, Mr. Leonard, of Oct. 30, 1969, Doc. CCD/PV.447, para. 13, *supra* note 88, at 512.

<sup>90</sup> Geneva Convention on the Territorial Sea and the Contiguous zone, Art. 7, para. 6, and Resolution VII adopted by the Geneva Conference at its 20th plenary meeting, UN CONFERENCE ON THE LAW OF THE SEA, 2 OFFICIAL RECORDS 145 (1958).

<sup>91</sup> Art. 7, para. 4.

<sup>92</sup> See the Soviet intervention in Doc. CCD/PV.440, *supra* note 84 (Oct. 7, 1969); and D. P. O'CONNELL, *supra* note 1, at 155-56.

<sup>93</sup> The legislation and other materials are presented in W. E. BUTLER, *THE LAW OF SOVIET TERRITORIAL WATERS* 12-15 (1967); and in V. SEBEK, 1 *THE EASTERN EUROPEAN STATES AND THE DEVELOPMENT OF THE LAW OF THE SEA* 166-72 (1977-79).

<sup>94</sup> A recent statement of the U.S. position is in A. W. ROVINE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1973, at 291 (1974). Among legal writers, see especially, L. BOUCHEZ, *THE REGIME OF BAYS IN INTERNATIONAL LAW* 281 (1964); C. DE VISSCHER, *PROBLÈMES DE CONFINS EN DROIT INTERNATIONAL* 134 (1969); F. LAURIA, *IL REGIME GIURIDICO DELLE BAIE E DEI GOLFI* 148-56 (1970).

<sup>95</sup> W. E. BUTLER, *supra* note 93, at 13-14.

<sup>96</sup> See the positions taken by the United States, Japan, and the Federal Republic of Germany and the replies of the USSR in M. WHITEMAN, 4 *DIGEST OF INTERNATIONAL LAW* 251-57 (1965). That the definition of historic bays is still uncertain seems also to emerge from the fact that attempts at codification have been postponed more than once since the Geneva Conferences of 1958 and 1960. Lastly, in 1977 the International Law Commission decided that the subject did not require further consideration in the near future and that it could be taken up in the light of the results of the Third Conference on the Law of the Sea: [1977] 2 Y.B. INT'L L. COMM'N, 2d part, at 127.

<sup>97</sup> See *Hearing on EX. H. 92-1*, *supra* note 82, at 8, 12.

certainly cannot be considered as recognition of the Soviet interpretation,<sup>98</sup> it might indicate the intention of those states not to raise disputes with the USSR on this subject.<sup>99</sup>

Within the 12-mile zone, the treaty's impact on the situation under customary law depends on whether the coastal state has a territorial sea of 12 miles or one of a lesser extent. In the first case, as the treaty provisions do not apply to the territorial sea, no exception is made to the coastal state's power to establish installations and devices of any kind and to authorize or forbid other states to do so.<sup>100</sup> In the second case, the situation is less simple, as appears from the following rule of the treaty: "The undertakings of paragraph 1 of this article [the prohibition] shall also apply to the sea-bed zone referred to in the same paragraph, except that within such sea-bed zone, they shall not apply either to the coastal State or to the sea-bed beneath its territorial waters."<sup>101</sup> Though far from clear, this language indicates that the coastal state is exempt from the prohibition set forth in the treaty as regards the 12-mile zone, even when its territorial sea is of a lesser width. Yet other states are not exempted from the prohibition in the intermediate zone between the outer limit of the territorial sea and the 12-mile limit, as they otherwise would be. Consequently, the coastal state may exclude other states from the intermediate zone exactly as it may from its territorial sea. In this regard, the treaty has brought about an interesting innovation. Its importance, however, depends on the situation under customary law of the continental shelf, to which the intermediate zone belongs.<sup>102</sup>

Apart from this, the provision in question does not provide for exceptions to general international law. It does not "permit" the coastal state to emplace

<sup>98</sup> Especially in the light of the so-called disclaimer clause contained in Article IV of the treaty.

<sup>99</sup> This appears to be confirmed by a recent modification in the conference's negotiating text (ICNT/Rev.2 Art. 298, para. 1(a)), which provides that compulsory settlement of disputes concerning boundary delimitation or "historic bays or titles" can be excluded by contracting parties by resorting to an optional exception, though these disputes have to be submitted to conciliation. It is well known that excluding compulsory arbitral or judicial settlement on delimitation and on historic bays and titles has been an objective of the USSR throughout the conference: see especially the intervention of the Head of the Soviet delegation, Mr. Kozyrev, at the 106th meeting of the Plenary on May 19, 1978 (UNCLOS III, 9 OFF. REC. 84). See also Irwin, *Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations*, 8 OCEAN DEV. & INT'L L. 105 (1980).

<sup>100</sup> "This provision is designed to leave unaffected the sovereign authority and control of the coastal State within such territorial sea" (Mr. Leonard, United States, at the General Assembly's First Committee, Nov. 16, 1970, UN Doc. A/C.1/PV.1762, at 34-35). "That provision must be interpreted as embodying the intangible rights of all coastal States arising from such sovereignty under international law" (Mr. Roschin, USSR, at the same forum on the same day, *id.* at 47).

<sup>101</sup> Art. I, para. 2.

<sup>102</sup> Thus the opinion, upheld by E. D. BROWN, ARMS CONTROL, *supra* note 40, at 71, Goralczyk, *supra* note 83, at 63, and Skowronski, *supra* note 84, at 55, that the coastal state cannot authorize other states to emplace or implant in the intermediate zone the weapons and installations considered in the treaty, is acceptable only if one accepts the idea that the coastal state enjoys no such power regarding its continental shelf. The power of the coastal state to authorize other states to utilize the bed of its territorial sea is explicitly linked to the situation of sovereignty there by Mr. Irving, U.S. Under Secretary of State, in *Hearing on EX. H. 92-1*, *supra* note 82, at 23.



or emplant nuclear weapons and installations on the bed of the territorial sea and the intermediate zone; it simply does not apply to the coastal state as far as these parts of the seabed are concerned.

Significantly, the coastal state seems to have exclusive rights in the intermediate zone over verification of compliance with the treaty obligations, even though the treaty provides for a multistage procedure involving other states. This conclusion follows from the fact that the observation rights of other states are limited to the area beyond the 12-mile zone referred to in Article I.<sup>103</sup>

As regards states claiming territorial seas of more than 12 miles, nothing in the treaty authorizes them to claim that the prohibition does not apply to the seabed beyond the 12-mile line.<sup>104</sup> The reference to the width of the contiguous zone in the Geneva Convention (it cannot exceed 12 miles from the baseline) precludes such a claim.

Unlike the Seabed Treaty of 1971, the Tlatelolco Treaty of 1967<sup>105</sup> places substantial limitations on the coastal state's freedom to emplace weapons and installations on or beneath the bed of the territorial sea. The prohibition in this treaty refers to the contracting parties' "territory,"<sup>106</sup> which is defined as including "the territorial sea, air space and any other space over which the State exercises sovereignty in accordance with its own legislation."<sup>107</sup> Thus, the parties are forbidden from doing something that would otherwise be within their sovereignty.

In contrast with the Partial Test Ban Treaty, the prohibition in the Tlatelolco Treaty does not depend upon the environment in which explosions are conducted or upon the radioactive debris they cause. The treaty exempts explosions for peaceful purposes, while the Partial Test Ban Treaty does not.<sup>108</sup>

Compared to the Seabed Treaty, the prohibition in the Tlatelolco Treaty is narrower in scope. It concerns only "nuclear weapons" and not other weapons of mass destruction. Moreover, although it prohibits the "receipt, storage, installation, deployment and any form of possession" of such weapons,<sup>109</sup> it does not prohibit, as the 1971 treaty does, emplacing or emplanting on the seabed structures or installations designed for storing, testing, or using such weapons.

The most interesting aspect of the provision on the territorial scope of the prohibition is the reference to "any other space over which the State exercises sovereignty *in accordance with its own legislation*." This reference

<sup>103</sup> Art. III, para. 1. This conclusion was explicitly set forth by the USSR delegate, Mr. Roschin, at the CCD meeting of July 7, 1970 (Doc. CCD/PV.476, para. 71, *reprinted in ACDA*, [1970] DOCUMENTS, *supra* note 65, at 297), while rejecting as redundant a Swedish proposal concerning the exclusive right over verification in the intermediate zone.

<sup>104</sup> Krieger, *The United Nations Treaty Banning Nuclear Weapons and Other Weapons of Mass Destruction on the Ocean Floor*, 3 J. MAR. L. & COMM. 107, 118 (1971).

<sup>105</sup> Treaty for the Prohibition of Nuclear Weapons in Latin America of Feb. 14, 1967, 634 UNTS 364.

<sup>106</sup> Art. 1, chapeau.

<sup>107</sup> Art. 3.

<sup>108</sup> Art. 18.

<sup>109</sup> Art. 1(a) and (b).

would seem to include territorial seas of more than 12 miles, provided the coastal state exercises sovereignty over them according to its domestic law.<sup>110</sup> This conclusion is not contradicted by the declaration made by the United Kingdom when it deposited its ratification of Protocols I and II. The declaration states:

the reference in Article 3 of the Treaty to "its own legislation" relates only to such legislation as is compatible with the rules of international law and as involves an exercise of sovereignty consistent with those rules and accordingly . . . signature or ratification of either Additional Protocol by the Government of the United Kingdom could not be regarded as implying recognition of any legislation which did not, in their view, comply with the relevant rules of international law.<sup>111</sup>

The USSR made a similar declaration.<sup>112</sup>

Unilateral extensions of the territorial sea, as we have seen, may be contrary to international law, and the United Kingdom and the USSR have rightly indicated their unwillingness to acquiesce in them. This unwillingness, however, does not imply that the legislation containing those extensions may not be used in a treaty as a spatial criterion, according to which states accept certain rights and obligations. Thus, the state party not recognizing the lawfulness under international law of a given extension of the territorial sea beyond 12 miles is not precluded from claiming that a state that has adopted the extending legislation must observe its obligations under the Tlatelolco Treaty.

This discussion will lose much of its relevance when, and if, the treaty applies not only to the "territories" of the parties but also to the wider zone indicated in Article 4, paragraph 2. This zone includes, and goes further than, the 200-mile territorial sea claimed by some of the contracting parties.<sup>113</sup> The conditions for making this zone applicable, however, have not yet been met. They include the ratification of the treaty by all sovereign states situated in their entirety south of the 35° north latitude, and of Additional Protocol II by all the nuclear powers.<sup>114</sup> Some Latin American republics,

<sup>110</sup> D. P. O'CONNELL, *supra* note 1, at 157; Brown, *The Demilitarization*, *supra* note 73, at 77. According to the national laws collected by A. SZEKELY, 1 *LATIN AMERICA AND THE LAW OF THE SEA* (1978), the Latin American states claiming sovereignty over zones of 200 miles are Argentina, Brazil, Ecuador, El Salvador, Panama, and Uruguay. See also Szekely's commentaries in 2 *id.*, ch. IIB, 2(c) and (d). It must be stressed, however, that the term "sovereignty" in the treaty can raise serious difficulties because legislations using it do not always refer to the same fullness of powers to which the Geneva Convention refers regarding the territorial sea, where the only exception is innocent passage.

<sup>111</sup> UNITED NATIONS, STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS 64-65 (Special supp. to 2 UN DISARMAMENT Y.B. 1977 (1978)). A. García Robles, the Mexican Under Secretary of State who chaired the preparatory commission for the denuclearization of South America, commented upon the UK declaration in the following terms: "it is obvious that no one would contest this statement which, in light of the preparatory work of the treaty, corresponds to what its authors had in mind all the time" (SIPRI Y.B. 1969-70, at 231).

<sup>112</sup> 3 UN DISARMAMENT Y.B. 1978, at 492 (1979).

<sup>113</sup> A map showing the zone to which the treaty will apply according to Art. 4, para. 2 is in SIPRI Y.B. 1972, at 548.

<sup>114</sup> These conditions are set out in Art. 28, para. 1.

including Cuba, have not yet ratified the convention, and while all the nuclear powers have ratified Additional Protocol II, it must be stressed that the USSR, when it overcame its reluctance<sup>115</sup> and became party to the protocol, declared that its ratification in no way signified "recognition of the possibility of application of the Treaty, as prescribed in article 4, paragraph 2, beyond the territories of States parties, including the air space and the territorial sea established in accordance with international law."<sup>116</sup>

### III. ARCHIPELAGIC WATERS

Archipelagic waters are among the characteristic features of the future Law of the Sea Convention.<sup>117</sup> Provisions in the negotiating text<sup>118</sup> permit states "constituted wholly by one or more archipelagos,"<sup>119</sup> under certain conditions and with certain limitations,<sup>120</sup> to "draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago."<sup>121</sup> The breadth of the territorial sea, the economic zone, and the continental shelf is measured from these baselines,<sup>122</sup> and the waters situated within them are archipelagic waters.<sup>123</sup>

According to the negotiating text, archipelagic states enjoy sovereignty over archipelagic waters. This sovereignty extends to the airspace, the bed and subsoil, and the resources contained in them.<sup>124</sup> Though sovereignty is a feature of the coastal state's rights over both internal and territorial waters, archipelagic waters are neither of the two. Explicit provisions entitle the archipelagic state to internal<sup>125</sup> as well as territorial waters.<sup>126</sup> Consequently, archipelagic waters may be considered an entirely new concept. It differs from the concept of internal waters because sovereignty over archipelagic waters is limited. Though the main limitation is the right of innocent passage,<sup>127</sup> archipelagic waters are different from territorial waters because a particular kind of passage, "archipelagic sea lanes passage," is

<sup>115</sup> On the Soviet attitude, see SIPRI Y.B. 1972, at 544-45.

<sup>116</sup> 3 UN DISARMAMENT Y.B. 1978, at 492.

<sup>117</sup> D. W. BOWETT, *THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW* 73-113 (1979); B. H. DUBNER, *THE LAW OF TERRITORIAL WATERS OF MID-OCEAN ARCHIPELAGOS AND ARCHIPELAGIC STATES* (1976); J. SYATAUW, *SOME NEWLY INDEPENDENT STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* 168-82, 185-89 (1961); C. F. AMERASINGHE, *The Problem of Archipelagos in the International Law of the Sea*, 23 INT'L & COMP. L.Q. 538-75 (1974); COQUIA, *Territorial Waters of Archipelagos*, 1 PHILIPPINE J. INT'L L. 119 (1962); EVENSEN, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, 1 UN CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 289-302 (1958); KUSUMAATMAJIA, *The Legal Regime of Archipelagos: Problems and Issues*, in *THE LAW OF THE SEA: NEEDS AND INTERESTS OF DEVELOPING COUNTRIES* 166 (Alexander ed., 1973); O'CONNELL, *Mid-Ocean Archipelagos in International Law*, 45 BRIT. Y.B. INT'L L. 1-72 (1971); SØRENSEN, *The Territorial Sea of Archipelagos*, 6 NETH. INT'L L. REV. SUPP. 315 (1959).

<sup>118</sup> ICNT/Rev.2 Arts. 46-54.

<sup>119</sup> ICNT/Rev.2 Art. 46.

<sup>120</sup> Set forth in Arts. 46(a) and 47, paras. 2-8.

<sup>121</sup> Art. 47, para. 1.

<sup>122</sup> Art. 48.

<sup>123</sup> Art. 49, para. 1.

<sup>124</sup> Art. 49, paras. 1 and 2.

<sup>125</sup> Art. 50.

<sup>126</sup> Art. 48.

<sup>127</sup> Art. 52.

provided. It is similar to "transit passage" through straits and includes the right of overflight.<sup>128</sup>

Though the Law of the Sea Conference has agreed on the main features of archipelagic waters, there is room for doubt about the status of the concept under international law, as it stands today. The unilateral action of archipelagic states in drawing baselines around archipelagoes, and usually in proclaiming the waters so encompassed as "internal waters,"<sup>129</sup> has met opposition from the states most interested in navigation.<sup>130</sup> At the Caracas session of the Law of the Sea Conference, various delegations pointed out that "so far international law has not admitted the concept of the archipelagic State."<sup>131</sup> Apart from making claims on the basis of historic waters,<sup>132</sup> none of the delegates from the archipelagic states who took the floor affirmed that the concept was already a part of international law. One of them explicitly referred to it as a matter of "progressive development of international law."<sup>133</sup> Nonetheless, during the debate most delegations sympathized with the concept. They stressed, however, that its acceptance depended upon the formulation of a definition that would protect navigational interests and exclude archipelagoes whose islands were considered too far apart.<sup>134</sup> The present provisions in the negotiating text seem to meet these requirements.<sup>135</sup>

<sup>128</sup> Art. 53. According to paragraphs 1 and 2, if the archipelagic state designates "sea lanes and air routes thereabove" for archipelagic passage, the right of overflight undoubtedly exists: see Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AJIL 57, 66 (1978), and Moore, *supra* note 3, at 110-11. When the archipelagic state does not designate such sea lanes and air routes, Article 53, paragraph 12 provides that "the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation." The implication seems to be that the right to fly "thereabove" is included, but the language could open the way to disagreement over this interpretation.

<sup>129</sup> Philippine note of Dec. 12, 1945 to the UN Secretary-General, in UN, *LAW AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEAS* 39-40 (ST/LEG/SER.B/6, 1957); Philippine Republic Act No. 3046 of June 17, 1961, sec. 2, UN, *NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA* 103 (ST/LEG/SER.B/15, 1970); Philippine Constitution of Jan. 17, 1973, Art. 1, sec. 1, *NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA* 30 (ST/LEG/SER.B/18, 1976). Indonesian communiqué of Dec. 13, 1975 (in J. SYTAUW, *supra* note 117, at 173); Indonesian Act No. 4 of Feb. 18, 1960, Art. 1(1), in UN Doc. A/CONF-19/5/Add.1, at 3; see also the Indonesian reservations to the Geneva Convention on the High Seas, in *MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS* 559 (ST/LEG/SER.D/12, 1979).

<sup>130</sup> For a summary, see M. WHITEMAN, 4 *DIGEST OF INTERNATIONAL LAW* 282-85 (1965). For a discussion of the relevance of these protests, see O'Connell, *Mid-Ocean Archipelagos*, *supra* note 117, at 60-69. See also the objections to Indonesia's reservations to the Geneva High Seas Convention by Australia, Denmark, the Federal Republic of Germany, Japan, Madagascar, the Netherlands, Thailand, the United Kingdom, and the United States (*MULTILATERAL TREATIES*, *supra* note 129, at 561-62). Fiji and Tonga accepted the Indonesian reservations, while stressing the continuing existence of the right to innocent passage through the waters which, before being included in Indonesian internal waters, belonged to the High Seas (*ibid.*).

<sup>131</sup> Algeria, UNCLOS III, 2 OFF. REC. 271. See also the United Kingdom, *id.* at 261, and the USSR, *id.* at 266.

<sup>132</sup> Philippines, *id.* at 264.

<sup>133</sup> Mauritius, *id.* at 269.

<sup>134</sup> For example: Japan, *id.* at 261; Bulgaria, *ibid.*; the Netherlands, *id.* at 262; France, *id.* at 263; the USSR, *id.* at 266; Egypt, *id.* at 268; Singapore, *ibid.*; Canada, *id.* at 271.

<sup>135</sup> Since the compromise that appears in Arts. 117-121 of part II of the 1975 Single Negotiating Text (UNCLOS III, 4 OFF. REC. 168) was reached, there have been only minor

These developments suggest that the idea that archipelagic states are entitled to some specific rights over the waters connecting their component islands, which would otherwise belong to the high seas, has not yet become part of international law, even though the process for establishing it as customary seems to have started.<sup>136</sup> However, it may well be that, in practice, the concepts of the economic zone and of historic waters will be sufficient to cover this idea. The precise definition of archipelagic waters, as well as the detailed indication of the rights recognized for other states as regards these waters, seems to belong to the domain of provisions that become binding only when included in a duly ratified convention. Nonetheless, especially (but perhaps not exclusively) if the Law of the Sea Conference adopts a treaty with provisions on archipelagic waters along the lines of those of the negotiating text, and the most directly involved states do not dissent, it seems likely that the archipelagic states will quickly start seeing a limit to their claims in the provisions and that other states will find in them reason for recognizing those claims. Custom would grow out of accepted compromise.<sup>137</sup>

Under the detailed rules of the negotiating text, the limitations on the archipelagic state's sovereignty over its archipelagic waters and the underlying bed and subsoil do not concern the placing of military installations and devices on or beneath the seabed. Therefore, the situation seems to be the same as for internal and territorial waters, and it will hold true if, even before the entry into force of the new Law of the Sea Convention, the archipelagic state's sovereignty over archipelagic waters becomes generally accepted through the process described above. On the contrary, under today's international law, even if one were to accept the idea that archipelagic states enjoy some specific rights in their archipelagic waters, it would be difficult to maintain that they include the exclusive power to emplace military installations or devices on or beneath the bed of these waters. Although states have invoked security reasons for proclaiming archipelagic waters,<sup>138</sup> the debate has concentrated mostly on navigational rights and rights to the resources of the seabed, and other uses have not been discussed.<sup>139</sup> Conse-

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changes, the essential aspects remaining unchallenged. Yet, states with offshore archipelagoes would also like to apply the archipelagic waters concept to these archipelagoes.

<sup>136</sup> This would seem to be the situation in the light of the weakening of the protests against archipelagic states during the Third Law of the Sea Conference and of the fact that some leading maritime states actively participated in the elaboration of proposals on the subject. Most authors do not try to assess the situation as it stands but prefer to formulate guidelines for the solution of the problem on a *de lege ferenda* basis; see, e.g., Amerasinghe, *supra* note 117, at 575; O'Connell, *Mid-Ocean Archipelagos*, *supra* note 117, at 75-77; B. H. DUBNER, *supra* note 117, at 67-81.

<sup>137</sup> This would be one of the consequences mentioned above (sec. I, "The Evolving Legal Framework") of the accelerating effect of general diplomatic conferences on state practice and of decisionmaking by consensus in such conferences. On the importance of the compromise on archipelagoes, see Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AJIL 763, 784-85 (1975).

<sup>138</sup> See, e.g., the Philippines, SECOND UN CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 51, and Indonesia, UNCLOS III, 2 OFF. REC. 260. Also D. W. BOWETT, *supra* note 117, at 98-102.

<sup>139</sup> The exception, among legal writers, seems to be Amerasinghe, *supra* note 117, at 571.

quently, the legal situation is the same as the one otherwise prevailing for the continental shelf or the bed of the high seas.

As far as treaty law is concerned, the most relevant question is whether the 1971 Seabed Treaty (which excludes from its area of application a zone coterminous with the contiguous zone, as defined in the 1958 Convention on the Territorial Sea and measured according to either that convention or international law) can be interpreted as referring to a contiguous zone measured from an archipelagic baseline. The implications of an answer in the affirmative run counter to the interest of disarmament. Vast seabed areas, in which emplanting and emplacing nuclear weapons and installations are precluded under the treaty, would be excluded from the prohibitions. Because of their sovereignty over these areas, archipelagic states would also be entitled to permit other states to use them. Archipelagic waters could then hide depositories of the hitherto prohibited weapons and installations.

One possible interpretation of the treaty supports this answer. Under this interpretation, the reference to international law in Article II would be considered to have paramount importance. Provided that international law recognized the concept of archipelagic waters, the archipelagic baseline would be the baseline of the contiguous zone, and archipelagic waters would not be included in the prohibitions as regards archipelagic states.

However, a different interpretation is also possible. This interpretation would consider the reference to the 12-mile zone defined in part II of the Geneva Convention on the Territorial Sea and the Contiguous Zone as the most important factor in Article II of the treaty. The reference to international law would thus concern only baselines not dealt with in the convention (such as those of historic bays) and not those regulated by it. In Article 10, the convention provides for determining the baselines for islands, without distinguishing between those belonging to archipelagos and other islands. Consequently, the existence of archipelagic waters would be irrelevant to the obligations set forth in the Seabed Treaty. The coastal state would be exempted from their observance only within a 12-mile zone drawn for each island.

That the principle of the "peaceful uses" of the seas does not extend to archipelagic waters could be invoked in favor of the first interpretation. The second interpretation, however, seems closer to the expectations of the parties that negotiated the treaty, when archipelagic waters certainly were not an accepted concept in international law.

In practice, the relevance of this discussion depends on whether archipelagic states are, or are likely to become, bound by the Seabed Treaty. By the end of 1979, the main archipelagic states, Indonesia and the Philippines, were not. On the other hand, the Seychelles and Mauritius were parties to the treaty. The position of the Seychelles, however, is not entirely clear,<sup>140</sup>

<sup>140</sup> The Seychelles Maritime Zones Act, 1977 defines the "limits" of the various maritime zones by referring to "the individual or composite group or groups of islands constituting the territory of Seychelles" (NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA 112, ST/LEG/SER.B/19 prel. issue, 1978).

and Mauritius, though a member of the Group of Archipelagic States from the outset, does not qualify as such under the rules of the negotiating text on the maximum length of the archipelagic straight baselines and on the required ratio of land to water.<sup>141</sup>

#### IV. THE CONTINENTAL SHELF AND ECONOMIC ZONE

##### *The Applicable Rules*

The emplacement of military objects on or beneath the seabed under national jurisdiction beyond the territorial sea<sup>142</sup> is not explicitly permitted or prohibited by the traditional, or by the new, law of the sea. The legal problems must therefore be solved on the basis of the general rules concerning that area of the seabed. Under the traditional law of the sea, these are the rules on both the continental shelf and the high seas. The former recognize broad powers as belonging to the coastal state, but they pertain to the exploration and exploitation of resources. Among the latter, as will be seen, is the residuary rule of freedom. Under the articles elaborated by the Third Law of the Sea Conference, the legal regime of the seabed under national jurisdiction falls under the rules not only on the continental shelf, but also on the exclusive economic zone.<sup>143</sup> This conclusion is to be drawn from the fact that the negotiating text does not ascribe sovereign rights to the coastal state in the exclusive economic zone for the exploration and exploitation of the resources of the water column only, but of the seabed and subsoil as well.<sup>144</sup>

The distinction between the two sets of rules is important. The outer limit of the continental shelf, while never being at a shorter distance from the baseline than that of the economic zone, may in some cases extend farther, according to developments at the conference.<sup>145</sup> Consequently, for the area of the seabed that is included in the continental shelf, but lies beyond the economic zone, the rules designed for the latter do not apply and only those regarding the continental shelf can be invoked.

<sup>141</sup> Gayan, *Mauritius and the Law of the Sea*, IRANIAN REV. INT'L REL., Nos. 11-12, 1978, at 220-21; see also D. W. BOWETT, *supra* note 117, at 92.

<sup>142</sup> See M. S. McDUGAL & W. T. BURKE, *supra* note 5, at 716-24; E. D. BROWN, ARMS CONTROL, *supra* note 40, at 22-33; U. JENISCH, *supra* note 1, at 84-87; W. KÜHNE, DAS VÖLKERRECHT UND DIE MILITÄRISCHE NÜTZUNG DES MEERESBODENS 39-59 (1975); B. RÜSTER, *supra* note 1, at 224-27; Baxter, *Legal Aspects of Arms Control Measures Concerning the Missile, Submarine and Anti-Submarine Warfare*, in THE FUTURE OF THE SEA-BASED DETERRENT 209, 218-19 (Tsipis ed., 1979); Gehring, *supra* note 1, at 188-95; Knight, *The Law of the Sea and Naval Missions*, U.S. NAVAL INST. PROC., June 1977, 32, 37, 39; O'Connell, *Resource Exploitation, the Law of the Sea and Security Implications*, in NEW STRATEGIC FACTORS IN THE NORTH ATLANTIC 160-67 (Bertram & Holst eds., 1977); Petrowski, *supra* note 1, at 279.

<sup>143</sup> ICNT/Rev.2, pts. V and VI, respectively. On the relationship between these two parts, see R. J. DUPUY, *supra* note 1, at 112-14; Pistorelli, *La piattaforma continentale: Un istituto ancora vitale?*, 61 RIVISTA DIRITTO INTERNAZIONALE 496 (1978); Phillips, *The Exclusive Economic Zone as a Concept in International Law*, 26 INT'L & COMP. L.Q. 585, 614-15 (1977); Pulvenis, *Zone économique et plateau continental—Unité ou dualité?*, IRANIAN REV. INT'L REL., Nos. 11-12, 1978, at 103-20.

<sup>144</sup> ICNT/Rev.2 Art. 56, para. 1(a).

<sup>145</sup> ICNT/Rev.2 Art. 76.

Admittedly, the rules on activities on the seabed of the economic zone are almost the same as those for the continental shelf.<sup>146</sup> Regarding artificial islands, installations, and structures, there is a specific cross-reference from the set of rules on the continental shelf to the rule on the subject in the chapter on the economic zone.<sup>147</sup> Moreover, the general rule on the economic zone in the negotiating text provides that "the rights set out in this article shall be exercised in accordance with part VI,"<sup>148</sup> which is the part on the continental shelf.<sup>149</sup>

These parallels have prompted the idea that the concept of the economic zone—regardless of the formulation in the negotiating text—does not apply to the seabed and its resources, which would autonomously be regulated by the rules on the continental shelf.<sup>150</sup> The fact that the coastal state's rights over the continental shelf "do not depend . . . on any express proclamation,"<sup>151</sup> which does not hold true for the exclusive economic zone, is invoked in support of this idea.<sup>152</sup> This observation indicates the importance of the continental shelf within the 200-mile line when no economic zone has been proclaimed. Yet, when an economic zone exists, there is an important difference between the legal regimes of the seabed under national jurisdiction within and beyond the 200-mile line: the negotiating text's part on the economic zone sets forth a general rule on the rights and duties of other states in the economic zone and a rule on the resolution of conflicts between the latter and coastal states when the convention "does not attribute rights or jurisdiction" to either of them.<sup>153</sup> The first rule makes applicable to the economic zone a relatively specific group of principles on the high seas; the second indicates the intention of avoiding the choice of a residuary rule, be it coastal state jurisdiction or freedom of the high seas.<sup>154</sup> The regimes for the seabed within and beyond the 200-mile line differ in that these rules apply only within the line, while beyond it the residuary rule of freedom prevails.

This difference does not seem to exist within the framework of today's customary international law. It is true that many aspects of the coastal state's powers in the economic zone, as described in the negotiating text,

<sup>146</sup> The only discrepancy seems to concern the laying of cables and pipelines. According to Article 58, paragraph 1, all states enjoy the freedom to lay cables and pipelines in the economic zone, while Article 79, paragraph 3 provides that on the continental shelf "the delineation of the course" for the laying of cables and pipelines "is subject to the consent of the coastal State." See Phillips, *supra* note 143, at 615, and R. J. DUPUY, *supra* note 1, at 112. As Article 58 states that the freedoms it mentions are to be enjoyed "subject to the relevant provisions of this Convention," and as Article 79, paragraph 1 states that "[a]ll States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article," it seems that the requirement of the coastal state's consent to the delineation of the course for the cable or pipeline is a modality of the exercise of this freedom, which thus applies to the shelf as a whole and so also within the 200-mile line. Therefore, no contradiction seems to exist. Another interpretation would lead to the absurd result that the coastal state would have more powers over the continental margin beyond the 200-mile limit than within that limit.

<sup>147</sup> ICNT/Rev.2 Arts. 80 and 60.

<sup>148</sup> ICNT/Rev.2 Art. 56, para. 3.

<sup>149</sup> On scientific research on the continental shelf beyond 200 miles, see *infra* note 220.

<sup>150</sup> Pistorelli, *supra* note 143, at 503.

<sup>151</sup> ICNT/Rev.2 Art. 77, para. 3.

<sup>152</sup> Pistorelli, *supra* note 143, at 504.

<sup>153</sup> ICNT/Rev.2 Arts. 58 and 59.

<sup>154</sup> For further developments, see "The New Law of the Sea," in this section *infra*.



are now generally accepted, especially as far as fisheries are concerned.<sup>155</sup> Though perhaps in a less definite way, other powers regarding the preservation of the marine environment and marine scientific research seem already to be recognized as belonging to the coastal state.<sup>156</sup> To these must be added the coastal state's well-established powers regarding the continental shelf. Taken together, these powers tend to coincide with those listed in the negotiating text's article on "rights, jurisdiction and duties of the coastal State in the exclusive economic zone."<sup>157</sup> Consequently, it is possible to say that in today's international law, coastal state powers within a 200-mile zone are recognized or, at least, that there is a definite trend towards recognizing them. Saying this, however, does not mean that the legal nature of these powers coincides with the concept of the economic zone set forth in the negotiating text. The widespread recognition of the coastal state's powers within the 200-mile limit has developed gradually, activity by activity. Thus, the powers regarding resource-oriented activities on the seabed were recognized first, within the concept of the continental shelf, and of those regarding activities in the water column, powers over fishing were accepted before and more clearly than others. Because the concept of the economic zone has not developed in contemporary practice as a general, all-encompassing legal institution, but as a bundle of powers each of which has a different history and whose merging has not yet taken place, the residuary rule of freedom still seems to apply, as in the traditional law of the sea. The rule in the negotiating text for cases where rights or jurisdiction are attributed neither to the coastal state nor to other states is an attempt at compromising the opposing views of the coastal and the maritime states on the desirable residuary rule for the future Law of the Sea Convention. There is no evidence that it is followed in today's practice. This conclusion is reinforced when one considers that the impact of the rule is mostly procedural, which will be seen later. Procedure is a domain eminently dependent on treaty rules. Consequently, even though more and more powers are and will be recognized as belonging to the coastal state, the residuary rule continues to be the same as in the traditional law of the sea.

### *The Traditional Law of the Sea*

A starting point in assessing the evolution of the law on military installations and devices is the Geneva Conference on the Law of the Sea of 1958,

<sup>155</sup> Among the elements upholding this view, the most persuasive seem to be the following: (1) that even states not yet ready to accept the notion of the exclusive economic zone have proclaimed 200-mile fisheries zones, in particular the United States, the USSR, the EEC countries, and Japan; (2) that bilateral fisheries agreements have been concluded recognizing the rights of states that have proclaimed fisheries or economic zones (*see, e.g.*, the agreement cited *supra* at note 32); and (3) that multilateral regional fisheries agreements have been abrogated and renegotiated for the purpose of taking into account the coastal states' claims to sovereign rights over fisheries in 200-mile zones (*see, e.g.*, the Convention on future Multilateral Cooperation in the Northwest Atlantic Fisheries, opened for signature at Ottawa on Oct. 24, 1978, 21 O.J. EUR. COMM. (No. C 271) 2 (1978)).

<sup>156</sup> *See Kiss, La pollution du milieu marin*, 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 903, 929-31 (1978); Treves, *Principe*, *supra* note 61, at 266-68.

<sup>157</sup> ICNT/Rev.2 Art. 56.

where the doctrine of the continental shelf was consecrated. During the discussion of the articles on the continental shelf, India made a proposal (which replaced a narrower one put forward by Bulgaria) stipulating that "the continental shelf adjacent to any coastal State shall not be used by the coastal State or any other State for the purpose of building military bases or installations."<sup>158</sup> The proposal was defeated by 31 votes to 18, with 6 abstentions.<sup>159</sup>

Interestingly, both the states making the proposal and those opposing it started from the same premise. This premise, in the words of the Bulgarian representative, was that, "except for the purposes of exploration and exploitation of natural resources, the continental shelf was subject to the regime of the high seas."<sup>160</sup> The Federal Republic of Germany, perhaps the most outspoken of those against the proposal, resorted to almost the same words: "except for the express purpose of the exploration and exploitation of its natural resources, the continental shelf, including its subsoil, was subject to the regime of the high seas."<sup>161</sup> The two sides diverged, however, on the consequences to be drawn from this premise. Bulgaria, followed by India, continued its argument by saying: "hence, the presence of any military installations on the continental shelf would be a violation of international law." The Federal Republic of Germany concluded its intervention by stressing that "any State could build installations on it [*i.e.*, on the continental shelf], provided that they did not interfere with the exploration and exploitation of natural resources."

In the light of this discussion, the rejection of the Indian proposal seems to indicate that the interpretation set forth by the Federal Republic is the correct one and that the Geneva Convention does not support the contention that "the construction of military bases or installations on the continental shelf [*is*] illegal," as it "constitute[s] a violation of the freedom of the high seas."<sup>162</sup> Consequently, in principle, the freedom of the high seas confers on both coastal and other states the right to emplace military installations, devices, and weapons on or in the continental shelf.<sup>163</sup> Any interference

<sup>158</sup> UN Doc. A/CONF.13/C.4/L.57, UN CONFERENCE ON THE LAW OF THE SEA, 5 OFFICIAL RECORDS 141 (1958). The Bulgarian proposal (which was withdrawn in favor of the Indian one) was formulated as follows: "The Coastal State shall not use the continental shelf for the purposes of building military bases or any installations which are directed against other States." In a revised version, the words "which are directed against other States" were deleted: UN Doc. A/CONF.13/C.4/L.41 and L.41/Rev.1, *id.* at 137.

<sup>159</sup> UN CONFERENCE ON THE LAW OF THE SEA, 6 OFFICIAL RECORDS 91.

<sup>160</sup> *Id.* at 73. See also the Indian intervention at p. 85 and the one by the USSR at p. 77.

<sup>161</sup> *Id.* at 83.

<sup>162</sup> Intervention by India: *id.* at 85. See also O. DE FERRON, 2 LE DROIT INTERNATIONAL DE LA MER 213 (1960).

<sup>163</sup> This implies that on the continental shelf the residuary rule of allocation of powers between the coastal state and the generality of states is in favor of the latter because of the functional character of the rights of the coastal state. They are limited to the purposes of exploration and exploitation of resources, while the freedom of the high seas has a general character. Consequently, whenever the functional rights of the coastal state are not involved, the general rule, which obviously applies to the coastal state also, prevails. This view—though rejected by some writers, *e.g.*, E. D. BROWN, ARMS CONTROL, *supra* note 40, at 27–28, and W. T.

with the exercise of this right, unless justified by international law, is an international wrong that causes international responsibility.

There are, however, international law rules that limit this right in many ways. While some of the limitations apply generally, others apply only to states other than coastal states and thus give the latter, as far as their continental shelf is concerned, a stronger position. The limitations that only the coastal state can invoke are particularly relevant here because, as will be seen, those that apply to all states are based on principles that can be used not only for the purpose of limiting the freedom to emplace military installations, devices, etc., on the continental shelf, but also for the opposite purpose of reinforcing the claim of the emplacing state.

The most important of the general limitations derives from the principle contained in the last part of Article 2 of the Geneva Convention on the Continental Shelf. According to it, the high seas freedoms "shall be exercised by all States with reasonable regard to the interest of other States in the exercise of the freedom of the high seas."

What states wishing to emplace weapons, installations, and other military devices on the continental shelf (as well as on the seabed of the high seas) are obliged to do in order to have "reasonable regard" to the exercise of other states' high seas freedoms can be found in the provisions of the Geneva Convention on the Continental Shelf that set forth the obligations binding on coastal states when they exercise their right to "construct and operate" installations and devices necessary to exploring the continental shelf and exploiting its resources.<sup>164</sup> As these provisions limit and set conditions for the emplacement and operation of installations and devices when in the exercise of a specific right, they seem to be all the more applicable to limiting and setting conditions for the exercise of a general freedom. In other words, if the coastal state, which is in a privileged position, must abide by such limitations and conditions, all other states, which are on an equal level, have to abide by them, too, though they may also have to take supplementary precautions.

These limitations and conditions provide for particular safeguards of the freedom of navigation and of other freedoms of the high seas. Thus, due notice must be given of installations that may interfere with high seas

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Burke, *Contemporary Legal Problems in Ocean Development*, in SIPRI, *TOWARDS A BETTER USE OF THE OCEAN* 13, 111-12 (1969)—not only is upheld by the above-quoted *travaux* of Geneva and seems to be accepted by the USSR (UN Doc. A/C.1/PV.1605, meeting of Nov. 11, 1968), but also seems to correspond to the assessment of the present state of the law prevailing at the Third Law of the Sea Conference. The discussions at the conference on the "residuary rule" to be applied to the economic zone appear to indicate that states agree in thinking that such a rule exists in the traditional law of the sea regarding the high seas. The same conclusion seems to ensue from the discussions at the conference on the legality of mining the deep seabed. One position is that the freedom of the high seas includes this activity. The position opposing it relies, more than on the idea that there is no treaty or custom specifically permitting seabed mining, on the alleged existence of a rule forbidding it, a rule that would be evidenced by the Declaration of Principles of 1970: see UN Docs. A/CONF.62/BUR/SR.41 (1978) and A/CONF.62/SR.109 (1978) (see also *infra* sec. V).

<sup>164</sup> Geneva Convention on the Continental Shelf, *supra* note 24, Art. 5.

freedoms, "and permanent means for giving warning of their presence must be maintained."<sup>165</sup> Installations that are abandoned or no longer used must be removed.<sup>166</sup> Installations and devices are prohibited "when interference may be caused to the use of recognized sea lanes essential to international navigation."<sup>167</sup>

As indicated earlier, the obligation of paying "reasonable regard" to the exercise by other states of the freedoms of the high seas can also be an argument for upholding the right to emplace installations and other military devices on the continental shelf when this obligation is applied not to the emplacing state, but to other states. The latter may not interfere with the emplacement or operation of these installations and devices. They may not impede or hamper their emplacement or remove or destroy them. They may not interfere with their functioning, for instance, through the use of magnetic or electronic devices or lasers. However, if no interference with their functioning is implied, apparently they may inspect them, provided that they are unmanned; if they are manned, inspection would entail by definition a violation of the jurisdiction of the state having control over them. They may in all cases observe them, as observation does not imply interference.

The principles that limit the freedom of all states, except the coastal states, to emplace weapons and military installations and devices on the continental shelf work only one way, because they may only be invoked by coastal states. The most important of these principles provides that the coastal state enjoys on its continental shelf "sovereign rights for the purpose of exploring it and exploiting its natural resources."<sup>168</sup>

This principle can be invoked, first of all, to reinforce the coastal state's position when it emplaces military objects on its own continental shelf. The coastal state is likely to resort to it in order to prevent interference with installations built for purposes of resource exploration and exploitation but used more or less overtly for military ones as well.

However, the most relevant application of the principle is to the emplacement by a state of military installations and other objects on another

<sup>165</sup> *Id.*, Art. 5, para. 5. The establishment of safety zones (Art. 5, paras. 2 and 3) is something the coastal state is entitled, but not obliged, to do.

<sup>166</sup> *Id.*, Art. 5, para. 5. On the environmental implications of this article, see Treves, *La pollution résultant de l'exploration et de l'exploitation des fonds marins en droit international*, 24 *ANNUAIRE FRANÇAIS DROIT INT'L* 827, 835 (1978). Commenting on a case decided by the French Conseil d'Etat, Dec. 4, 1970, 99 *JOURNAL DROIT INT'L* 572 (1970), in which an abandoned target moored to the continental shelf by the French Navy had caused damage to a ship navigating in the area, Queneudec (*id.* at 577-78) makes the point that the use of the continental shelf for military activities is to be considered lawful because it is not forbidden by international law. Consequently, the rule on removal of installations should also apply to military installations "by analogy and for the same reasons of navigational security." It would seem that it is not necessary to invoke analogy. The application of the rule to military installations is a consequence of the need to ensure reasonable regard for the interests of other states in their exercise of the freedom of the high seas. There is also a literal argument in this direction: Article 5, paragraph 5 of the Continental Shelf Convention says that "any" installations must be removed, and thus not only those for exploration and exploitation.

<sup>167</sup> Geneva Convention on the Continental Shelf, *supra* note 24, Art. 5, para. 6.

<sup>168</sup> *Id.*, Art. 1, para. 2.

state's continental shelf. In this case, the coastal state can invoke the principle in order to claim that these installations and devices hamper the exercise of its sovereign rights over resource exploration and exploitation.

States emplacing the military objects can respond by pointing out that the objects cannot possibly interfere with exploration or exploitation, or by invoking the Geneva Convention on the Continental Shelf, which provides that the coastal state's sovereign rights over exploring the continental shelf and exploiting its resources shall not interfere with navigation and the laying of cables and pipelines.<sup>169</sup> The latter counterclaim is particularly strong because it relies on the rule that navigation and the laying of cables and pipelines by any state prevail over the economic uses of the continental shelf by the coastal state. The difficulty in resorting to it, however, lies in proving that the emplacement of the military objects can be considered, in the specific instance, as included in the concepts of navigation or of laying cables or pipelines. This may be claimed, though with some difficulty and not in all cases, for listening devices,<sup>170</sup> but certainly not for weapons. The former counterclaim is based even more on the facts of the situation, as it requires proving noninterference in the resource-oriented activities of the coastal state. In view of the coastal state's sovereign rights over the continental shelf for the purpose of conducting these activities, one might reasonably conclude that its position as to whether there is interference in them will carry substantial weight.<sup>171</sup>

Were the problems raised by these claims and counterclaims to be decided upon by a judge or arbitrator, the first question to be ruled upon would be the factual-legal problem whether the military objects interfere with the resource-oriented activities of the coastal state and whether their emplacement is included in the freedom of navigation and the freedom to lay cables and pipelines. Then it would be easy to determine whether inspection or removal of the objects by the coastal state is lawful. The existence of the already mentioned optional exception for military activities makes judicial or arbitral settlement of the dispute rather unlikely. Thus, if the situation comes into the open and is not brought before a dispute-settling organ, the conflict between the emplacing state and the coastal state may cause political tension because both parties will consider that important rights on sensitive matters are at stake.<sup>172</sup> It must be observed, however, that, in practice,

<sup>169</sup> *Id.*, Art. 5, paras. 1 and 4.

<sup>170</sup> Which might be considered included in the freedom to lay cables: see O'Connell, *Resource Exploitation*, *supra* note 142, at 167.

<sup>171</sup> Though the legal premises are different, this conclusion seems to be equivalent, in practice, to that reached, on considerations of policy, by M. S. McDUGAL & W. T. BURKE, *supra* note 5, at 724, and by Petrowski, *supra* note 1, at 289. According to McDougal and Burke, the emplacement of military installations on the continental shelf "should come within the same exclusive authority" (of the coastal state); this use of the continental shelf by the coastal state "should be regarded as reasonable, subject to the requirement of relatively slight interference with navigation" (*ibid.*). For reasoning closer to that followed in the text: Baxter, *supra* note 142, at 218-219.

<sup>172</sup> Buzan, *A Sea of Troubles?*, 143 *ADELPHI PAPERS* 12 (1978), observes that "a dispute arising out of the detection of unsuspected military devices could be quite serious if both parties stood by what they felt to be their rights."

military objects on the continental shelf, and especially on another state's continental shelf, are emplaced covertly and, more often than not, removed covertly if found by the coastal state.<sup>173</sup>

Another legal rule the coastal state could rely upon, in some cases, is the provision of the Geneva Convention on the Continental Shelf that "the consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there."<sup>174</sup> If the objects are emplaced on the continental shelf of another state, allegedly for conducting "purely scientific research" but, according to the coastal state, really for military research,<sup>175</sup> the coastal state may claim to be freed from the obligation set out in the same provision "normally" not to withhold its consent, and may deny it. Here the position of the coastal state is stronger because consent has to be asked for in any case, and the researching state cannot emplace its equipment and installations without having obtained it, whatever the merits of its claims regarding the purely scientific nature of the project. In some situations, however, it may prove easier for the emplacing state to obtain the coastal state's consent by claiming that the objects are being placed on the continental shelf in order to conduct military research. This situation can occur when the politico-military relations between the two states are good and the coastal state is wary of having other states conduct research concerning its natural resources.

### *Evolutionary Trends*

After the 1958 conference, a position that had already been vaguely implied in a statement by India at Geneva,<sup>176</sup> and that contradicted the basic assumptions of the reasoning developed above, came to the fore. According to this position, the sovereign rights of the coastal state are not to be considered as limited to exploration and exploitation but as having a more general scope. It follows from this premise that no state can construct, operate, or maintain installations of any kind (including military installations and devices) on the continental shelf of another state unless the latter has given its consent.

This view was strongly advocated by Mexico during the debates leading to the adoption of the 1971 Seabed Treaty.<sup>177</sup> India also upheld it on various occasions: in the declaration accompanying its ratification of the Seabed Treaty<sup>178</sup> and, more recently, in an intervention at the 1977 Review Conference of the same treaty. On the latter occasion, India stated that "other countries could not use its continental shelf for military purposes"; moreover, India had "the sovereign right to . . . verify, inspect, remove or destroy any weapon, device, structure, installation or facility, which might be

<sup>173</sup> Knight, *supra* note 93, at 37.

<sup>174</sup> Geneva Convention on the Continental Shelf, *supra* note 24, Art. 5, para. 8. See also this section *infra*, "Installations and Equipment for Military Scientific Research."

<sup>175</sup> See the references at note 6.

<sup>176</sup> UN CONFERENCE ON THE LAW OF THE SEA, 6 OFFICIAL RECORDS 83 (*but see also* 85) (1958).

<sup>177</sup> UN Doc. A/C.1/PV.1763, at 4: intervention of Mr. García Robles of Nov. 17, 1970.

<sup>178</sup> STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 111. See also Jain, *India and the Sea-Bed Arms Control Treaty*, 30 INDIA Q. 300 (1974).

emplanted or emplaced on or beneath its continental shelf by any other country."<sup>179</sup> The same thought seems to underlie the declaration accompanying Canada's ratification of the Seabed Treaty.<sup>180</sup>

This trend culminated at the Caracas session of the Third United Nations Conference on the Law of the Sea in 1974 in the presentation by Mexico and Kenya (rapidly joined by 35 other states) of a proposal stating that "no State shall be entitled to construct, maintain, deploy or operate on or over the continental shelf of another State any military installations or devices or any other installations for whatever purposes without the consent of the coastal State."<sup>181</sup> This proposal sufficiently impressed the French Government for it to have referred to it in its arguments before the arbitration tribunal of its continental shelf dispute with the United Kingdom. France took the view that a solution to the dispute that would deprive it of parts of its claimed continental shelf would entail "detriments to French security." These detriments were "all the more substantial in that the new law of the sea relating to the exclusive economic zone may include provisions debarring other States from placing any military or other installation on the continental shelf without the consent of the coastal State."<sup>182</sup>

No trace of the Mexican-Kenyan proposal is present, however, in all the negotiating texts so far produced by the Law of the Sea Conference. According to one writer, "the United States apparently made it clear that it would be willing to see the entire Conference collapse rather than compromise on this kind of issue," and subsequently, according to the same writer, the efforts of the United States and other states "to phrase draft articles so as to avoid direct reference to military uses such as detection devices proved relatively successful."<sup>183</sup> No serious effort has been made at the conference since the Caracas session to revive the Mexican-Kenyan proposal. Nor was any such step taken in the general debate held in Plenary during the fourth session (spring 1976) on the "peaceful uses of the oceans."<sup>184</sup>

These events seem to reinforce, as far as today's international law is concerned, the conclusions already reached on the basic rule of freedom concerning the emplacement of military installations and other devices on the continental shelf. Two reasons may be mentioned in support of this view. The first is that the Mexican-Kenyan proposal did not deny (as the Indian proposal at Geneva did) the right to emplace military installations and other devices on the continental shelf to *all* states, but to all but the coastal

<sup>179</sup> Doc. SBT/CONF/SR.5, paras. 11-14 (and corrigendum thereto).

<sup>180</sup> STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 108-09.

<sup>181</sup> UN Doc. A/CONF.62/C.2/L.42/Rev.1 (1974), 3 OFF. REC. 220. The original Mexican proposal, UN Doc. A/CONF.62/C.2/L.42, was limited to *military* installations and appliances.

<sup>182</sup> Arbitral award of June 30, 1977, *supra* note 28, para. 161.

<sup>183</sup> Purver, *Canadian Foreign Policy and the Military Uses of the Seabed*, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 202, 245-46 (Johnson & Zacher, eds., 1977). See also Buzan, *supra* note 172, at 12. According to Stevenson and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AJIL 1, 23-24 (1975), the U.S. position seemed to be that "arms control questions were more properly addressed in other forums and could complicate the negotiations."

<sup>184</sup> 5 OFF. REC. 54-68.

state. The fact that the proposal was not accepted appears to make untenable the view that such emplacement is forbidden to all states by international law. The same conclusion can be drawn from France's arguments before the Anglo-French arbitration tribunal. The second reason can be found in the way the Mexican-Kenyan proposal disappeared from the Law of the Sea Conference's negotiating table. The main military powers (none of which has dissociated itself from the alleged "heavy pressure"<sup>185</sup> exerted by the United States) have let it be known that inclusion of a principle like the one in the Mexican-Kenyan proposal would jeopardize the conclusion of a new law of the sea convention acceptable to them and would change the existing law in a direction incompatible with their interests.

### *The New Law of the Sea*

The legal situation of military installations and devices on the continental shelf changes considerably under the negotiating text. This change results from the presence in the text, on the one hand, of the economic zone concept, with its corollaries as to the residuary rule of competence, and, on the other, of a much more detailed formulation of the article on the coastal state's rights regarding installations, structures, and devices. The effect of this change is a widening of the powers explicitly recognized for the coastal state. This widening of powers, however, is counterbalanced by the use of more precise terms, which seems to open the way for a distinction, entailing different legal regimes, between objects emplaced on the bed of the economic zone for military purposes and those emplaced on the bed for other purposes.

The article on "installations and structures" in the economic zone (which applies to the continental shelf as well) also considers artificial islands, which were not mentioned in the Geneva Convention. These islands are subject to the coastal state's "exclusive right" both to construct them and to authorize and regulate their construction and operation whatever their purpose.<sup>186</sup> Consequently, artificial islands for military purposes cannot be built or operated against the coastal state's will.

The coastal state's exclusive right regarding the construction, authorization, regulation, and use of installations and structures is not limited, as it is in the Geneva Convention, to those used for exploring and exploiting seabed resources.<sup>187</sup> It applies to all the purposes of such structures over which the coastal state enjoys rights or jurisdiction in the economic zone. Apart from resource-related activities, these purposes include "other activities for the economic exploration and exploitation of the zone, such as the production of energy from the water, currents and winds," marine scientific research, and the preservation of the marine environment.<sup>188</sup>

Besides the installations and structures encompassed by this already comprehensive list, to which those serving "all other economic purposes" must

<sup>185</sup> Buzan, *supra* note 172, at 12.

<sup>186</sup> ICNT/Rev.2 Art. 60, para. 1(a).

<sup>187</sup> ICNT/Rev.2 Art. 60, para. 1(b).

<sup>188</sup> ICNT/Rev.2 Art. 56, to which reference is made in Art. 60, para. 1(b).



be added, the coastal state's exclusive right extends to "installations and structures which may interfere with the exercise of the rights of the coastal State in the zone."<sup>189</sup> This provision amounts to a spelling out of the consequences of the rule that the coastal state enjoys sovereign rights over the exploration and exploitation of resources. However, it seems somehow to strengthen the position of the coastal state,<sup>190</sup> especially since it includes installations and structures that *may* interfere with the exercise of the coastal state's rights. The extension to potential interference makes the coastal state's assessment even more difficult to challenge than it is under the Geneva Convention. Such a challenge has to be based on the claim that the military installations or structures *may not* interfere with the exercise of the coastal state's rights. When this is the case, the latter state has no right to authorize or regulate the emplacement of the installations and structures.

In designating the objects on or beneath the seabed over which coastal states have the exclusive right mentioned above, the negotiating text uses language different from that of the Geneva Convention; it permits a narrower interpretation of the scope of the coastal state's rights. While the Geneva Convention speaks of "installations and devices,"<sup>191</sup> the negotiating text speaks of "installations and structures."<sup>192</sup> To define "structures" is not easy, especially if one wants to distinguish them from "installations."<sup>193</sup> It is certain, however, that "structure" is a narrower concept than "device"; it cannot include relatively small objects such as some of those used for the tracing of submarines and as navigational aids. Consequently, those devices that cannot be considered installations or structures are not among the objects over whose deployment and operation the coastal state enjoys an exclusive right. This exception holds true even when such devices may interfere with the exercise of the rights of the coastal state in the economic zone.<sup>194</sup>

<sup>189</sup> ICNT/Rev.2 Art. 60, para. 1(c).

<sup>190</sup> Stevenson and Oxman, *The 1975 Geneva Session*, *supra* note 137, at 777, observe that this provision "tilts" heavily towards the coastal state even with respect to noneconomic installations in the economic zone."

<sup>191</sup> Art. 5, para. 2.

<sup>192</sup> Art. 60, paras. 1(b) and (c). This variation was introduced by the Evensen Group during the 1975 Geneva session. See the group's final document on the economic zone in THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, DOCUMENTS OF THE GENEVA SESSION 273 (ed. Platzöder, 1975), Arts. 1, para. 1(c) and 4, para. 1(b). This variation in the English text notwithstanding, the original translation of "devices" as "*dispositifs*" was maintained for translating "structures" in the French version of the various negotiating texts up to the ICNT/Rev.1 (1977). The French language group of the Drafting Committee proposed adoption of the term "*ouvrages*," which is closer to "structures": Conf. Doc. FLGDC/1 (May 11, 1979). This proposal was adopted in the French version of the ICNT/Rev.2.

<sup>193</sup> Indications are in the Evensen text, *supra* note 192, Art. 1, para. 1(c) and in the ICNT/Rev.2 Art. 1, para. 5, which speak of "installations and similar structures" and of "platforms and other man-made structures at sea."

<sup>194</sup> Clingan, in LAW OF THE SEA: NEGLECTED ISSUES, *supra* note 23, at 418, argues, in the same vein, that under Art. 60 of the ICNT any installation which falls within one of the three categories listed therein is prohibited, while any installation "which does not fall in these categories is not prohibited, be it military or not." Fraser, *id.* at 401, argues that Art. 60 "implicitly" prohibits military installations, and the same view seems to be held by D. W. BOWETT, *supra* note 117, at 122.

The legal situation of these devices, as well as that of military installations and structures that cannot interfere with the exercise of the coastal state's rights in the economic zone or on the continental shelf, varies according to whether these devices, installations, and structures are emplaced in the seabed of the economic zone or on the continental shelf beyond the 200-mile limit. This conclusion seems valid even though the rules on the coastal state's powers regarding "artificial islands, installations and structures" are identical for the two areas.

As for the continental shelf beyond the 200-mile limit, the situation does not appear to differ from that for the continental shelf as a whole under traditional law and the Geneva Conventions. The principle is the freedom to emplace these objects on or beneath the seabed, subject to the limitations mentioned above and with the consequence, also mentioned above, that unjustified interference with their emplacement and operation amounts to an international wrong.<sup>195</sup>

As far as the economic zone is concerned, the implication just drawn for the continental shelf beyond 200 miles—*i.e.*, that whatever activity is not within the coastal state's exclusive rights (such as the emplacement of military "devices") comes under the principle of the freedom of the high seas and consequently is protected by international law in the sense that unjustified interference with it is an international wrong—cannot be drawn in such an easy and unqualified way.

In carefully and painfully negotiated articles of the negotiating text,<sup>196</sup> the regime of the economic zone is defined as a "specific" one "under which the rights and jurisdictions of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."<sup>197</sup> The text attributes some freedoms in the economic zone to all states. These are the freedoms of navigation and overflight, and of laying submarine cables and pipelines, "and those other internationally lawful uses of the sea related to these freedoms such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."<sup>198</sup> The negotiators of this provision probably had uppermost in their minds military activities on the surface of the sea or in the water column, such as naval maneuvers, firing exercises, and the movement of submarines. It can have some applicability, however, to devices, installations, and structures emplaced on the seabed for military purposes.

It may be contended that the emplacement of sensor arrays, at least in some circumstances, is included in the freedom to lay cables.<sup>199</sup> In any

<sup>195</sup> However, a Soviet proposal aiming at making this freedom somewhat more explicit (Conf. Doc. NG.6/8 of April 18, 1979, in *DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—GENÈVE SESSION 1979*, at 640 (ed. Platzöder, 1979)) did not obtain enough support and did not find its way into the ICNT/Rev.1.

<sup>196</sup> Oxman, *The 1977 New York Session*, *supra* note 128, at 67–75; Treves, *La Conferenza sul diritto del mare dal "Testo unico riveduto" del 1976 al "Testo composito informale di negoziato" del 1977*, 60 *Riv. Diritto Internazionale* 566, 569–72 (1977).

<sup>197</sup> ICNT/Rev.2 Art. 55.

<sup>198</sup> ICNT/Rev.2 Art. 58, para. 1.

<sup>199</sup> *Supra* note 170.

event, seabed devices used as navigational aids for military purposes certainly are "associated with the operation of ships." In addition, sensors used to trace other states' submarines can be considered as "associated with the operation of ships," provided the idea is accepted that the efficient use of warships and submarines implies recourse to the best available means of locating the position and tracing the movements of those of other states. In any case, sensors emplaced as navigational aids are difficult to distinguish from those used to locate other states' submarines.

Although the emplacement of military devices, installations, and structures can be considered a freedom recognized for all states in the economic zone, there is an important limitation to consider. In exercising its freedom, the emplacing state "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations established by the coastal State in accordance with the provisions of this Convention and other rules of international law not incompatible with this Part."<sup>200</sup> This limitation is counterbalanced, however, by another provision of the negotiating text: the coastal state, in exercising its rights under the convention, "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."<sup>201</sup> Nevertheless, the reference in the former provision to the duty of complying with the laws and regulations established by the coastal state may tilt the balance in its direction, even though it may be interpreted as merely spelling out, without going beyond, the rights and jurisdiction explicitly recognized as residing in the coastal state in the economic zone.<sup>202</sup>

What is the situation if the emplacement of devices and of installations and structures (which cannot interfere with the coastal state's rights in the economic zone) cannot be considered the exercise of a freedom specifically attributed to all states in the economic zone? It would seem that it falls in the no-man's-land of the "cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone."<sup>203</sup> As already noted, the negotiating text acknowledges the existence of the problem; but instead of solving it with a residuary rule, it provides that when in such cases

a conflict arises between the interests of the coastal State and any other State . . . , the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.<sup>204</sup>

This provision tries to furnish a procedural solution for the problem of the "residuary rule" by setting forth a guideline for solving disputes. A dispute might be brought before one of the organs for compulsory dispute

<sup>200</sup> ICNT/Rev.2 Art. 56, para. 2.

<sup>201</sup> ICNT/Rev.2 Art. 58, para. 3.

<sup>202</sup> Moore, intervention in *NEW TRENDS IN MARITIME NAVIGATION* 32 (Proceedings of the 4th International Ocean Symposium, Nov. 20-22, 1979, the Japan Shipping Club, Tokyo, 1980).

<sup>203</sup> ICNT/Rev.2 Art. 59.

<sup>204</sup> ICNT/Rev.2 Art. 59. This rule was first introduced in 1975: UN Doc. A/CONF.62/WP.8, pt. II, Art. 47(3), 4 OFF. REC. 159.

settlement established by the negotiating text. Resort to these organs, however, requires overcoming an array of legal obstacles, not least of which is the already mentioned optional exception for military activities.<sup>205</sup> The difficulty of overcoming these obstacles makes it far from certain whether this kind of dispute is amenable to compulsory arbitral or judicial settlement under the negotiating text, but the dispute may also be solved by the parties through negotiation leading to an agreement. The way the rule is drafted, by indicating criteria for settling the dispute, seems to imply that the parties have an obligation at least to start negotiating in good faith. This view is reinforced by the fact that the rule incorporates concepts such as "equity," "relevant circumstances," and "the importance of the interests involved."<sup>206</sup> Thus, the situation seems to be similar to those considered by the International Court in the *Fisheries Jurisdiction* case and the *North Sea Continental Shelf* case, where the Court found "implicit" in rights defined as "preferential," and in principles defined as "equitable," "that negotiations are required."<sup>207</sup>

Negotiations may not, however, bring agreement, and the procedural "solution" to the problem of the residuary rule can fail. It then becomes necessary to look for the substantive meaning, if any,<sup>208</sup> of the rule. Its foremost purpose would seem to be negative. Its presence in the text indicates that when rights and jurisdiction are attributed neither to the coastal state nor to other states, it cannot be presumed either that jurisdiction belongs to the coastal state or that the principle of freedom applies. The

<sup>205</sup> First of all, it has to be established that the dispute concerns the "interpretation or application" of the convention, as the means of settlement provided for in the ICNT/Rev.2 apply only to these disputes (Arts. 279 ff.). This obstacle overcome, it has to be determined whether the dispute relates to the "exercise" by a coastal state of its sovereign rights or jurisdiction (Art. 296, para. 1). If the answer is in the negative (because one considers that a question regarding the existence of these rights is different from one regarding their exercise), resort to arbitral or judicial procedures is possible. If the answer is in the affirmative, in order to resort to arbitral or judicial settlement, the dispute must be included in those listed in Article 296, para. 1 of the ICNT/Rev.2. Paragraph 1(a) seems particularly relevant, as it considers the case

when it is alleged that a coastal State has acted in contravention to the provisions of this Convention in regard to the freedoms and rights of navigation or overflight or of the laying of submarine cables and pipelines or other internationally lawful uses of the sea specified in article 58.

Even when applicable in principle, arbitral or judicial means of settlement must be ruled out if the already mentioned optional exception for military activities included in Article 298, paragraph 1(b) is applicable.

<sup>206</sup> Brown, *The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts Between Different Users of the EEZ*, 4 MAR. POL'Y & MGMT. 325, 338-44.

<sup>207</sup> *Fisheries Jurisdiction* case, *supra* note 28, at para. 74; *North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), Judgment of Feb. 20, 1969, [1969] ICJ REP. 3, especially para. 85. See the observations of Brown, *Exclusive Economic Zone*, *supra* note 206, at 343-44.

<sup>208</sup> Skeptical observations on the legal effects of this provision are in Queneudec, *Un Problème en suspens: la nature de la zone économique*, IRANIAN REV. INT'L REL., Nos. 4-5, 1975-76, at 39, 40; and in Gündling, *Die exklusive Wirtschaftszone*, 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 616, 654-55 (1978).

meaning of the former presumption seems clear. One must not deduce from the presence of sovereign and jurisdictional rights specifically attributed to the coastal state that, when there is no such attribution, the coastal state has jurisdiction as well;<sup>209</sup> the concept of the economic zone cannot grow into something more comprehensive than the sum total of the powers specifically recognized for the coastal state.

The meaning of the second presumption is less clear. What does it mean to say that activities not specifically indicated as free cannot be presumed to be free? Activities envisaged in the provision under consideration, be they conducted by the coastal state or by other states, do not enjoy the same position as those encompassed by the freedoms of the high seas, whose exercise in the economic zone the negotiating text recognizes for all states. Both coastal and other states only have "interests" in conducting the former activities. However, the rule in Article 59 indicates that these interests are recognized, provided that the activity conducted in their pursuit does not cause a conflict with the interest of other states. This qualification puts the state that emplaces military objects, of the kind and under the conditions now under consideration, on the bed of the economic zone of another state in a relatively better position than the other state. While it cannot be presumed (even though for weapons it might be) that the emplacement of these objects conflicts with the interest of the coastal state, it is obvious that their removal or destruction by the coastal state conflicts with the interest of the emplacing state. Thus, emplacement of the objects may precede negotiations (or the arbitral or judicial settlement) because it does not necessarily cause a conflict; but their removal and destruction, unless the coastal state can rely on other rules such as those on self-defense,<sup>210</sup> have to be preceded by negotiation (or by judicial or arbitral settlement) because they invariably cause a conflict of interest. Consequently, objects may be removed or destroyed only if it is agreed or decided that they cannot be emplaced "on the basis of equity and in the light of all the relevant circumstances, taking into account" the other factors indicated in Article 59.

This situation is not entirely reflected in current customary international law. The position seems to be somewhere in between traditional law and the new law of the sea, as it emerges from the conference's negotiating text.

The evolutionary trends that have found acceptance in the negotiating text have weight from two viewpoints. The first is that of the width of the continental shelf. The new limits may reasonably be thought to have some influence on customary law. Though the precise definition of the outer limit

<sup>209</sup> According to Riphagen, *supra* note 27, at 170-71 n.96, the legal importance of Article 59 is mostly negative "as it rules out 'residual' rights of the coastal State."

<sup>210</sup> While it would seem difficult to rely on self-defense for the purpose of justifying the emplacement of military objects on the seabed of another state (see E. D. BROWN, *supra* note 40, at 29-32), in some instances, especially when the objects emplaced are weapons, it appears possible to do so in order to justify the removal of the objects emplaced by another state. This position can be upheld either by accepting the interpretation that anticipatory self-defense is admissible under international law, or by relying on the fact that removal of the objects may be considered as not constituting use of force against a state and that it would fall into a concept of self-defense broader than that envisaged in Article 51 of the UN Charter.

of the shelf beyond the 200-mile line<sup>211</sup> can hardly be considered to have become customary, apparently the criteria in the Geneva Convention<sup>212</sup> are now obsolete and the coastal state's sovereign rights over resources are in the process of being recognized at least within the 200 miles,<sup>213</sup> and possibly soon beyond them, up to some yet undetermined reasonable limit based upon the physical characteristics of the shelf. The second is a consequence of the widening of the coastal state's jurisdiction. The duty of not interfering with activities conducted by the coastal state in the exercise of its sovereign rights over the continental shelf has been widened in scope to include noninterference with the new sovereign and jurisdictional rights of the coastal state within the 200-mile zone. Of course, the converse is also true. The coastal state must comply with a similar duty regarding other states' freedoms while it exercises its new powers within the 200-mile limit.

Two other aspects of the rules in the negotiating text do not seem to be reflected in current customary law. The first is the distinction among objects on the seabed, which has already been described as deriving from the replacement in the negotiating text of the word "devices" from the Geneva Convention with the word "structures." This distinction is so dependent on textual interpretation and on the history of the provision that it hardly can have an echo outside the framework of treaty law. The second, and more important, concerns the residuary rule. Because the rule in Article 59 on the "basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone" is the outcome of a compromise in the negotiation and is not confirmed by practice, the residuary rule remains that of freedom, as in traditional law. Though this rule is tilted toward the emplacing state for the time being, the situation might turn to its disadvantage in the long run. Were the concept of the economic zone to become more general and comprehensive than the sum of sovereign and jurisdictional rights on specific and different matters, the trend towards accepting the idea of the residuary competence of the coastal state might prove irresistible. From this point of view, the rule in the negotiating text seems to be a fair compromise and its widespread acceptance desirable.

Consequently, the legal situation of military objects emplaced on or beneath the seabed under national jurisdiction is not likely to undergo radical changes in the near future. The acceptability of using the seabed for the emplacement of detection and communication devices<sup>214</sup> is confirmed by the trend in the negotiating text towards reinforcing their inclusion within the high seas freedoms, and in particular within the freedoms recognized for all states in the economic zone. As regards weapons, though their emplacement in principle is free, it is likely that it would not be tolerated by the coastal state, which would possibly invoke interference with the exercise of its sovereign or jurisdictional rights within the 200-mile line.

<sup>211</sup> ICNT/Rev.2 Art. 76.

<sup>212</sup> Art. 1, Continental Shelf Convention, *supra* note 24.

<sup>213</sup> See, e.g., the agreement on delimitation quoted in note 32 *supra*.

<sup>214</sup> See the references in notes 65 and 66 *supra*.

*Installations and Equipment for Military Scientific Research*

The regime resulting from the negotiating text of the Law of the Sea Conference requires further qualification as to installations and equipment used for military scientific research on the bed of the economic zone or on the continental shelf.<sup>215</sup> According to the text, the deployment and use of such installations and equipment are subject "to the same conditions as those for the conduct of marine scientific research" in the various zones of the sea.<sup>216</sup>

The general principle underlying the regime for marine scientific research in the economic zone and on the continental shelf is the consent of the coastal state.<sup>217</sup> The coastal state has "discretion" to deny its consent when the research project involves "the construction, operation or use of artificial islands, installations and structures," as referred to in the relevant articles in the parts on the economic zone and the continental shelf.<sup>218</sup> Yet, even if the scientific installations and equipment are no more than "devices," consent is still at the coastal state's discretion whenever the research involves exploration and exploitation of resources, drilling, the use of explosives, or the introduction of harmful substances into the marine environment.<sup>219</sup> Only when none of those conditions is verified<sup>220</sup> will consent be granted "in normal circumstances," and then only if the research "to be carried out in accordance with this Convention [is] exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind."<sup>221</sup>

At this point, the question of determining the meaning of "peaceful purposes" arises,<sup>222</sup> as well as whether this determination may be submitted to compulsory dispute settlement.<sup>223</sup> Once it is established that the research equipment for which discretionary consent is not otherwise prescribed is to

<sup>215</sup> N. PAPADAKIS, *THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS* 205-25 (1977); Caflisch & Piccard, *The Legal Regime of Marine Scientific Research and the Third United Nations Conference on the Law of the Sea*, 38 ZEITSCHRIFT AUSL. OEFF. R. U. VÖLKERRECHT 848, 882-90 (1978); Yusuf, *Towards a New Legal Framework for Marine Research: Coastal-State Consent and International Coordination*, 19 VA. J. INT'L L. 411, 427 (1979).

<sup>216</sup> ICNT/Rev.2 Art. 258.

<sup>217</sup> ICNT/Rev.2 Art. 246, paras. 1 and 2.

<sup>218</sup> ICNT/Rev.2 Art. 246, para. 4(c).

<sup>219</sup> ICNT/Rev.2 Art. 246, paras. 4(a) and (b).

<sup>220</sup> It must be added that even when these conditions are met the coastal state "may not exercise" its discretion when research of direct significance for the exploration and exploitation of resources is to take place on the continental shelf beyond the 200-mile limit, provided, however, that the area where the research is conducted has not been publicly designated as an area "in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time" (ICNT/Rev.2 Art. 246, para. 6). This is the outcome of a long negotiation aiming at a compromise between states wishing to have the same regime for research on the continental shelf both within and beyond the 200-mile line and those maintaining that the regime of research on the outer continental shelf should be as liberal as possible. Compare Art. 246 bis(b) in UN Doc. A/CONF.62/91 (1979) and the Soviet proposal cited in note 195 *supra*.

<sup>221</sup> ICNT/Rev.2 Art. 246, para. 3.

<sup>222</sup> See *supra* sec. I, "Peaceful Purposes."

<sup>223</sup> See Art. 296, para. 2 of the ICNT/Rev.2, and the comments by Caflisch & Piccard, *supra* note 215, at 877-78 and by Treves, *Principe*, *supra* note 61, at 264-65.

be used exclusively for peaceful purposes (some military equipment may be included, according to one interpretation of "peaceful purposes"), consent will be granted "in normal circumstances." Thus, an obligation on the part of the coastal state is implied. In order not to abide by it, the coastal state has to claim that circumstances of an abnormal character prevail. Although it has a certain discretion in defining those circumstances, the burden of claiming their existence falls on the coastal state. On the other hand, if it is established that the scientific installations and equipment (always assuming discretionary consent is not otherwise required) are not exclusively for peaceful purposes, there is no obligation to grant consent "in normal circumstances." Because consent also is not at the coastal state's discretion, the case does not fit into the categories established by the rules on scientific research, apart from the general one that requires the coastal state's consent.<sup>224</sup> The degree of obligation, and, conversely, of discretion, devolving upon the coastal state in granting its consent would then seem to depend on the degree to which the research project and its installations and equipment are linked to activities that all states are free to pursue under the general rules of the negotiating text on the economic zone.<sup>225</sup> Thus, for instance, a scientific device for studying the propagation of sound in the marine environment in order to improve the performance of submarine sensing devices ought to be authorized, even assuming that it has been classified as not exclusively for peaceful purposes.

#### *Treaty Law Exceptions*

Treaty law permits substantial exceptions to the legal regime just described.

As already mentioned, under the Partial Test Ban Treaty of 1963, nuclear explosions may not be carried out in the water column or on the surface of the seabed; whether they may be carried out beneath the seabed seems to depend on their not leaving radioactive debris in the water column or in the atmosphere.<sup>226</sup> The first prohibition is in a provision that speaks of explosions "under water including territorial waters or high seas." The new concept of the economic zone suggests the question whether explosions in the economic zone or on its seabed are excluded, especially considering that the regime for the economic zone is defined as a "specific" one.<sup>227</sup> This kind of question is likely to be asked about a number of treaties that are framed in terminology shaped under the traditional law of the sea but will be applied under the new law of the sea.<sup>228</sup> The answer, at least as far as the 1963 Partial Test Ban Treaty is concerned, appears to be in the negative: the distinction between absolute and conditional prohibitions probably in-

<sup>224</sup> ICNT/Rev.2 Art. 246, para. 1.

<sup>225</sup> Treves, *Principe*, *supra* note 61, at 267.

<sup>226</sup> *Supra* sec. II.

<sup>227</sup> ICNT/Rev.2 Art. 55.

<sup>228</sup> This question has been asked regarding the reference to the "high seas" contained in Article 12 of the 1944 Chicago Convention on Civil Aviation: does this reference in the conditions now prevailing exclude the economic zone? Compare Heller, *Airspace over Extended Jurisdictional Zones*, in *THE LAW OF THE SEA: NEGLECTED ISSUES*, *supra* note 23, at 135, 144-48, and Hailbronner, *id.* at 154.



dicates that the treaty provision envisages every area of the seas.<sup>229</sup> Consequently, explosions on the bed of the economic zone continue to be prohibited.

As to the prohibitions in the Tlatelolco Treaty of 1967, their scope of application will include the continental shelf when the conditions for the full application of the treaty are met. At present, there may be some difficulty in determining whether the treaty applies to the continental shelf of the contracting states because this depends on whether they exercise "sovereignty" over the shelf under their own laws.<sup>230</sup>

The Seabed Treaty of 1971 has prompted discussion, both among states and among legal writers, that requires three different sets of observations. First, it has already been pointed out that the area covered by the prohibition includes all the continental shelf and the economic zone beyond the line that the treaty defines by cross-reference to the Geneva Convention on the Territorial Sea.<sup>231</sup> Nevertheless, it has been suggested that if the parties to the treaty were to agree to the definition of the contiguous zone in the negotiating text, under which this zone may extend up to 24 miles from the baselines of the territorial sea,<sup>232</sup> the nuclear-free zone set forth by the treaty would shrink by 12 miles.<sup>233</sup> This opinion apparently stems from the assumption that the exempted zone is defined with reference to the notion of the contiguous zone, no matter what it may be, provided it is applicable to the parties. But, as already noted, the reference in the treaty is to a precise 12-mile measure, "coterminous" with the contiguous zone as defined in the Geneva Convention.

Second, the treaty does not grant the contracting parties the right to emplace or implant conventional weapons and related structures, installations, and facilities on the continental shelf or in general where the emplacement and implanting of nuclear weapons, weapons of mass destruction, and related structures are prohibited.<sup>234</sup> The legal situation of conventional weapons remains as it is under the general law of the sea on the continental shelf and the economic zone.<sup>235</sup> The only inference that can be drawn in this respect is that the contracting states believe that there is no general rule preventing them from emplacing conventional weapons on the seabed: the presence of such a rule would make the prohibition in the treaty superfluous. Yet even this inference could raise some doubts: in a specific article, the treaty disclaims any consequence on the parties' positions on the most important problems of the law of the sea.<sup>236</sup>

<sup>229</sup> This seems to be confirmed by the Legal Adviser to the Department of State, who stated that "the phrase 'including territorial waters or high seas' is illustrative and not limiting": M. WHITEMAN, 11 DIGEST OF INTERNATIONAL LAW 790 (1968).

<sup>230</sup> See *supra* sec. II.

<sup>231</sup> Arts. I and II: see *supra* sec. II.

<sup>232</sup> ICNT/Rev.2 Art. 33, para. 2.

<sup>233</sup> Larson, *supra* note 5, at 50-51.

<sup>234</sup> The opposite line of reasoning seems to have been taken by the USSR, whose representative said at the United Nations on Nov. 11, 1968: "if we should prohibit military uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction, we would, as it were, be permitting the use of the continental shelf for military purposes" (UN Doc. A/C.1/PV.1605, para. 39).

<sup>235</sup> E. D. BROWN, ARMS CONTROL, *supra* note 40, at 28.

<sup>236</sup> Art. IV.

Third, the Seabed Treaty provides for an elaborate multistage verification procedure<sup>237</sup> that allows any state party to engage in observation if it does not interfere with the seabed activities of other parties. More penetrating forms of verification, such as "inspection of objects, structures, installations and other facilities," may be carried out only after consultation with the state suspected of acting inconsistently with the treaty, and provided they are effected in cooperation with other states.

One might draw the implication from the provisions on verification that any form of verification they do not regulate is precluded. This implication, however, is difficult to accept. It has already been shown that all states may observe and inspect objects emplaced on the continental shelf of any other state (unless this interferes with their functioning).<sup>238</sup> It would be absurd for states to have more powers over verification regarding conventional weapons than they have regarding the infinitely more dangerous nuclear weapons. Consequently, it seems preferable not to interpret the provisions on verification so as to restrict the existing verification powers of both coastal and other states.

The declaration made by Canada when it ratified the treaty may have proceeded from a premise of this kind. Canada stated:

[T]he provisions in article III cannot be interpreted as indicating any restrictions or limitations upon the rights of the coastal State, consistent with its sovereign rights with respect to the continental shelf, to verify, inspect or effect the removal of any weapon, structure, facility or device emplaced or emplaced on the continental shelf or the subsoil thereof appertaining to the coastal State. . . .

India made the same point and mentioned, in addition, the coastal state's right to destroy the objects emplaced by other states on or beneath its continental shelf.<sup>239</sup>

As the procedures regulated by the treaty cannot thus be seen as restrictions on the coastal state's (as well as any other state's) rights of verification, the innovative aspect of the treaty has to be sought in its improvements on these rights. These improvements are apparent when one considers that the treaty provides for cooperation among states and for assistance to be given to states needing it by other states, as well as through "appropriate international procedures within the framework of the United Nations and in accordance with its Charter."<sup>240</sup> These provisions improve the contracting states' capacity to perform verification activities. The procedures set forth in

<sup>237</sup> Art. III. Apart from the unilateral "observation" set forth in paragraph 1, the procedures for verification considered in the article have never been utilized: Final Act of the 1977 Review Conference under Art. III, in UN Doc. SBT/CONF/25/II. The article is analyzed by E. D. BROWN, *ARMS CONTROL*, *supra* note 40, at 75-88, and by L. MIGLICRINO, *supra* note 40, at 73-89.

<sup>238</sup> See *supra* sec. IV, "The Traditional Law of the Sea."

<sup>239</sup> STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 109-11. This does not mean that it is possible to agree with these states on the rights which international law recognizes for the coastal state on the shelf. See also *id.*, the objections by the Federal Republic of Germany, the United States, and the United Kingdom.

<sup>240</sup> Art. III, para. 5.

the treaty, including inspection under certain conditions, may be carried out by all state parties on the continental shelves of all other state parties, and by the coastal state not only when it claims interference with its sovereign rights over resource-oriented activities but in all cases.

The principle of interpretation used above, *i.e.*, that the provisions of the treaty cannot reduce verification powers already existing under international law, helps in assessing whether other declarations made by state parties conform to the treaty. According to Brazil, the word "observation" in the treaty "refers only to observation that is incidental to the normal course of navigation in accordance with international law."<sup>241</sup> This declaration did not meet with any objections, probably because it was assumed that international law permits navigation for any purpose in the sea above the continental shelf. However, it would be contrary to the treaty if it were meant to refer to a situation—such as the one consequential to Brazil's claim to a 200-mile territorial sea—in which only innocent passage is admitted in those waters.<sup>242</sup>

Yugoslavia declared that

article III, paragraph 1, should be interpreted to the effect that a State exercising a right under this article shall be obliged to notify in advance the coastal State, in so far as observations are to be carried out within the stretch of the sea extending above the continental shelf of that State.<sup>243</sup>

The United States, the United Kingdom, and the Federal Republic of Germany objected to this declaration by stating that it could not have an effect on the existing law of the sea.<sup>244</sup> The decisive reason for considering the declaration as incompatible with the treaty is probably that it would diminish, and not improve, the verification powers already existing under the treaty and international law of all but the coastal state.

#### V. THE INTERNATIONAL SEABED AREA

Few observations are needed on the legal situation of military installations, structures, and devices on the seabed beyond national jurisdiction under the traditional law of the sea. It is the same as for that of the continental shelf, though with the obvious difference that claims that the coastal state can exercise by taking advantage of its sovereign rights over resource-oriented activities are out of place for the deep seabed. Thus, according to the traditional international law of the sea, all states are free to emplace any kind of military installation, structure, or device on the deep seabed. The main limitations on this freedom come, first, from the duty to pay

<sup>241</sup> STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 108.

<sup>242</sup> Decree Law No. 1098 of March 25, 1970, Art. 3, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA (ST/LEG/SER.B/16, at 3, 1974); A. SZEKELY, *supra* note 110, vol. 2, Booklet 3, at 49 (Jan. 1978).

<sup>243</sup> STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 113.

<sup>244</sup> *Id.* at 111, 113.

"reasonable regard" to the interests of other states in their exercise of the freedom of the high seas and, second, from treaty obligations.

The observations already made about the interests of other states also apply to the deep seabed, especially the possibility of resorting to the rules on installations emplaced on the continental shelf for economic purposes, which safeguard the freedom of navigation and other high seas freedoms. As for the second kind of limitation, the prohibitions under the 1963 Partial Test Ban Treaty and the 1971 Seabed Treaty apply to the whole deep seabed, and the Tlatelolco Treaty of 1967, when it is applied in its full geographical scope, will include some portions of the deep seabed.

Will this situation change in the framework of the new law of the sea? The main features of this new law, as it emerges from the conference's negotiating text, relevant to this question are the principle that the International Seabed Area and its resources are the "common heritage of mankind"<sup>245</sup> and the rules providing that the exploration and exploitation of resources in the Area shall be "organized, carried out and controlled" by a new international entity, the International Seabed Authority,<sup>246</sup> which will grant "exclusive rights" to the exploration and exploitation of given portions of the Area<sup>247</sup> to states, state entities, natural or juridical persons, and a new international industrial entity, the Enterprise.<sup>248</sup>

Under the UN General Assembly's Declaration of Principles of 1970 and the negotiating text, the principle of the common heritage of mankind applies not only to the resources of the Area, but also to the Area itself.<sup>249</sup> As military activities are not resource oriented, it seems necessary to determine, preliminarily, whether the principle that the Area as such is the common heritage of mankind entails a legal situation different from that prevailing under the rules on the high seas.

The answer would seem to be that it does not, and that the proclamation of the Area as the common heritage of mankind is essentially rhetorical. Although there are some provisions in the negotiating text that mention activities conducted in the seabed Area beyond national jurisdiction different from the resource-oriented activities defined as "activities in the Area," they do not seem to add anything to what is already implied in the regime of the high seas.

Thus, the rule on marine scientific research in the Area repeats the general principle of freedom applicable to research in the high seas.<sup>250</sup>

<sup>245</sup> GA Res. 2749 (XXV) of Dec. 17, 1970, para. 1; ICNT/Rev.2 Art. 136

<sup>246</sup> ICNT/Rev.2 Art. 153, para. 1.

<sup>247</sup> ICNT/Rev.2, Ann. III, Art. 16.

<sup>248</sup> ICNT/Rev.2 Art. 153, para. 2.

<sup>249</sup> "The Area and its resources are the common heritage of mankind": ICNT/Rev.2 Art. 136 (emphasis added).

<sup>250</sup> ICNT/Rev.2 Arts. 143(3), 256, and 257. The proposals for an "internationalization of research" in the Area (see, e.g., the Iranian intervention at the 68th meeting of the Plenary, 5 OFF. REC. 66) had no further consequence than the adoption of rules permitting the Authority to engage in marine scientific research "concerning the Area and its resources" and providing that states shall promote scientific cooperation in the Area (ICNT/Rev.2 Art. 143, paras. 2 and 3).

The rule on the use of the Area exclusively for peaceful purposes does not add anything to the rule on the same subject for the high seas.<sup>251</sup> Nor does the rule forbidding appropriation of any part of the Area add to the rule that "no State may validly purport to subject any part of the high seas to its sovereignty."<sup>252</sup>

Moreover, some rules concerning (resource-oriented) "activities in the Area" consider the non-resource-oriented activities in order to safeguard the freedom to pursue them and to accommodate them to the "activities in the Area." Thus, the first revision of the Informal Composite Negotiating Text contained a rule permitting the Authority to close a particular zone of the Area to prospecting for resources when there is a risk of "unjustifiable interference with other uses of the Area."<sup>253</sup> The second revision includes an article on "accommodation of activities in the Area and in the marine environment" that provides that "activities in the Area shall be conducted with reasonable regard for other activities in the marine environment."<sup>254</sup>

Thus, no change seems to follow from the fact that the Area as such has been proclaimed the common heritage of mankind. This is not so, however, with regard to the application of the common heritage principle to the resources of the Area and with regard to the international regime of exploration and exploitation that the negotiating text sets forth to substantiate the principle.<sup>255</sup> The key article is the one on the accommodation of activities in the Area to other activities in the marine environment. This article contains two general rules: the first one, already quoted, states that activities in the Area shall be carried out with "reasonable regard" for other activities in the marine environment; the second states that "other activities in the marine environment shall be conducted with reasonable regard for activities in the Area."<sup>256</sup>

These provisions give no priority to one kind of activity over the other. They repeat the general rule on the exercise of high seas freedoms with reasonable regard for the exercise of these freedoms by other states. The only detailed indication of how this "reasonable regard" should be construed can be found in the provisions on installations for conducting "activities in the Area." When emplacing and using these installations, the entities engaged in exploration and exploitation shall take various precautions for safeguarding the freedom (and the safety) of navigation that are similar to those set forth for installations emplaced for the same purpose on the con-

<sup>251</sup> Compare Art. 141 with Art. 88 of ICNT/Rev.2.

<sup>252</sup> Compare Art. 137, para. 1 with Art. 89 of ICNT/Rev.2.

<sup>253</sup> ICNT/Rev.1, Ann. II, Art. 2, para. 1(d). The article was deleted from the ICNT/Rev.2 "since the nature of prospecting activities is such that it is unlikely to have such major effects as to cause irreparable harm to the marine environment or interfere seriously with other uses of the Area" (UN Doc. A/CONF.62/91, at 39 (1979)).

<sup>254</sup> Art. 147, para. 1.

<sup>255</sup> Even apart from the distinction in the text, the literature on the consequences of the common heritage principle for military activities is scant. See, however: O'Connell, *Resource Exploitation*, *supra* note 142, at 166-67; Buzan, *supra* note 172, at 13-14; Booth, *supra* note 23, at 354-56.

<sup>256</sup> ICNT/Rev.2 Art. 147, paras. 1 and 3.

tinental shelf.<sup>257</sup> As argued before, when the problems of military installations on the continental shelf were examined, the same precautions should apply whenever possible to installations emplaced for purposes other than the exploration and exploitation of the Area. Because these obligations apply to entities with an exclusive right to explore and exploit a given portion of the Area, they should be all the more applicable to states that have not obtained such rights.

There are further obligations states and entities conducting "activities in the Area" and states engaged in other activities in the marine environment have to comply with in order to pay "reasonable regard" to each other's activities. It may be useful to distinguish between the situation preceding and leading to the grant of an exclusive right to explore and exploit a given portion of the Area, and the situation following approval of the plan of work which grants this right.

In the former situation, prospecting is the most relevant activity. Though prospecting imposes some obligations on the prospector towards the Authority,<sup>258</sup> it does not seem to imply any privilege in respect to other states' activities. Consequently, states engaging in prospecting shall manifest the same reasonable regard for other activities, including military ones, as states conducting the latter shall observe towards prospecting. The Authority, directly through the Enterprise or indirectly through other entities, is involved in the "activities in the Area" and consequently bound by the article on accommodation of activities. Thus, it should avoid creating situations of conflict or unreasonable conflict. There is, however, no specific provision for ensuring this result. On the contrary, it is likely that the procedure for approving plans of work will not even serve to inform the Authority of other competing or conflicting interests in the seabed. This situation results from the otherwise justifiable lack of publicity inherent in the procedure for approving plans of work<sup>259</sup> and the policy reflected in the negotiating text of preventing the Authority from interfering in fields other than the exploration and exploitation of the Area.<sup>260</sup>

In the second period, after the plan of work has been approved, the general rules on reasonable regard will still be applicable. Exploration and exploitation of resources are on the same footing as other activities and enjoy no special status. Thus, in principle, if entities conducting "activities in the Area" claim, for instance, that military sensors on the mining site al-

<sup>257</sup> ICNT/Rev.2 Art. 147, para. 2. The main difference between this provision and the rules on installations in the economic zone and on the continental shelf (Arts. 60 and 80) seems to be that the establishment of safety zones is compulsory, while, according to the articles just mentioned, it is a right of the coastal state.

<sup>258</sup> ICNT/Rev.2, Ann. III, Art. 2, para. 1(b).

<sup>259</sup> ICNT/Rev.2, Ann. III, Art. 6.

<sup>260</sup> Besides the already mentioned article on marine scientific research, see the definition of "activities in the Area" as the "activities of exploration for, and exploitation of, the resources of the Area" (ICNT/Rev.2 Art. 1). This definition entails a substantial limitation to the scope of the Authority's powers in most articles of part XI of the ICNT/Rev.2. However, for an indication of the potential for expansion of the powers of the Authority, see Darman, *supra* note 3, at 387.

lotted to them are hampering their activities and ask that the sensors be removed, they will not be in a better position than the emplacing states if the latter claim that the mining is interfering with the functioning of their sensors. In practice, however, there are factors that give some advantage to the former claim. The rights of the entity engaged in exploration or exploitation, though not sovereign, are "exclusive." Moreover, they are granted by an international organization acting "on behalf of mankind." These considerations seem to rule out the possibility that the "activities in the Area," especially those of the Enterprise, might be conducted "not exclusively for peaceful purposes," an assumption that cannot be taken for granted for the conflicting activities.

Judicial or arbitral decisions, of course, could contribute to making the law clearer in this, as in other, fields. It is not likely, however, that these problems will be examined by a court or tribunal because the optional exception to compulsory settlement of disputes related to military activities, mentioned earlier, also applies here. Apart from this exception, which, as mentioned, is optional, compulsory settlement seems to apply to the situation here considered, though only to some extent. The Seabed Disputes Chamber of the Law of the Sea Tribunal, as envisaged by the negotiating text, has jurisdiction over "disputes between States parties concerning the interpretation and application" of the part of the convention dealing with activities in the Area.<sup>261</sup> This part includes the article on the accommodation of activities in the Area and other activities in the marine environment. Thus, a dispute over whether the exclusive right to explore and exploit a portion of the Area entitles the state that has been granted this right to obtain or effect the removal of sensors emplaced there by another state may be submitted to the Seabed Chamber, unless one of the parties to the dispute has resorted to the "military activities" exception. What seems possible for disputes between states, however, is problematical for disputes of this kind with the Authority, and seemingly impossible for disputes with the Enterprise.<sup>262</sup> This gap must be viewed as a serious flaw in the system for settling disputes relating to the International Seabed Area.

Accommodating "activities in the Area" with "other activities in the marine environment" becomes even more difficult if the state conducting the latter is not a party to the Law of the Sea Convention. In this case,

<sup>261</sup> ICNT/Rev.2 Art. 187(a).

<sup>262</sup> Regarding disputes with the Authority, the Chamber has jurisdiction over those that concern acts or omissions violating part XI of the convention (or the annexes thereto, or the rules, regulations, and procedures promulgated in accordance with it) or acts of the Authority alleged to be, in excess of jurisdiction or misuse of power (ICNT/Rev.2 Art. 187(b)). The state whose military objects on the seabed are interfered with by mining activities could claim that the Authority, in granting exclusive rights to the mining entity, has violated the rule of Article 147 on accommodation of uses. The same article could be invoked by the Authority against the emplacement of military objects in a zone of the seabed for which it has granted a mining contract. It would seem, however, that both of these claims would be quite indirect. Concerning disputes with the Enterprise, there seems to be no possibility of bringing them before the Chamber because such disputes are taken into account by the negotiating text only when they arise between the parties to a contract for exploration and exploitation (ICNT/Rev.2 Art. 187(c)).

not only will recourse to compulsory settlement of disputes under the convention be ruled out, but the reasons for giving greater weight to the claims of the entity conducting "activities in the Area" under the convention will be less compelling. A strict application of the "reasonable regard" concept in the exercise of high seas freedoms seems to be the only answer, though it may not be entirely satisfactory for avoiding conflicts.

What is or will be the situation of military installations, structures, and devices on the seabed beyond national jurisdiction pending the entry into force of the Law of the Sea Convention? In other words, has the concept of the common heritage of mankind already produced some consequences that can influence the legal situation of these installations, structures, and devices?

If the assumption were true that under present international law, as influenced by the 1970 Declaration of Principles and by the work of the Third United Nations Conference on the Law of the Sea, the recovery of minerals from the seabed beyond national jurisdiction is illegal if not conducted according to the system regulated by the Law of the Sea Convention, there would be no doubt that, in principle, a claim to use the seabed for the emplacement of military objects would prevail over an invalid claim to use it for mining purposes. If, however, this assumption, which the Group of 77 strongly upholds at the conference,<sup>263</sup> were not found to be acceptable, and the position of the most interested industrialized states were followed,<sup>264</sup> seabed mining would be an activity included in the high seas freedoms. The "reasonable regard" test would be decisive. Yet, especially if mining were conducted under an arrangement (domestic or international) designed to respect the common heritage principle, for instance by diverting a part of the profits to developing countries and international assistance organizations,<sup>265</sup> some of the reasons already indicated for preferring the claims of the mining states, in case of conflict, could be invoked.

<sup>263</sup> See especially the interventions of the Group of 77's spokesman, the representative of Fiji, on Aug. 28 and Sept. 15, 1978: UN Docs. A/CONF.62/BUR/SR.41 and A/CONF.62/SR.109. The full text of the latter intervention is reprinted in 10 LAW. AMERICAS 977 (1978). See also UN Doc. A/CONF.62/77 (April 25, 1979), with a memorandum by a special group of legal experts of the Group of 77. See also Orrego Vicuña, *Les législations nationales pour l'exploitation des fonds des mers et leur incompatibilité avec le droit international*, 24 ANN. J. FRANÇAIS DE DROIT INT'L 810-26 (1978).

<sup>264</sup> See especially the interventions by the U.S. representative on Aug. 28 and Sept. 15, 1978: UN Docs. A/CONF.62/BUR/SR.41 and A/CONF.62/SR.109, the latter being reprinted in 10 LAW. AMERICAS 981 (1978). See also the interventions by France, the Federal Republic of Germany, Italy, Belgium, Japan, the Netherlands, and the United Kingdom in UN Doc. A/CONF.62/SR.109 (1978). Among legal writers, T. G. KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING* (1979); Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims*, 29 STAN. L. REV. 1135 (1977); Jackson, *Deepsea Ventures: Exclusive Mining Rights to the Deep Seabed as a Freedom of the Sea*, 28 BAYLOR L. REV. 170 (1976).

<sup>265</sup> This kind of provision is included in the U.S. Deep Seabed Hard Minerals Resources Act of 1980, Pub. L. No. 96-283 §403 (see also §§102(c) and 201), 94 S. at. 553. The international arrangements mentioned in the text could include the "mini-treaty" envisaged by Darman, *supra* note 3, at 393-95, and criticized by Orrego Vicuña, *supra* note 263, at 824.



Whatever opinion is considered preferable on the legality of seabed mining under present international law, it would seem reasonable that states conduct their nonmining activities on the seabed beyond national jurisdiction so as to avoid jeopardizing the feasibility of mineral exploration and exploitation. If, for instance, the emplacement of military installations, structures, or devices were to require making huge crevasses in a part of the seabed rich in manganese nodules, and if these crevasses would substantially hamper seriously envisaged mining activities, an important question would be presented as to feasibility.

The rules in the Partial Test Ban Treaty, the Seabed Treaty, and the Treaty of Tlatelolco do not seem to conflict with the regime for the exploration and exploitation of the Area set forth in the negotiating text. On the contrary, the prohibitions stipulated by those treaties, inasmuch as they concern the Area, contribute to eliminating possible conflicts with "activities in the Area."

The idea of granting verification powers to the Authority, which would include those granted to states parties to the 1971 Seabed Treaty, has been proposed.<sup>266</sup> The negotiating text seems to rule out this possibility, however, by limiting the Authority's inspection powers to "all facilities in the Area used in connexion with activities in the Area."<sup>267</sup> Nonetheless, this provision gives the Authority the opportunity to determine whether states use installations for military purposes that were emplaced for conducting "activities in the Area." This discovery, when made public, would already amount to a sanction. Yet the Authority would have further means to apply pressure on the emplacing state by claiming violation of the "peaceful purposes" clause. It could issue warnings and, if certain conditions were met, suspend or terminate the contract.<sup>268</sup> Moreover, were the emplacing state subsequently to ask for another contract, the Authority could claim it was not qualified because the military use of the installations under the previous contract amounted to an unsatisfactory performance of that contract.<sup>269</sup>

Verification conducted by member states in cooperation with the Authority (or by the Authority on behalf of member states) might also be considered, in the words of the Seabed Treaty, as verification conducted "through the appropriate international procedures within the framework of the United Nations and in accordance with its Charter."<sup>270</sup> Though attractive, this possibility does not seem to correspond either to the provisions of the negotiating text or to those of the Seabed Treaty.<sup>271</sup> From the vantage point of the former, it implies that the Authority and its activity are included in the framework of the United Nations. From that of the latter, it requires a wider power of inspection than is now admitted.

<sup>266</sup> Canadian intervention of March 6, 1972, at the Seabed Committee (UN Doc. A/AC.138/SC.1/SR.33), and Iranian intervention at the Third Law of the Sea Conference on April 26, 1976, UNCLOS III, 5 OFF. REC. 66 (especially para. 26). E. LUARD, *supra* note 1, at 243.

<sup>267</sup> ICNT/Rev.2 Art. 153, para. 5.

<sup>268</sup> ICNT/Rev.2, Ann. III, Art. 18.

<sup>269</sup> ICNT/Rev.2, Ann. III, Art. 4, para. 2. <sup>270</sup> Seabed Treaty Art. III, para. 5.

<sup>271</sup> L. MIGLIORINO, *supra* note 40, at 85-87.

# THE CONCEPT OF AUTONOMY IN INTERNATIONAL LAW

*By Hurst Hannum and Richard B. Lillich\**

## I. INTRODUCTION

"Autonomy" is not a term of art or a concept that has a generally accepted definition in international law. Indeed, one surveying either the literature on the subject or the examples brought forth to demonstrate the existence of the concept is apt to conclude, to paraphrase the late jurist John Chipman Gray, that "on no subject of international law has there been so much loose writing and nebulous speculation as on autonomy."<sup>1</sup> Yet the term is very much in vogue today. The Camp David framework, for instance, establishing the context for negotiating peace in the Middle East, seeks to provide "full autonomy to the inhabitants" of the West Bank and Gaza.<sup>2</sup> Regional autonomy has been extended recently to the Basque country and Catalonia by Spain,<sup>3</sup> and to the 34 atolls composing the Marshall Islands by the United States.<sup>4</sup> Currently, demands for greater autonomy have been made by the Shetland Islands against Great Britain,<sup>5</sup> as well as by Quebec against Canada.<sup>6</sup> Greek officials have offered to create "a self-administered and inviolable" area within Greece as a permanent site for the Olympic Games.<sup>7</sup> While conventional wisdom accords regional autonomous entities only limited status under international law,<sup>8</sup> the increasing frequency of claims

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<sup>1</sup> Cf. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 122 (1909).

<sup>2</sup> Camp David Framework for Peace in the Middle East (Egypt-Israel), Sept. 17, 1978, para. A(1) (a), DEP'T OF STATE PUB. NO. 8954 (1978), *reprinted in* 17 ILM 1466, 1467 (1978).

<sup>3</sup> *Financial Times* (London), Oct. 23, 1979, at 17, cols. 1-8.

<sup>4</sup> *N.Y. Times*, Jan. 15, 1980, at A15, col. 1.

<sup>5</sup> *The Times* (London), Feb. 11, 1980, at 1, col. 8.

<sup>6</sup> *See, e.g., N.Y. Times*, May 12, 1980, at A7, cols. 1-6.

<sup>7</sup> *Id.*, May 5, 1980, at A10, cols. 2-4.

<sup>8</sup> *See, e.g., J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW* 211-12 (1979).

Autonomous areas are regions of a State, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part. For such status to be of present interest, it must be in some way internationally binding upon the central authorities. Given such guarantees, the local entity may have a certain status, although since that does not normally involve any foreign relations capacity, it is necessarily limited. Until a very advanced stage is reached in the progress towards self-government, such areas are not States.

to autonomy and the incremental effect such claims will have upon the international legal order make the concept of autonomy ripe for review.<sup>9</sup>

In an effort to ascertain just what has been considered over the years to constitute autonomy, the authors initially undertook 22 case studies of nonsovereign entities and federal states offering a wide range of examples of varying degrees of governmental autonomy and internal self-government.<sup>10</sup> These studies, from which the data for this article were extracted, fell, albeit somewhat arbitrarily, into the three major categories of federal states,<sup>11</sup> internationalized territories and territories of particular international concern,<sup>12</sup> and associated states,<sup>13</sup> along with a fourth, miscellane-

<sup>9</sup> No treatise or monograph on autonomous entities exists, although a then current comprehensive survey of such entities may be found in W. WILLOUGHBY & C. FENWICK, *TYPES OF RESTRICTED SOVEREIGNTY AND OF COLONIAL AUTONOMY* (1919). Most of the writing on autonomy consists either of individual case studies or scattered general references embedded in works on self-determination, sovereignty, or statehood. For a good cross-section of such writing, see the bibliographies in I. BERNIER, *INTERNATIONAL LEGAL ASPECTS OF FEDERALISM* 275-91 (1973); J. CRAWFORD, *supra* note 8, at 437-79; and C. OKEKE, *CONTROVERSIAL SUBJECTS OF INTERNATIONAL LAW* 228-35 (1974).

<sup>10</sup> These case studies may be found in PAIL Institute, *1 The Theory and Practice of Governmental Autonomy* 56-237 (Final Report for the Department of State, 1980) [hereinafter cited as PAIL Report]. A second, 335-page companion volume contains basic constituent documents. Copies of the 2-volume report are available in the libraries of the American Society of International Law and the PAIL Institute, Washington, D.C.

<sup>11</sup> The term "federal state" is used here in a broad sense and generally refers to a composite state made up of equal entities or subdivisions, which enjoy some degree of local or home rule, and a central government generally having full authority over foreign affairs. The federal or quasi-federal systems studied were the proposed Turkish Federated State of Cyprus, Eritrea (1952-1962), Catalonia and other autonomous regions under the Second Spanish Republic, the Basque country under its 1979 Autonomy Statute, the United Arab Emirates, Switzerland under the 1848 Federal Constitution, the Greenland-Denmark relationship following the granting of home rule to Greenland in 1978, and the Belgian linguistic communities following the 1971 constitutional reforms. See 1 PAIL Report, *supra* note 10, at 57-118; see generally I. BERNIER, note 9 *supra*; E. ELAZAR, *FEDERALISM AND POLITICAL INTEGRATION* (1979).

<sup>12</sup> An internationalized territory, somewhat analogous to a guaranteed or protected state, is an entity that has been created under international supervision or control in response to a particular political situation. It may or may not be considered a state in international law, although it generally retains full authority over local affairs and is restricted only by its international constituent documents. The internationalized territories surveyed were the Free City of Danzig (1919-1945), the Free Territory of Trieste proposed in 1947, the International Settlement of Shanghai (1845-1944), the Memel Territory (1924-1939), the Saar (1920-1935 and 1945-1956), and the Aland Islands. See 1 PAIL Report, *supra* note 10, at 119-76; see generally M. YDIT, *INTERNATIONALIZED TERRITORIES FROM THE "FREE CITY OF CRACOW" TO THE "FREE CITY OF BERLIN"* (1961).

<sup>13</sup> An associated state, a relatively modern concept that has arisen out of UN discussions with respect to non-self-governing territories, is an entity that has delegated certain competences (particularly in the areas of foreign affairs and defense) to a principal state, although it retains its international status as a state. The associated state systems studied were the non-self-governing territories under the United Nations in general; New Zealand's relationship with the Cook Islands, Niue, and Tokelau; the U.S. territorial relationships, focusing on Puerto Rico and current proposals for the Trust Territory of the Pacific Islands, compared with the non-self-governing "incorporated territories" of Guam and the U.S. Virgin Islands; and the Netherlands Antilles. See 1 PAIL Report, *supra* note 10, at 177-214; see generally R. CHOWDHURI, *INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS* (1955); W. REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION* (1975); Clark,

ous grouping.<sup>14</sup> The entities surveyed were chosen because they represented a wide range of autonomy arrangements which, at least to some extent, have been recognized or seriously considered in international law.<sup>15</sup> In addition, an attempt was made to select subjects whose historical and legal context was not so atypical as to lessen their value as precedents. For this reason, the historical anomalies of Andorra, Liechtenstein, Monaco, and San Marino were omitted, as was the uniquely situated Holy See. The bulk of the present or former members of the British Commonwealth (Empire), whose gradual development (or, in some instances, abrupt independence) generally was tied to a unique complex of cultural, historical, and political ties to Great Britain, rather than being expressed in formal constitutional arrangements, also was omitted. Finally, in the area of federal relationships, the focus was on those states with a relatively high degree of regional autonomy and on contemporary autonomy arrangements, rather than on essentially unitary states or those states where regional autonomy exists more on paper than in practice.

The term "autonomy," as used in this article, should be understood to mean general political or governmental autonomy. More restrictive types of autonomy, *e.g.*, cultural or religious autonomy, also have been considered where appropriate, as in the case of the Aland Islands, the Belgian linguistic communities, Eritrea, Greenland, and the millet system under the Ottoman Empire. Autonomy and self-government are determined primarily by the degree of actual as well as formal independence enjoyed by the autonomous entity in its political decisionmaking process. Generally, autonomy is understood to refer to independence of action on the internal or domestic level, as foreign affairs and defense normally are in the hands of the central or national government,<sup>16</sup> but occasionally power to conclude international agreements concerning cultural or economic matters also may reside with the autonomous entity. In brief, the article's examination of autonomy in theory and practice will provide a description and analysis of the degree of independence and control over its own internal affairs that an autonomous entity generally enjoys, rather than consider the more abstract, if nonetheless interesting, questions of sovereignty or statehood.

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*Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980); Armstrong, *The Negotiations for the Future Political Status of Micronesia*, 74 AJIL 689 (1980).

<sup>14</sup> Under this category were studied the British proposals for provincial autonomy in Palestine (1946–1947), the millet system under the Ottoman Empire, and the Isle of Man. See 1 PAIL Report, *supra* note 10, at 215–37.

<sup>15</sup> Among those arrangements or proposals not surveyed that might be fruitfully explored are, *inter alia*, the recent devolution plans for Scotland and Wales, the 1972 autonomy arrangements in Italy's South Tyrol region, and the federal system of Malaysia.

<sup>16</sup> In view of the wide variation in the governmental structures surveyed, no single term adequately encompasses the relationships of every entity discussed. The terms "central," "national," "principal," and "sovereign" all describe the superior entity; "autonomous," "local," and "regional" are used to describe the inferior or dependent entity. The use of different terms throughout the article does not imply any difference in the degree or type of autonomy under consideration.

The article is divided into two major sections. Section II, which follows, surveys the general governmental structure of autonomous entities, indicating how executive, legislative, and judicial authority is allocated between the entity and the central government. Section III, a functional analysis of particular issues and powers, considers the degree of international personality, including control over foreign affairs and defense, enjoyed by the autonomous entity: the issues discussed are police and security arrangements; land and natural resources; social services; financial and economic arrangements; and cultural, religious, and minority group concerns. A relatively brief conclusion advances the thesis that, in the Middle East and elsewhere, autonomy remains a useful, if imprecise, concept within which flexible and unique political structures may be developed to respond to the increasing complexity of contemporary world politics.

## II. GENERAL GOVERNMENTAL STRUCTURE

### *Executive Authority*

The great majority of the entities surveyed have an identifiable executive branch of government, headed by a chief executive official (governor, president, prime minister) or by an executive or administrative council. The executive may be independent, as in the United States, or dependent on and responsible to a legislative body, on the British parliamentary model. In either case, the local executive is responsible for the execution and administration of the territory's laws and generally has the authority to issue executive orders or administrative regulations necessary for the enforcement of those laws.

The primary variables in discussing the executive authority of an autonomous or nonsovereign entity are:

- (1) the political character of the local executive: does he or she represent the central government or the local government? how and by whom is the executive selected?
- (2) the responsibilities of the executive: does the local executive administer the laws of the central government? does the central government retain concurrent or separate powers to enforce national laws?
- (3) the authority of the executive within the legislative process: is there a veto or other power over local legislation?
- (4) the extent of local authority over normally national executive branch matters such as foreign relations and national defense; and
- (5) the extent of local police powers and the relation between the local and national security forces.

The last two issues will be considered in greater detail below; one should simply note here that the role of the local executive in foreign relations and national defense is usually minimal, at best, while the extent of local police powers varies greatly.

Within federal states, both local responsibility for and local selection of the chief executive official are common. In each of the federal states there is a national executive official, responsible to the entire country, while in none of the federal examples examined was there direct national influence over the selection of the local governor or other chief executive official.<sup>17</sup> The executive's responsibilities are thus to the local population; the executive does not represent the central government.

In addition to the local selection of their own chief executive, several of the subfederal autonomous regions also are granted the specific authority and responsibility for the enforcement of national laws within the region. For example, both the 1932 Catalonia Autonomy Statute and the 1979 Basque Autonomy Statute provide that, while standard setting or the establishment of basic norms in certain areas (including penal and labor legislation, internal transport, and the communications media) is left to the national government, actual implementation and administration of such national norms are reserved to the regional governments.<sup>18</sup> The manner of ensuring that the national norms are in fact implemented is unclear; for example, the Catalan statute provided that, in areas of shared administrative and legislative competence, the national government retained the right to "inspect" local implementation of social laws in order "to guarantee their strict fulfillment."<sup>19</sup> The governments of the emirate members of the United Arab Emirates undertake "to take the appropriate steps to implement the laws promulgated by the Union . . . , including the promulgation of the

<sup>17</sup> The only exception to this general statement might be the Basque chief executive, whose appointment by the Basque parliament must be confirmed by the Spanish King. 1979 Basque Autonomy Statute, Art. 33.1, unofficial text and translation *reprinted in* U.S. Government telegram Madrid 9189, Aug. 31, 1979, from American Embassy, Madrid, to the Secretary of State, Washington, D.C. [hereinafter cited as 1979 Basque Stat.].

<sup>18</sup> 1979 Basque Stat., Art. 12; 1932 Catalonia Autonomy Statute, Art. 5, *reprinted in Spanish in* E. PEERS, *THE CATALAN STATUTE AND THE CORTES (1932)* [hereinafter cited as 1932 Catalan Stat.]. (This and other translations are unofficial.)

Both pre-Civil War and post-Franco Spain constitute fertile ground for autonomy studies, as Spain's Basque, Catalan, and Galician ethnic groups have long sought greater autonomy from the Castilian-dominated central Government. The reestablishment of the Spanish Republic in 1931 afforded the first real opportunity for greater regional autonomy, authorized by Article 11 of the 1931 Spanish Constitution. Catalonia was the only region to become formally autonomous during the Second Republic, although its experiment and similar proposals for Basque and Galician autonomy ended with the outbreak of the Civil War in 1936. For texts of these earlier statutes and drafts, see, in addition to E. PEERS, *supra*, J. DE ORUETA, *FUEROS Y AUTONOMÍA, EL PROCESO DEL ESTATUTO VASCO* (1934); B. CORES TRASMONTE, *EL ESTATUTO DE GALICIA (ACTAS Y DOCUMENTOS)* (1976); C. MASSO I ESCOFET & R. GAY DE MONTELLA, *L'ESTATUT DE CATALUNYA* (1933).

With the adoption of the new post-Franco Spanish Constitution in 1978, *reprinted in* 13 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (eds. Blaustein & Flanz, 1971-) [hereinafter cited as Blaustein & Flanz], autonomy once again became possible. Following approval by the Spanish Parliament, both the Basque country (Euzkadi) and Catalonia adopted their own autonomy statutes in 1979. Similar proposals were narrowly defeated in Andalusia in 1980, in part owing to strong central governmental opposition to Andalusian autonomy, as the proautonomy forces failed to achieve the required approval of 50% of the registered voters in each of Andalusia's 8 provinces. See N.Y. Times, Feb. 29, 1980, at A11, col. 1, and Mar. 1, 1980, at A9, col. 3.

<sup>19</sup> 1932 Catalan Stat., Art. 6.

local laws, regulations, decisions, and decrees necessary for such implementation"; the Union authorities "shall supervise" such implementation.<sup>20</sup> In Eritrea, which had the status of "an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian crown" from 1952 to 1962,<sup>21</sup> there was specific provision for the delegation to the Eritrean government of the assessment and collection of all federal taxes, although there was no general provision for the administration of national laws by local officials.<sup>22</sup>

In other federal states, federal authorities generally are responsible for the enforcement and administration of federal (national) laws within the subfederal regions. The specific reservation of implementation of national laws to regional governments seems to be limited to those situations in which local autonomy is coupled with a certain degree of mistrust of or dislike for the central authorities, *e.g.*, Eritrea, Catalonia, the Basque country, and the individual emirates within the United Arab Emirates.

In nonfederal states, it is difficult to perceive a consistent pattern in the selection of the chief executive or in his or her responsibilities. The "typical" arrangement probably could be represented by a locally selected chief executive, responsible politically to the local electorate or legislature rather than to the central authorities, with separate national or concurrent local/national administration of national laws applicable to the autonomous territory. This description would apply, for example, to the U.S. territories of Guam and the Virgin Islands, Puerto Rico, the Cook Islands and Niue, and the former International Settlement of Shanghai (although late in its history Shanghai did begin to enforce certain Chinese tax laws applicable to Chinese residents of the settlement).

There are several examples in which the chief executive of the autonomous territory or region is appointed by political authorities outside the territory, either by the central government or an international organization. In some instances, this outside appointment requires either formal or de facto local consent, *e.g.*, the Memel Territory (the Directorate was required to receive the confidence of Memel's legislature subsequent to its appointment)<sup>23</sup> and the Aland Islands (prior agreement of the provincial legislature is required before the appointment of the Governor by the Finnish authorities).<sup>24</sup>

In other cases, the chief executive is, in effect, imposed upon the autonomous territory by a higher political authority to which the executive is responsible, *e.g.*, the League of Nations-appointed Governing Commission

<sup>20</sup> CONST. OF THE UNITED ARAB EMIRATES, ART. 125, reprinted in 15 Blaustein & Flanz [hereinafter cited as UAE CONST.].

<sup>21</sup> Eritrea Federal Act, set forth in GA Res. 390 (V), 5 UN GAOR, Supp. (No. 20) 20, UN Doc. A/1561 & Add.1 (1950), para. 1.

<sup>22</sup> *Id.*, para. 2.

<sup>23</sup> Convention and Transitory Provision concerning Memel, signed May 8, 1924, Art. 17, 29 LNTS 87 [Annex hereinafter cited as Memel Stat.].

<sup>24</sup> Law No. 670 of Dec. 28, 1951, Concerning the Autonomy of the Aland Islands (Finland) [hereinafter cited as Aland Autonomy Law], provisions of which are summarized in 5 CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES (eds. Blaustein & Blaustein, 1976-) [hereinafter cited as Blaustein & Blaustein].

of the Saar.<sup>25</sup> Colonial or colonylike situations generally follow this pattern, *e.g.*, Tokelau,<sup>26</sup> the Netherlands Antilles (where the Governor plays a dual role, representing both the Dutch monarch and the local government),<sup>27</sup> the Isle of Man,<sup>28</sup> pre-1968 Guam<sup>29</sup> and the U.S. Virgin Islands,<sup>30</sup> and the various British proposals for Palestine in 1946 and 1947.<sup>31</sup> Where, as in the situations just cited, the chief executive is appointed by the central government, national laws tend to be implemented or administered by the relevant national authorities, rather than reserved to local administration.

Some distinction also should be drawn between the executive powers available to a centrally (or internationally) appointed executive in a *transitional* government and arrangements that are intended to be permanent or indefinite; indeed, this distinction is relevant to the degree of local control over governmental powers generally, not just the executive branch. There is a much greater concentration of power in the executive and a concomitant lesser degree of local control or autonomy in transitional regimes: *e.g.*, the international administration of the Saar from 1920 to 1935; the proposed provisional government for Trieste, which was to operate prior to the entry into force of the Permanent Statute; and the British Palestine proposals under the Morrison and Bevin Plans.

The Governing Commission of the Saar, appointed by the League of Nations after World War I, had "all the powers of government" that formerly belonged to Germany, although the latter retained formal sovereignty.<sup>32</sup> While local bodies of a purely advisory nature were established, the Commission enjoyed plenary executive and legislative powers.<sup>33</sup> Similar powers, somewhat more restricted, were to be granted to the Governor of Trieste during a brief transitional period to the permanent Trieste regime.<sup>34</sup> The Morrison Plan for Palestine called for initial administration of the central government by a British High Commissioner, who would exercise both executive and legislative functions with the assistance of an appointed Executive Council; a High Commissioner with "supreme" legislative and executive authority was provided for in the Bevin Plan for a 5-year period of British trusteeship over Palestine.<sup>35</sup>

<sup>25</sup> Treaty of Versailles, signed June 29, 1919, section IV, Arts. 45-50, 11 Martens Nouveau Recueil 3d, at 323, and Annex [Annex hereinafter cited as Saar Stat.], Arts. 16-19.

<sup>26</sup> Tokelau Islands Act (No. 24, 1948), secs. 4, 9, as amended (New Zealand), reprinted in 4 Blaustein & Blaustein.

<sup>27</sup> Charter of the Kingdom of the Netherlands, Arts. 2, 44; Constitution of the Netherlands Antilles, Arts. 11, 12; both reprinted in 5 Blaustein & Blaustein.

<sup>28</sup> Cf. UK Home Office Memorandum to the MacDermott Commission, para. 13 (1958), reprinted in 4 Blaustein & Blaustein.

<sup>29</sup> Organic Act of Guam, ch. 512, sec. 6, 64 Stat. 386 (1950).

<sup>30</sup> Revised Virgin Islands Organic Act of 1954, ch. 558, sec. 11, 68 Stat. 503 (1954).

<sup>31</sup> See REPORT OF THE ANGLO-AMERICAN COMMITTEE OF ENQUIRY REGARDING THE PROBLEMS OF EUROPEAN JEWRY AND PALESTINE, Cmd. No. 6808 (1945-46) and Remarks of H. Morrison, M.P., 426 PARL. DEB., H.C. (5th ser.) 962 (1946) [hereinafter cited as the Morrison Plan]; PROPOSALS FOR THE FUTURE OF PALESTINE (PALESTINE No. 1), Cmd. No. 7044 (1947) [hereinafter cited as the Bevin Plan].

<sup>32</sup> Saar Stat., Art. 19.

<sup>33</sup> *Ibid.*

<sup>34</sup> Treaty of Peace with Italy, signed Feb. 10, 1947, 61 Stat. 1245, TIAS No. 1648, 49 UNTS 3, Ann. VII.

<sup>35</sup> See note 31 *supra*.



The two Palestine plans and the provisional government of Trieste clearly were intended as temporary measures only, while permanent arrangements were either agreed upon or set in place; elections to draft a Trieste constitution, for example, were to be held within 4 months of the beginning of the provisional government.<sup>36</sup> In the Saar, however, both the length of time of the "transitional" regime (15 years) and the possibility that it would become permanent (although not considered likely) render the Saar structures unique. It is doubtful that an arrangement that provided for so little meaningful local participation would be acceptable today; it should be remembered that the primary purpose of the League regime governing the Saar was to facilitate the exploitation of the Saar's coal mines by France, not to prepare the region for self-government or to grant it autonomy.<sup>37</sup>

Nevertheless, it does appear that, in the past, transitional regimes have been seen as justifying broader derogations from principles of self-government than more permanent structures. Insofar as a transitional regime acts merely as a provisional administration to oversee the creation of agreed-upon permanent institutions, it undoubtedly could be given powers beyond those normally granted to a purely executive authority; however, the present survey offers no examples of the successful implementation of a transitional regime without prior agreement on the general nature of the permanent regime to follow.

### *Legislative Authority*

The great majority of autonomous entities surveyed have a locally elected legislative body as the fundamental source of local governmental power. While the extent of legislative competence varies considerably, as do the designations both for the body itself (legislature, council, parliament) and for the instruments enacted (laws, decrees, regulations), the existence of an elected legislative body is nearly universal.<sup>38</sup> The only exceptions to this proposition among the situations studied are the traditional structures retained by the individual emirates that compose the United Arab Emirates and by the separate atolls of Tokelau; the transitional League of Nations administration of the Saar; the landowners' council in Shanghai, which had delegated, but technically advisory, authority; and the systems of cultural autonomy within the Belgian linguistic communities and under the Ottoman millet system, both of which lack a separate legislative body.

<sup>36</sup> Treaty of Peace with Italy, *supra* note 34, Ann. VI [hereinafter cited as Trieste Stat.], Art. 8. The UN Security Council was unable to agree upon selection of a Governor for Trieste, and neither the transitional nor permanent Free Territory of Trieste was ever established. See generally B. NOVAK, TRIESTE, 1941-1954 (1970). The London Agreement among the United States, the United Kingdom, Italy, and Yugoslavia, signed Oct. 5, 1954, 235 UNTS 99, definitively abandoned the Free Territory proposal and divided the territory between Italy and Yugoslavia. Cf. J. CAMPBELL, SUCCESSFUL NEGOTIATION, TRIESTE 1954 (1976).

<sup>37</sup> For helpful accounts of the Saar under League of Nations administration, see F. RUSSELL, THE SAAR, BATTLEGROUND AND PAWN (1951); L. COWAN, FRANCE AND THE SAAR, 1680-1948 (1950); M. FLORINSKY, THE SAAR STRUGGLE (1934).

<sup>38</sup> The terms "legislature" and "laws" are used in a general sense and do not imply the presence or absence of the ultimate legislative or constitutional authority of the state or entity.

There are three general factors that should be considered when comparing the extent of independence or autonomy enjoyed by local legislative bodies, in addition to comparisons of specific powers in such areas as control over land and natural resources, social services, and fiscal matters.<sup>39</sup> These three points of general comparison are:

(1) residual powers: is the local legislature one of general powers, restricted only by specific grants of authority to the principal entity, or does it enjoy limited, enumerated authority subject to the reserved or residual powers of the principal or sovereign state?

(2) veto powers: does the central or sovereign government retain either a legislative or executive veto over local enactments?

(3) constitutional amendment: may the local entity independently amend its own constitution or basic constituent laws or is the amending process subject to the approval of the ultimate sovereign?

The third factor exhibits the clearest pattern in the cases surveyed, as the great majority of autonomous governments considered do *not* have the unilateral power to alter their own constitutional structure without the approval of the central government or higher sovereign. The exceptions are the proposed Turkish Federated State of Cyprus, which in many respects is organized as an independent sovereign state;<sup>40</sup> Eritrea, except for the unalterable provisions of its Federal Act which defined the basic relationship between Eritrea and Ethiopia;<sup>41</sup> the United Arab Emirates, subject to the supremacy of the Union Constitution;<sup>42</sup> the Cook Islands, which specifically retains the right to alter unilaterally not only its internal structure but also the relationship with New Zealand;<sup>43</sup> and the districts that presently constitute the Trust Territory of the Pacific Islands.<sup>44</sup>

<sup>39</sup> Discussed in text at notes 108–156 *infra*.

<sup>40</sup> CONST. OF THE TURKISH FEDERATED STATE OF CYPRUS [hereinafter cited as TURKISH CYPRIOT CONST.], Art. 138, *reprinted in* 6 Blaustein & Blaustein. The Turkish Federated State of Cyprus was proclaimed by the Turkish Cypriot community in 1975, but to date it has been recognized only by Turkey. While the constitution envisages a future Federal Republic of Cyprus to be comprised of autonomous Greek and Turkish regions, it represents the most extensive grant of autonomy examined. No opinion with respect to the political desirability or practicality of the proposed arrangements should be inferred from their inclusion in the present survey.

<sup>41</sup> CONST. OF ERITREA, Art. 91, *reprinted in* 5 Blaustein & Blaustein.

<sup>42</sup> UAE CONST., Art. 151.

<sup>43</sup> CONST. OF NIUE, Art. 35, *reprinted in* 4 Blaustein & Blaustein.

<sup>44</sup> See Compact of Free Association between the United States and the Governments of Palau, the Marshall Islands, and the Federated States of Micronesia, Jan. 14, 1980 [hereinafter cited as Micronesia Compact] (text on file at the library of the American Society of International Law). The Compact has been initialed by only the Marshall Islands among the 3 Trust Territory districts, but it is anticipated that Palau and the Federated States will adhere to essentially similar agreements. The Compact must be approved by a local plebiscite and by Congress before it enters into force, thus ending U.S. trusteeship over the area (which also includes what is now the Commonwealth of the Northern Mariana Islands) of the Trust Territory of the Pacific Islands. See the comprehensive and current Clark, note 13 *supra*; Armstrong, note 13 *supra*; UN DEP'T OF POLITICAL AFFAIRS, TRUSTEESHIP AND DECOLONIZATION, ISSUE ON THE TRUST TERRITORY OF THE PACIFIC ISLANDS (No. 16, 1980); N.Y. Times, Jan. 15, 1980, at A15, col. 1.

The more common arrangements are typified, for example, by the 1979 Basque Autonomy Statute, amendment of which must be approved by the Spanish Parliament;<sup>45</sup> the approval or veto power of the League of Nations and the United Nations over amendments to the constitutions of, respectively, the Free City of Danzig<sup>46</sup> and the Free Territory of Trieste;<sup>47</sup> the Memel Statute, which required Lithuanian approval of constitutional amendments;<sup>48</sup> and the ultimate authority of the United States to propose changes in the organic acts governing Guam and the U.S. Virgin Islands.<sup>49</sup>

Even those local entities that do have the power to amend their own constitutions are usually subject to the limitations of a federal constitution (e.g., the United Arab Emirates<sup>50</sup>) or to other specific legislative restrictions (e.g., Puerto Rico<sup>51</sup>). These limitations generally prohibit changes in the basic relationship between the local and principal/sovereign entity, while otherwise permitting amendments to local governmental organization or distribution of powers.

Ultimate authority to approve constitutional amendments does not seem to be linked to the question of whether reserved or residual governmental powers rest with the local or central government. Among the situations examined, the autonomous entity retains reserved powers in 11 instances,<sup>52</sup> while such powers lie with the central or sovereign entity in at least 14 cases.<sup>53</sup> If there is a determining factor in many of these cases, it seems to be whether the autonomous entity was an independent state (nation) prior to the creation of the new relationship of autonomy in concert with another state. Thus, the formerly independent, or at least separate, entities of Eritrea, the sheikhdoms within the United Arab Emirates, and the Swiss cantons all retain residual governmental powers; regions that were not independent but that rather gained increased autonomy as a result of constitutional changes in the central government tend to have only limited powers, e.g., Catalonia and the Basque country, Greenland, the Aland Islands, the New Zealand territory of Tokelau, and the U.S. territories.

<sup>45</sup> CONST. OF SPAIN, Art. 147.3; 1979 Basque Stat., Art. 46.1.

<sup>46</sup> CONST. OF THE FREE CITY OF DANZIG, Art. 49, reprinted in LEAGUE OF NATIONS O.J., Spec. Supp. 7 (1922).

<sup>47</sup> Trieste Stat., Art. 37.

<sup>48</sup> Memel Stat., Art. 38.

<sup>49</sup> Both Guam and the U.S. Virgin Islands recently adopted draft constitutions pursuant to federal authorization in Pub. L. No. 94-584, 90 Stat. 2899 (1976). However, the electorates in each territory rejected the proposed constitutions, and each remains governed by its respective organic act and other federal laws. Cf. Hannum & Gilmore, *The Search for Constitutional Change in the U.S. Virgin Islands*, 4 HARV. J.L. & PUB. POL'Y (1981); Pacific Daily News, Aug. 5, 6, 7, 1979, at 1; Virgin Islands Daily News, Mar. 1, 2, 3, 5, 6, 7, 1979, at 1; Wash. Post, Mar. 8, 1979, at A13, col. 1.

<sup>50</sup> UAE CONST., Art. 151.

<sup>51</sup> CONST. OF THE COMMONWEALTH OF PUERTO RICO, Art. VII, sec. 3, reprinted in 1 Blaustein & Blaustein.

<sup>52</sup> The Turkish Federated State of Cyprus, Eritrea, the United Arab Emirates, the Swiss cantons under the 1848 Constitution, Danzig, Trieste, the Saar in 1945, the Cook Islands, Niue, the Netherlands Antilles, and the districts of the Trust Territory of the Pacific Islands.

<sup>53</sup> The Basque country, Catalonia in 1932, Greenland, the Belgian linguistic communities, the International Settlement of Shanghai, the Memel Territory, the Saar from 1920 to 1935, the Aland Islands, Tokelau, Puerto Rico, Guam, the Isle of Man, and the Morrison and Bevin Plans for Palestine.

The internationalized territories follow no pattern, as the extent of their legislative powers is seemingly dictated primarily by immediate political concerns. Thus, Danzig enjoyed plenary legislative authority, as would have Trieste, subject only to the specific restrictions of their governing statutes,<sup>54</sup> while the Memel and Saar territories were granted only limited legislative competence, subject to the reserved powers of Lithuania and the League of Nations, respectively.<sup>55</sup> The powers of the International Territory of Shanghai were specifically enumerated in the Land Regulations approved by the Chinese Emperor, although those powers were considerably expanded as a result of the *de facto* political and military strength of the western powers in Shanghai.<sup>56</sup>

There is some correlation, although it is far from universal, between the reservation of residual powers to the autonomous government and the existence of a veto over local legislation by the central or sovereign government. Where the autonomous government retains such residual powers, the central government generally does not have any veto power over local legislation, *e.g.*, the Swiss cantons, the United Arab Emirates, Danzig (subject to the reservation of some specific powers to the League of Nations), the Cook Islands and Niue, and, within their areas of competence, the Ottoman millets. Where the sovereign government retains residual governmental powers, it is likely to retain the power to veto local legislation (although the enactment of such legislation does not generally require the approval of the central government), *e.g.*, the former Memel Territory,<sup>57</sup> the Aland Islands,<sup>58</sup> Guam,<sup>59</sup> and the Isle of Man.<sup>60</sup>

There are, of course, exceptions. While residual governmental powers remain with the national Spanish Government, neither Catalan nor Basque legislation within local competence is subject to national veto. Eritrea retained residual powers, but the national government (through the representative of the Emperor) had a partial veto over local legislation considered to be incompatible with federal authority.<sup>61</sup> This veto, however, could be overridden by a two-thirds vote of the Eritrean Assembly.<sup>62</sup> The Trieste Assembly was granted the broad authority to consider "any matter affecting

<sup>54</sup> *E.g.*, restrictions on Danzig's authority over the port of Danzig and special rights granted to Poland by the Treaty of Versailles; restrictions on the Free Port of Trieste and on Trieste's capacity to enter into exclusive economic unions or military arrangements.

<sup>55</sup> Memel Stat., Arts. 1, 7; Saar Stat., Art. 19.

<sup>56</sup> This expansion was accomplished primarily through sec. 9 of the Shanghai Land Regulations, which identified the "better order and good government of the Settlement" as one of the objects of the regulations for which bylaws could be adopted. The Land Regulations, as amended through 1925, are *reprinted in* A. KOTENEV, *SHANGHAI: ITS MIXED COURT AND COUNCIL* (1925).

<sup>57</sup> Memel Stat., Art. 16.

<sup>58</sup> Summary of the Aland Autonomy Law, note 24 *supra*.

<sup>59</sup> Guam Organic Act, sec. 19 (codified at 48 U.S.C. §1423i (1980)). Congress has never exercised this veto power.

<sup>60</sup> Home Office Memorandum to the MacDermott Commission, *supra* note 28, at para. 12; *see also* preambles to Isle of Man statutes, *e.g.*, Isle of Man Constitution Amendment Act, 1919, 9 & 10 Geo. 5; Isle of Man Constitution (Elections to Council) Act, 1971, 20 & 21 Eliz. 2, c. 34. These and other statutes pertaining to the Isle of Man are *reprinted in* 4 Blaustein & Blaustein.

<sup>61</sup> ERITREA CONST., Art. 14.

<sup>62</sup> *Id.*, Art. 58.

the interests of the Free Territory," but it could not have overridden the veto of the UN-appointed Governor.<sup>63</sup>

With the exception of provision for a popularly elected legislative body and the prohibition of unilateral amendment of the basic autonomy statute or constitution defining local-sovereign relations, the structure, competence, and organization of the legislative branch exhibit wide variations depending on the particular political situation. Some of the specific areas of competence that might be relevant to, *e.g.*, the current Middle East situation, are discussed below, but further generalizations about the legislative powers of autonomous or self-governing entities are likely to be incomplete and misleading rather than instructive.

### *Judicial Authority*

A free and independent judiciary forms part of the governmental structure of all the politically autonomous entities surveyed. However, this independence does not necessarily imply total separation from the central or sovereign judicial authorities, as it is common for appeals from local courts to be heard in courts or other fora responsible to the central government. In addition, members of the highest local court often are appointed by or with the consent of the sovereign government, although in a majority of those cases examined members of the local judiciary are appointed by and responsible to only the local government.

Questions of subject matter jurisdiction are notoriously complex, and it is difficult to summarize accurately or adequately the many variations that appear among the jurisdictions examined. The 1979 Basque Autonomy Statute offers an illustrative example of an attempt to distinguish rather precisely between local and national jurisdiction: local original jurisdiction includes all matters of local civil law and all criminal, social, and administrative actions, although the latter three areas are subject to appeal to the national courts.<sup>64</sup> Jurisdictional questions between local courts are to be decided locally, while the national Constitutional Court has exclusive jurisdiction over constitutional challenges to local "normative provisions having the force of law."<sup>65</sup> The structure of the Basque judiciary is to be in accord with a national organic law on judicial authority.<sup>66</sup> The 1848 Swiss Constitution assigned specific cases to the Federal Tribunal, but it could hear appeals from cantonal courts only where there were federal law issues "of considerable importance."<sup>67</sup>

<sup>63</sup> Trieste Stat., Art. 19.

<sup>64</sup> 1979 Basque Stat., Art. 14.1.

<sup>65</sup> *Id.*, Art. 14.1, 14.2; SPAIN CONST., Art. 153.

<sup>66</sup> 1979 Basque Stat., Art. 34.1.

<sup>67</sup> FEDERAL CONST. OF SWITZERLAND (1848), Art. 101, *reprinted in* W. RAPPARD, *LA CONSTITUTION FÉDÉRALE DE LA SUISSE, SES ORIGINES, SON ÉLABORATION, SON ÉVOLUTION* (1948), and *translated in* THE FEDERAL CONSTITUTION OF THE SWISS CONFEDERATION (C.-J. Wyss pub., 1867). The authority of the Federal Tribunal, whose jurisdiction was in some instances dependent on the actions of the collegiate Swiss executive, the Federal Council, was considerably strengthened in Articles 110 through 114 of the 1874 Federal Constitution, *reprinted and translated in* E. JAMES, *THE FEDERAL CONSTITUTION OF SWITZERLAND* (1890).

The nonfederal autonomous areas are less likely to have a system of divided jurisdiction, as many of the laws of the sovereign or associated principal entity are inapplicable to the local entity. This situation prevails in, for example, the Cook Islands, Niue, and the Isle of Man; it also applied to the quasi-independent internationalized territories of Danzig, the Saar from 1920 to 1935, and that proposed for Trieste.

Finally, in many cases the exact relationship between the judiciary of the autonomous region and the central/sovereign government is left to be established by subsequent laws, rather than being set forth in the basic structural documents.<sup>68</sup>

Two areas that do indicate to some extent the degree of local judicial autonomy have been mentioned above: the manner of selection of local judges, particularly the judges of the highest local court; and whether or not local matters may be appealed to a higher tribunal outside the autonomous entity's jurisdiction.

Those federal provinces with high or even moderate degrees of autonomy have total control over the appointment of local judges, *e.g.*, the proposed Turkish Federated State of Cyprus, Eritrea, Catalonia, the Emirates, and the Swiss cantons. In Greenland and Belgium, no special provisions concerning the judiciary are included in the general autonomy documents, although Belgium does permit each parliamentary linguistic group to confer certain quasi-judicial or administrative jurisdiction on regional bodies in the four linguistic regions.<sup>69</sup> While the Basque courts have fairly extensive independent jurisdiction in other respects, as set forth above, the president of the Basque Supreme Court is appointed by the King of Spain rather than by local authorities.<sup>70</sup>

Some appointments involve both the local and the central/sovereign governments, with the latter holding the ultimate power of appointment but, in effect, relying on the advice or recommendations of the local authorities. This system was proposed for Trieste, where the UN-appointed Governor was to appoint judges from among candidates proposed by the Trieste Council of Government or from among other persons after consultation with the Council,<sup>71</sup> and is present in Tokelau, where local "commissioners" with jurisdiction over minor civil and criminal matters are appointed by the New Zealand Administrator after consultation with island elders.<sup>72</sup>

Finally, some appointments are made directly by the central government without formal local participation, *e.g.*, Guam, where a federal district court

<sup>68</sup> Cf., *e.g.*, the complex and changing relationship between France and the Saar in the post-World War II period, summarized in flow chart form in J. FREYMOND, *THE SAAR CONFLICT 1945-1955*, at 324-31 (1960); and the activities of the Mixed Court of the International Settlement of Shanghai, outlined in A. KOTENEV, note 56 *supra*, and M. YDIT, *supra* note 12, at 127-53.

<sup>69</sup> Act of July 3, 1971, relating to the splitting up of the members of the legislative houses into linguistic groups and referring to various provisions concerning the cultural councils for the French cultural community and for the Dutch cultural community (Belgium), *reprinted in* 2 Blaustein & Flanz.

<sup>70</sup> 1979 Basque Stat., Art. 34.2.

<sup>71</sup> Trieste Stat., Art. 16.

<sup>72</sup> Act No. 41 to amend the Tokelau Islands Act 1948 (1970) (NZ), secs. 9-11, *reprinted in* 4 Blaustein & Blaustein.

also serves as the court of appeal on local matters,<sup>73</sup> and the Netherlands Antilles, whose Supreme Court justices are appointed by the Dutch monarch after consultation with the Dutch-appointed Governor.<sup>74</sup> The Saar under the administration of the League of Nations represented a unique situation in which the preexisting local (German) courts were retained but made subject to appeals to a Governing Commission-appointed Supreme Court; in practice, while the Saar Supreme Court reversed some cases, the local courts seem to have remained relatively free from League influence.<sup>75</sup>

Even where local courts are otherwise independent and selected by local authorities, most autonomous entities considered are subject to the ultimate judicial authority of the principal state through appeals from the local courts to the highest court of the national judiciary. In most cases, however, such appeals are appropriate only to consider the constitutionality of local enactments or challenges that local actions are contrary to or beyond the restrictions of the basic constituent documents defining the relationship between the autonomous and principal entities.

Excluding the quasi-independent internationalized territories, only for Eritrea, the Isle of Man, the religious/social status decisions of the Ottoman millets, and, possibly, the Turkish Federated State of Cyprus, does one find immunity from challenges of a constitutional nature in courts outside the local forum; in the case of the Isle of Man and the Ottoman millets, this immunity results from the lack of a relevant constitution or statute to apply. With respect to the internationalized territories of Danzig, Trieste, and Shanghai, the local courts were or would have been supreme in local matters; disputes between Danzig and Poland were referred to the League of Nations Council (and six times to the Permanent Court of International Justice for advisory opinions),<sup>76</sup> and disputes concerning the interpretation of the Permanent Statute of Trieste were to be ultimately referred to an ad hoc "commission" whose neutral member was to be appointed by mutual agreement or by the UN Secretary-General.<sup>77</sup>

The judicial system in Shanghai was unique, dictated primarily by the existing power relationships between the International Settlement and China. Disputes involving nationals of the treaty powers present in Shanghai

<sup>73</sup> Guam Organic Act, secs. 22, 24 (codified at 48 U.S.C. §§1424, 1424b (1980)). An attempt by Guam to divest the federal court of its appellate jurisdiction over local cases through the establishment of a Guam Supreme Court was declared invalid in a much criticized U.S. Supreme Court ruling. *Guam v. Olsen*, 431 U.S. 195 (1977).

<sup>74</sup> NETHERLANDS ANTILLES CONST., Art. 111.

<sup>75</sup> Saar Stat., Art. 25. Cf. L. COWAN AND M. FLORINSKY, note 37 *supra*.

<sup>76</sup> Treaty of Versailles, *supra* note 25, Art. 103; Treaty of Paris, Poland-Danzig, signed Nov. 9, 1920, 6 LNTS 190. Disputes were decided in the first instance by the League's High Commissioner, but 54 of his more than 80 formal decisions were appealed to the Council of the League. The Council requested an advisory opinion from the Permanent Court of International Justice in the following cases: Polish Postal Service in Danzig, [1925] PCIJ, ser. B, No. 15; Jurisdiction of the Courts of Danzig, [1928] PCIJ, ser. B, No. 15; Free City of Danzig and the I.L.O., [1930] PCIJ, ser. B, No. 18; Polish War Vessels in the Port of Danzig, [1931] PCIJ, ser. A/B, No. 43; Treatment of Polish Nationals in Danzig, [1932] PCIJ, ser. A/B, No. 44; and Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, [1935] PCIJ, ser. A/B, No. 65.

<sup>77</sup> Trieste Stat., Art. 36.

were heard by a totally autonomous, independent Municipal Court which derived its authority from the extraterritorial jurisdiction of the foreign consuls. For other foreigners and Chinese, a "Mixed Court" was established responsible to the Chinese authorities, except for a brief period of de facto foreign control in the early 20th century. While this Mixed Court was integrated into the Chinese judicial system in 1929, it had jurisdiction over only the Chinese residents of Shanghai until the abolition of the Settlement in 1944.<sup>78</sup>

In summary, the scope of subject matter jurisdiction of autonomous courts is seen to depend directly on the extent of legislative and executive competence granted to the autonomous region in its constituent documents. With respect to local issues, most autonomous judicial authorities are supreme; in questions concerning the constitutionality of local actions or the relationship between the autonomous and principal governments, decisions of the local courts (where they can exercise original jurisdiction) are generally appealable to a higher court responsible to the central/sovereign authorities.

Organizationally, most of the autonomous judicial systems enjoy fairly complete independence from outside control. While there are exceptions, local inferior court judges generally are appointed by and responsible to the local government, and the internal administration of the local judiciary is a matter of local responsibility.

### III. PARTICULAR ISSUES AND POWERS

#### *Control Over Foreign Relations and Defense*

The cases surveyed led to the identification of three primary issues that illustrate the relative degree of international personality possessed by the autonomous entities considered: control over (national) defense; control over foreign relations; and competence to enter into international agreements, with or without the consent of the central/sovereign government.

There is an overwhelming consensus that responsibility for and authority over national defense matters rest with the central or sovereign government and that, in general, the autonomous, nonsovereign entity exercises no power in the national defense area. The only exceptions to this practice appear to be the proposed Turkish Federated State of Cyprus, which, although its constitution does not specifically mention "national defense," assigns to its president the responsibility of preserving the integrity of the state and reserves to the state the power "to receive any foreign aid from foreign states and international organisations [presumably including military aid] . . . [without restriction] under any condition or for any reason whatsoever";<sup>79</sup> the quasi-independent International Settlement of Shanghai, which provided for its own defense independent of its nominal

<sup>78</sup> See generally A. KOTENEV, note 56 *supra*; F. POTT, A SHORT HISTORY OF SHANGHAI (1928); M. YDIT, note 12 *supra*.

<sup>79</sup> TURKISH CYPRIOT CONST., Arts. 80, 135.



Chinese sovereign; and the associated states or proposed associated states of Niue, the Cook Islands, and the constituent districts of the Trust Territory of the Pacific Islands, all of which delegate authority over defense of their territory to the former colonial or trusteeship power, but which retain the power unilaterally to rescind that delegation.<sup>80</sup>

In every other example studied, there is either an express or implied reservation of national defense powers to the national government. The extent of these powers is usually not defined in detail; it appears to be assumed that such powers as the declaration of martial law or a state of emergency (assuming such declarations are permissible under national law) and the condemnation or seizure of property are unimpaired by a region's autonomous or self-governing status. Some of these issues, *e.g.*, expropriation of land and relations with local police forces, are discussed further below.

The reservation to the central or sovereign government of general authority to conduct foreign relations on behalf of the autonomous entity is almost as universal as the reservation of national defense powers. These powers, however, are more nuanced, and in some instances either formal or informal consultations on matters of foreign policy between the local and national governments are envisaged.<sup>81</sup> Again, the Turkish Federated State of Cyprus would seem to retain broad foreign affairs authority, although without a national constitution for the proposed Federal Republic of Cyprus one cannot arrive at definitive conclusions. In none of the other federal states are the constituent local governments granted general authority or responsibility in the foreign affairs area.

There are a few instances of separation of foreign relations and defense authority, in situations where security interests are particularly important but where a high degree of autonomy is also desirable. The clearest separation along these lines is found in the Compact of Free Association between the United States and the districts of the Trust Territory of the Pacific Islands, in which it is stated that the districts of the Trust Territory "have the capacity to conduct foreign affairs and shall do so in their own name and right," although it is also provided that there shall be consultation with the United States in the exercise of this authority.<sup>82</sup> The United States, on the other hand, reserves "full authority" over security and defense matters.<sup>83</sup>

The case of the Free City of Danzig also is instructive. While the Treaty of Versailles gave Poland the authority and responsibility to conduct the foreign relations of Danzig, the Permanent Court of International Justice interpreted the arrangement as a kind of agency relationship with mutual

<sup>80</sup> See note 13 *supra*. Associated statehood is seen as a self-governing alternative to emergence as a sovereign independent state or full integration with a sovereign state. *Cf.* GA Res. 742 (VIII), 8 UN GAOR, Supp. (No. 17) 21 (1953); GA Res. 1541 (XV), 15 UN GAOR Supp. (No. 16) 29 (1960); W. REISMAN, note 13 *supra*; Clark, *supra* note 13, at 38-66; Gilmore, *Legal Perspectives on Associated Statehood in the Eastern Caribbean*, 19 VA. J. INT'L L. 490 (1979).

<sup>81</sup> See, *e.g.*, Niue Constitution Act (No. 24, 1974), secs. 6, 8 (NZ), which provide, *inter alia*, for consultation between New Zealand and Niue on foreign affairs matters that require "positive co-operation."

<sup>82</sup> Micronesia Compact, secs. 121, 123.

<sup>83</sup> *Id.*, sec. 311.

veto powers.<sup>84</sup> Thus, Poland could not impose any particular foreign relations policy on Danzig without the latter's consent. The Free Territory of Trieste also would have enjoyed a certain freedom in the area of foreign relations, although the approval of the UN-appointed Governor was required for international agreements, and the Territory was prohibited from entering into agreements that were contrary to its statute or constitution or that would have created exclusive economic associations with any country.<sup>85</sup>

While most nonsovereign autonomous entities thus do not conduct their own foreign relations, several entities have been granted specific authority to enter into international agreements within limited areas of competence. Such treaty-making power is most often restricted to economic, cultural, social, and similar matters (as opposed to political or military agreements), and treaties between the local government and a foreign country usually require the specific approval of the central or sovereign government. In some instances, the local government is given the right to comment upon (although not to veto) proposed treaties that would have a direct effect on it or on matters within its jurisdiction.

Typical examples of such arrangements can be found in, *e.g.*, the 1848 Swiss Constitution, the Greenland autonomy statute, the statutes governing the Netherlands Antilles, the Constitution of the United Arab Emirates, and the recent Basque autonomy arrangements. The 1848 Swiss Constitution prohibits alliances and treaties "of a political character" between cantons, but permits agreements with foreign nations that concern "public economy, neighbourly intercourse, and police."<sup>86</sup> However, any such agreement must be brought to the attention of the federal authorities, who retain the right to veto the agreement if they think it is contrary to the union.<sup>87</sup> This cantonal treaty-making power has been exercised only rarely in recent times.

Greenland's foreign relations are specifically reserved to the central Danish Government, but fairly general provisions do allow Greenland's participation, with central governmental consent, in international negotiations "of special importance for Greenland's commercial life."<sup>88</sup> Greenland may demand that the Danish Government designate specific diplomatic officers to attend to Greenland's special commercial interests abroad, and provision is made for "guidelines" to be developed by the Danish authorities, in consultation with the Greenland authorities, for dealing with EEC matters of particular interest to Greenland.<sup>89</sup>

<sup>84</sup> The Court said:

[T]he rights of Poland as regards the foreign relations of the Free City are not absolute. The Polish Government is not entitled to impose a policy on the Free City nor to take any step in connection with the foreign relations of the Free City against its will. On the other hand, the Free City cannot call upon Poland to take any step in connection with foreign relations of the Free City which are opposed to her own policy. . . .

Free City of Danzig and the I.L.O., [1930] PCIJ, ser. B., No. 18, at 13.

<sup>85</sup> Trieste Stat., Art. 24.

<sup>86</sup> 1848 SWITZERLAND CONST., Art. 9.

<sup>87</sup> *Id.*, Art. 90(7).

<sup>88</sup> Greenland Home Rule Act (Act. No. 577, 1978), sec. 16 (Denmark), *reprinted* in 5 Blaustein & Blaustein.

<sup>89</sup> *Id.*, sec. 15.

The Netherlands Antilles enjoys somewhat wider powers vis-à-vis the central Dutch Government with respect to international economic and financial agreements. Such agreements that are or would be binding on the Netherlands Antilles may not be entered into or denounced without the consent of the Netherlands Antilles;<sup>90</sup> in addition, it is provided that the central Government "shall cooperate" in concluding such agreements on behalf of the Netherlands Antilles alone when the latter requests such cooperation, "unless this would be inconsistent with the partnership of the Country in the Kingdom."<sup>91</sup>

The individual emirates of the United Arab Emirates may enter into "limited agreements of a local and administrative nature with the neighbouring state or regions, provided that such agreements are not inconsistent with the interests of the Union or with Union laws and provided that the Supreme Council of the Union is informed in advance."<sup>92</sup> Specifically reserved to each emirate is the right to join the Organization of Petroleum Exporting Countries.<sup>93</sup>

The Basque treaty-making power is narrower, being limited to the establishment of cultural relations with states having Basque-speaking communities; indeed, such cultural relations apparently can be established only with the approval of the national Spanish Government and the national Parliament.<sup>94</sup> The Basques are given the authority to implement international agreements made by the national Government that affect matters within local jurisdiction, although such agreements may not affect the fundamental attributes or authority of the autonomous community without a local referendum.<sup>95</sup>

Participation by a nonsovereign autonomous entity in international organizations does not seem to be a common attribute, except in the case of associated states. For example, the Netherlands Antilles is a member of the Universal Postal Union and the World Meteorological Organization, and the Saar Territory under League of Nations administration was a member of the Universal Postal Union and the Universal Telegraphic Convention. Under French administration after World War II, the Saar was admitted to the European Coal and Steel Community and as an associate member of the Council of Europe.<sup>96</sup> The Compact between the United States and the districts of the Trust Territory of the Pacific Islands provides that the United States will support "membership or other participation" in international organizations for the districts "as may be mutually agreed."<sup>97</sup>

### *Police and Security Arrangements*

Local police powers, as opposed to security or military forces for national defense, are exercised by the local autonomous government in the great

<sup>90</sup> Charter of the Kingdom of the Netherlands, Art. 25.

<sup>91</sup> *Id.*, Art. 26.

<sup>92</sup> UAE CONST., Art. 123.

<sup>93</sup> *Ibid.*

<sup>94</sup> 1979 Basque Stat., Art. 6.5.

<sup>95</sup> *Id.*, Art. 20.3.

<sup>96</sup> See J. FREYMOND, *supra* note 68, at 70-81, 87-93.

<sup>97</sup> Micronesia Compact, sec. 122.

majority of instances examined. In many cases, local police forces are seen as merely a normal component of the governmental powers of any autonomous, self-governing entity. In Greenland, for example, police powers are not included within the specific powers delegated to the Greenland government, yet it is likely that the establishment of a local police force to enforce local legislation in the delegated areas, *e.g.*, taxation, trade, social welfare, and protection of the environment, would be considered to be within Greenland's authority over the "organization of local government."<sup>98</sup> On the other hand, it does not appear that separate police powers should be inferred in the context of the cultural autonomy of the Belgian linguistic communities established in 1970, although the new authority of the "cultural councils" does not appear to diminish preexisting local or regional police powers.

No local police power would seem to have been within the competence of the Ottoman millets, which depended on the Turkish civil authorities for execution of their decisions within the religious and cultural spheres; nor does it seem to be within the competence granted by New Zealand to the Tokelau Islands, although the traditional social structures on each atoll probably include forms of "police" powers as well. Perhaps the only clear case of the formal exercise of police powers by the central/principal government is found in the administration of the Saar by the League of Nations; the League's Governing Commission assumed plenary governmental powers from both the national and the provincial German authorities.<sup>99</sup>

Detailed provisions concerning the division of police and security powers have been drawn up in several situations, either to protect particular interests of the central or principal entity or to legitimize central intervention in the autonomous territory under certain specified circumstances. The 1979 Basque autonomy provisions, for example, establish an "autonomous police regime," responsible to the Basque government, which has jurisdiction over the maintenance of public order within the province.<sup>100</sup> Reserved to the national security forces are police services of an "extracommunitary or supracommunitary nature," such as guarding ports, airports, and frontiers, and controlling customs and immigration into the national territory.<sup>101</sup> A joint "security council" is established to coordinate the local police and national security forces, and the latter retain the right to intervene unilaterally, with the approval of this security council, if they consider "the general interest of the state to be gravely threatened," or without security council approval but under the direction of the national authorities in cases of "special urgency."<sup>102</sup>

Despite reference to the cantons as "sovereign," the 1848 Swiss Constitution also reserved a right of intervention to the federal Government in order to guarantee the cantons' constitutions;<sup>103</sup> the federal authorities could intervene unilaterally "if the safety of Switzerland be placed in jeopardy,"

<sup>98</sup> Greenland Home Rule Act, *supra* note 88, Schedule, para. 2.

<sup>99</sup> Saar Stat., Art. 19.

<sup>100</sup> 1979 Basque Stat., Art. 17.1.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Id.*, Arts. 17.4-17.6.

<sup>103</sup> 1848 SWITZERLAND CONST., Arts. 6, 90(3).

and these powers were used to put down an insurrection in 1890 that had overthrown a cantonal government.<sup>104</sup>

More complex divisions of authority with respect to local police powers may be seen in the 1924 Statute of the Memel Territory.<sup>105</sup> While primary responsibility over the police was within the competence of the local Memel authorities, special provision was made for (1) the protection of the port of Memel by local Memel police detailed for service under the Lithuanian authorities, and (2) total Lithuanian control over and staffing of the frontier, customs, and railway police.<sup>106</sup> The Free City of Danzig, on the other hand, retained authority over its own police force, including the branch that policed the port, although the port was (like the port of Memel) under joint administration with another state (Poland).<sup>107</sup>

*Land: Ownership and Power of Eminent Domain*

While control over land may be a divisive and complex issue, it has not often been addressed directly in autonomy arrangements. In general, it has been assumed that land ownership will remain as it was before the establishment of such arrangements and that, presumably, the autonomous and central/sovereign governments will both have eminent domain powers within their respective spheres of competence under the autonomy provisions. Where ownership of public lands is mentioned, it is most often in the context of a grant of public land and property formerly owned by the sovereign government to the newly constituted local government. The Basque autonomous community, for example, is granted "all rights and property of the state or other public organisms related to the services and competences assumed by the Basque government."<sup>108</sup>

Where new entities are created, some cession of territory usually is required: Germany renounced all right and title over the territory of Danzig in favor of the Allied and associated powers;<sup>109</sup> Italian sovereignty over Trieste was formally terminated and, in addition, Trieste was to receive without payment all Italian state and "parastatal" property within the territory.<sup>110</sup>

<sup>104</sup> *Id.*, Art. 16. Cf. G. CODDING, *THE FEDERAL GOVERNMENT OF SWITZERLAND* (1961), especially chs. 3 and 4.

<sup>105</sup> The Memel Territory was ceded by Germany to the Allied powers under the terms of the Treaty of Versailles and, following the failure of negotiations to internationalize the territory, was occupied by Lithuania in 1923. Faced with this fait accompli, the four powers (the British Empire, France, Italy, and Japan) and Lithuania recognized Memel, "under the sovereignty of Lithuania, [as] a unit enjoying legislative, judicial, administrative and financial autonomy within the limits prescribed by the Statute" annexed to the convention. Convention and Transitory Provision concerning Memel, *supra* note 23, Art. 2. The Memel Territory remained under Lithuanian sovereignty until the German invasion of Poland in 1939, and after the war it became an integral part of Lithuania, the USSR.

<sup>106</sup> Memel Stat., Art. 20.

<sup>107</sup> Treaty of Paris, *supra* note 76, Art. 19.

<sup>108</sup> 1979 Basque Stat., Art. 43.1.

<sup>109</sup> Treaty of Versailles, *supra* note 25, Art. 100.

<sup>110</sup> Treaty of Peace with Italy, *supra* note 34, at 209, Ann. X, Economic and Financial Provisions relating to the Free Territory of Trieste, Art. 1.

Control over land and resources was the moving factor behind the administration of the Saar by the League of Nations during the post-World War I period. While France never acquired sovereignty over the Saar, under the provisions of the Treaty of Versailles, Germany agreed to cede to France for 15 years "in full and absolute possession, with exclusive right of exploitation, unencumbered and free from all debts and charges of any kind, the coal-mines situated in the Saar Basin."<sup>111</sup> France had the right to install necessary communication, transportation, and other facilities incidental to exploitation of the mines;<sup>112</sup> no restriction could be placed on the importation of French workers to the Saar;<sup>113</sup> and the Saar was subject to the French customs regime.<sup>114</sup>

Private ownership of property is most often addressed in the context of guarantees of nondiscrimination between citizens of the autonomous territory and other citizens of the nation. Provisions guaranteeing that there will be no discrimination between citizens of an autonomous territory and other national citizens resident outside the territory are included in the constitutions or constituent documents of, for example, Eritrea,<sup>115</sup> Switzerland,<sup>116</sup> the former Free City of Danzig,<sup>117</sup> and the former Memel Territory.<sup>118</sup> In addition, some of the constituent documents also protect freedom of movement and residency. The 1848 Swiss Constitution specifically protected "the right of free settlement within the whole extent of the Confederation," subject to certain requirements of status documentation.<sup>119</sup> In the acquisition and sale of real estate, settlers and cantonal citizens had to be treated equally, although settlers could be expelled from a canton pursuant to a criminal sentence or by order of the police if the settler had "forfeited the rights and honors of citizenship" or was guilty of "an improper course of conduct."<sup>120</sup>

An annex to the Permanent Statute of Trieste specified in some detail individual property rights and procedures for the disposition of private property once the Free Territory came into being. The property of Italian nationals resident in Trieste was to be protected on a nondiscriminatory basis for a period of 3 years, and those persons who opted for Italian citizenship and moved to Italy were to have the right to take lawfully acquired property with them and to sell real property under the same conditions as Trieste nationals.<sup>121</sup> Italy had agreed to give reciprocal guarantees<sup>122</sup> and also all its state or parastatal property to Trieste, as noted above.<sup>123</sup>

An exception to the general rule of nondiscrimination against non-residents is the Aland Islands, a strategic Swedish-speaking territory that

<sup>111</sup> Treaty of Versailles, *supra* note 25, Art. 45.

<sup>112</sup> Saar Stat., Arts. 8, 14.

<sup>113</sup> *Id.*, Art. 12.

<sup>114</sup> *Id.*, Art. 31. By 1923, the French franc had become the Saar's only official currency, and a customs union with France was established in 1925.

<sup>115</sup> ERITREA CONST., Art. 9.

<sup>116</sup> 1848 SWITZERLAND CONST., Arts. 42, 48.

<sup>117</sup> Treaty of Versailles, *supra* note 25, Art. 104(5).

<sup>118</sup> Memel Stat., Art. 9.

<sup>119</sup> 1848 SWITZERLAND CONST., Art. 41.

<sup>120</sup> *Ibid.*

<sup>121</sup> Treaty of Peace with Italy, Ann. X, *supra* note 110, Arts. 9, 10.

<sup>122</sup> *Id.*, Art. 11.

<sup>123</sup> *Id.*, Art. 1.

has been under Finnish sovereignty since 1920. While Finland retains general legislative authority over the Alands, the islands have maintained their cultural independence through control over education, language, and land.<sup>124</sup> Only persons who possess a special domiciliary right in the Alands may acquire real estate; this right generally requires at least a 5-year period of continuous residency in the islands.<sup>125</sup> If land is conveyed to a person not having a domiciliary right, any private person possessing the right, the local community, or the province itself is entitled to "redeem" the property at an agreed-upon price or at a fair market price determined by the courts.<sup>126</sup>

### *Natural Resources*

Control over natural resources varies greatly in the situations examined in the course of the present survey. Those entities that enjoy greater autonomy tend to control their own natural resources, and most of the autonomous entities control the use of such resources as water, forests, and other nonmining resources within their own territory. In those federal states with a stronger central government, that government generally reserves control over the nation's natural resources, and it will have jurisdiction over resources that affect more than one province or other national subdivision.

Among those autonomous territories with complete control over their own natural resources are Eritrea<sup>127</sup> and the individual emirates of the United Arab Emirates; the latter, not surprisingly, have reserved to themselves the "natural resources and wealth in each Emirate" (including oil) as public property of that emirate, although "society shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy."<sup>128</sup>

The importance of natural resources to the development of Greenland led to the establishment of joint control between Greenland and the central Danish authorities over these resources as part of the 1978 home rule arrangements, although in other respects Greenland does not enjoy a wide degree of autonomy. Greenland is delegated the power to protect the environment, and its Home Rule Act specifically recognizes the "fundamental rights" of Greenland with respect to its natural resources.<sup>129</sup> The result is a requirement of approval by both the Greenland and central Danish authorities to any study, prospecting, or exploitation of natural resources in Greenland, although recent reports concerning Greenland's objections to uranium mining by the Danish Atomic Energy Authority suggest that the central Government may be able to override Greenland's veto to protect serious national interests.<sup>130</sup>

<sup>124</sup> Cf. summary of the Aland Autonomy Law, note 24 *supra*. The standard work on the Aland Islands is J. BARROS, *THE ALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE UNITED NATIONS* (1968).

<sup>125</sup> Summary of the Aland Autonomy Law, note 24 *supra*.

<sup>126</sup> *Ibid.*

<sup>127</sup> ERITREA CONST., ART. 5(2) (h).

<sup>128</sup> UAE CONST., ART. 23.

<sup>129</sup> Greenland Home Rule Act, *supra* note 88, sec. 8.

<sup>130</sup> See Financial Times (London), Sept. 14, 1979, at 2, col. 3.

A more typical division of authority over natural resources may be found in the autonomy arrangements recently agreed upon by the Basque country and Spain. The Spanish Constitution reserves to the "exclusive competence" of the national Government "basic legislation" on environmental protection (without prejudice to the establishment of stricter local standards), woodlands, forestry projects, and livestock trails; regulation of maritime fishing (also subject to some concurrent local competence); the regulation and concession of water resources and the authorization of electrical installations where more than one autonomous community is affected; and the bases of the mining and energy system.<sup>131</sup> On the other hand, in its autonomy statute, the Basque autonomous community is given "exclusive jurisdiction" over mountains and forests (subject to the Spanish constitutional provisions mentioned above); agriculture and livestock, "in accordance with the general ordering of the economy"; fishing in interior waters; internal water resources, including canals and irrigation; the internal production, distribution, and transportation of energy, so long as no other autonomous community is affected; and mineral, thermal, and subterranean waters (again subject to the provisions of the Spanish Constitution).<sup>132</sup> The Basque community, like most other autonomous regions, controls urban planning, public works, and the construction of roads and highways.<sup>133</sup>

The proposals for the Free Territory of Trieste contained specific provisions for the continuing supply of water and electricity to Trieste by both Italy and Yugoslavia, including provisions for a mixed commission of Trieste, Italian, and Yugoslav representatives to supervise the execution of agreements concerning the supply of hydroelectricity to the territory.<sup>134</sup>

Control over natural resources, if theoretically vested in an autonomous territory, may be exercised in fact by the central sovereign government under other powers, *e.g.*, national defense requirements. Thus, U.S. military forces control approximately one-third of the land on Guam, including the island's major water supply, and the "Hilo Principles" governing negotiations between the United States and the districts of the Trust Territory of the Pacific Islands grant full authority for security and defense to the United States, "including the establishment of necessary military facilities and the exercise of appropriate operating rights."<sup>135</sup> Specific land arrangements are to be agreed upon prior to termination of the trusteeship.<sup>136</sup> Military control over large land areas obviously may be resented by the local population, particularly in the context of a purported grant of autonomy or self-government.

<sup>131</sup> SPAIN CONST., Art. 149.

<sup>133</sup> *Ibid.*

<sup>134</sup> Treaty of Peace with Italy, *supra* note 34, at 207, Ann. IX, Technical Dispositions Regarding the Free Territory of Trieste.

<sup>135</sup> Statement of Agreed Principles for Free Association ("Hilo Principles"), *reprinted in* 72 AJIL 882-83 (1978).

<sup>136</sup> *Ibid.*

<sup>132</sup> 1979 Basque Stat., Art. 10.



*Social Services*

The situations surveyed indicate that the provision of social services such as health, education, and welfare is generally the responsibility of the local or autonomous community rather than the central/sovereign authority. For example, health, education, public assistance, and social security were within the jurisdiction of Eritrea;<sup>137</sup> social welfare, education, cultural affairs, health services, and housing administration are within the home rule jurisdiction of Greenland;<sup>138</sup> and jurisdiction over social services, health, and education is among those powers reserved to, for example, the Swiss cantons under the 1848 Constitution, the Saar under post-World War II French administration, and the associated states of Niue, the Cook Islands, and the Netherlands Antilles.

Contrary to this general trend is the Constitution of the United Arab Emirates, which delegates to the central Union authorities exclusive legislative and executive jurisdiction over education, public health, and health services, and exclusive legislative or standard-setting jurisdiction over labor relations and social security.<sup>139</sup> This centralization of social welfare powers is undoubtedly explained by the extremely small size of each individual emirate, which would render separate social or education legislation and administration impractical and inefficient. It also enables the less-developed shiekhdoms to take advantage of the more advanced social administration in, for example, Abu Dhabi and Dubai.

Control over education has been a major factor in some communities' desire for greater autonomy. The Aland Islands, for example, have established Swedish as the official language of instruction in all schools, and Finnish cannot be used without the specific consent of the community concerned.<sup>140</sup> The 1932 Catalonia Autonomy Statute established both Catalan and Castilian as official languages,<sup>141</sup> and the Basque autonomy provisions adopt a similar position, recognizing both Basque and Castilian as official languages, guaranteeing the use of both languages, and agreeing to provide the "measures and means necessary to ensure the learning of both languages."<sup>142</sup>

As noted above in the section concerning executive authority, some autonomy arrangements provide for the execution or implementation by the autonomous government of general norms set by the national/sovereign government. For example, national health and social security legislation is implemented by the Basque autonomous community,<sup>143</sup> and the Swiss cantons under the 1874 Constitution have the duty, enforceable by the federal authorities, to provide education.<sup>144</sup> Even where complete local autonomy exists in theory, the local government may in fact tailor its social legislation after that of the central or sovereign entity, *e.g.*, the Isle of Man.

<sup>137</sup> ERITREA CONST., Art. 5.

<sup>138</sup> Greenland Home Rule Act, *supra* note 88, Schedule.

<sup>139</sup> UAE CONST., Arts. 120, 121.

<sup>140</sup> Aland Autonomy Law, sec. 35.

<sup>141</sup> 1932 Catalan Stat., Art. 2.

<sup>142</sup> 1979 Basque Stat., Art. 6.

<sup>143</sup> *Id.*, Art. 18.

<sup>144</sup> 1874 SWITZERLAND CONST., Art. 27.

*Finance and Economy*

The great majority of the nonsovereign entities surveyed, with the exception of the Free Territory of Trieste, the Isle of Man, the associated states, and possibly the proposed Federal Republic of Cyprus, form part of an economic and customs union with the principal or sovereign government. Control over customs and excise duties is therefore generally vested in the central/sovereign government, although the actual collection of such taxes may be delegated to the autonomous entity, *e.g.*, Eritrea.<sup>145</sup> Other financial matters almost universally under the control of the sovereign government include regulation of currency and the coinage of money, regulation of foreign and interstate commerce, and regulation of the banking system.

The authority to impose local taxes, on the other hand, generally has been deemed to be a matter within the jurisdiction of the local or autonomous territory. This power is specifically granted to the autonomous community in the relevant documents concerning, for example, Eritrea,<sup>146</sup> Shanghai,<sup>147</sup> and Memel,<sup>148</sup> and is implicit in the reserved or residual powers retained under their documents by, *e.g.*, the Swiss cantons, Danzig, and the Cook Islands.

Other, more detailed arrangements also have been agreed upon. For example, the 1978 Spanish Constitution provides that the autonomous communities "shall enjoy financial autonomy for the development and exercising of their competencies, in conformity with the principles of coordination with the State National Treasury and solidarity among all Spaniards."<sup>149</sup> The 1979 Basque Autonomy Statute additionally provides that relations in the tax sector between the autonomous community and the central Government will be governed by a traditional form of agreement or accord ("*Concierto Económico o Convenios*") between the two governments.<sup>150</sup> Among the matters to be decided in this manner is the amount of a lump sum payment to be made by the Basque authorities to the central Government as the Basque contribution to national expenses for services provided to the Basque country.<sup>151</sup> The Basques also may be granted funds from the general national budget in payment for services delegated to the autonomous community by the national authorities.<sup>152</sup> Thus, the Basques in principle have a fairly extensive degree of financial autonomy, although it is too early to determine what the scope of this autonomy will be in practice.

The non-self-governing territories of and entities associated with the United States also enjoy special tax status in some cases. Puerto Rico, for example, is exempt from the provisions of the federal income tax law and is free to impose its own local taxes.<sup>153</sup> In Guam, the federal income taxes

<sup>145</sup> Eritrea Federal Act, *supra* note 21, para. 3.

<sup>146</sup> ERITREA CONST., Art. 5(1).

<sup>147</sup> Shanghai Land Regulations, *supra* note 56, sec. 10.

<sup>148</sup> Memel Stat., Art. 5(12).

<sup>149</sup> SPAIN CONST., Art. 156.1.

<sup>150</sup> 1979 Basque Stat., Art. 41.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Id.*, Art. 42; SPAIN CONST., Art. 158.1.

<sup>153</sup> Puerto Rican Federal Relations Act, *as amended*, sec. 9, originally enacted as the Jones Act of Mar. 13, 1917, ch. 145, 39 Stat. 951 (codified at 48 U.S.C. §734 (1980)).

attributable to Guam are covered into the Guam treasury as though they were collected as a territorial income tax and thus provide a significant amount of Guam's revenue.<sup>154</sup> Both Guam and Puerto Rico enjoy certain preferential treatment with respect to customs duties as well.<sup>155</sup>

The public indebtedness of Guam, Puerto Rico, and the U.S. Virgin Islands is restricted by federal laws, which possibly reflects their less than fully autonomous status.<sup>156</sup> Such a limitation is not common with respect to the other entities with local fiscal responsibility that were examined.

*Cultural, Religious, and Minority Group Autonomy*

This analysis has focused on situations in which the autonomous entities enjoyed, to a greater or lesser degree, a measure of general political or governmental autonomy. Thus, it has covered the extent of such entities' executive, legislative, and judicial authority, besides examining specific areas such as police powers and control over local finances. However, there are several entities that have been granted "autonomy" not as a response to desires for political self-government, but rather as a means of guaranteeing to certain social or ethnic groups a degree of independence from governmental interference in matters of particular concern to these groups, *e.g.*, cultural autonomy or religious freedom. Examples of such limited autonomy include the Belgian linguistic communities, the Aland Islands, the millets under the Ottoman Empire, the provisions for ethnic minorities in Eritrea, and the *de facto* cultural autonomy enjoyed by traditional societies in the Tokelau atolls.

While each of these examples is sufficiently unique to require reference to its particular historical situation, one can observe generally that the effect of the relevant statutory or other provisions in these cases is to protect certain customs, practices, and societal structures from interference on the part of the central or sovereign government. Thus, the religious-based millets established in the Ottoman Empire were independent within the restricted realms of religious practice and law and the regulation of the civil status of members of the millets.<sup>157</sup> They also seem to have enjoyed a degree

<sup>154</sup> Guam Organic Act, sec. 30 (codified at 48 U.S.C. §1421h (1980)).

<sup>155</sup> See, *e.g.*, Puerto Rican Federal Relations Act, sec. 3 (codified at 48 U.S.C. §738 (1980)); Guam Organic Act, sec. 27 (codified at 48 U.S.C. §1421e (1980)); see also the territorial exceptions to the General Tariff Schedule, 19 U.S.C. §1202, headnote 3(a) (1980).

<sup>156</sup> Guam Organic Act, sec. 11 (codified at 48 U.S.C. §1423a (1980)); Puerto Rican Federal Relations Act, sec. 3 (codified at 48 U.S.C. §728 (1980)); Revised Virgin Islands Organic Act of 1954, sec. 8(b) (i) (codified at 48 U.S.C. §1574(b) (i) (1980)).

<sup>157</sup> It is beyond the scope of the present article to discuss the complexities of the Ottoman millet system in depth. The millet concept, which involved the granting of a degree of cultural and civil autonomy to religious communities within the Ottoman Empire, seems to have originated with the establishment of the Greek Orthodox millet in the mid-15th century. Distinctions between the religious authority of the millets and the secular authority of the Ottoman administration are far from clear; they also varied greatly depending on the time frame studied. While the millets' jurisdiction was personal rather than territorial, each millet tended to constitute a geographical community as well. See generally S. SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY* (2 vols., 1976); H. GIBB & H. BOWEN, *ISLAMIC SOCIETY AND THE WEST* (1950); A. LYBYER, *THE GOVERNMENT OF THE OTTOMAN EMPIRE IN THE TIME OF SULEIMAN THE MAGNIFICENT* (1913).

of administrative autonomy, in that the collection of taxes and responsibility for the general behavior of the community could be delegated from the Ottoman rulers to the heads of the various millets. Similar recognition was granted in more formal statutory language to tribal or ethnic groups within Eritrea: all Eritrean nationals were guaranteed "the right to respect for their customs and their own legislation governing personal status and legal capacity, the law of the family, and the law of succession."<sup>158</sup> In addition, customary property rights, including rights to state-owned land, could not be impaired in a discriminatory manner, and ethnic languages were permitted in dealings with governmental authorities, as well as for religious and educational purposes.<sup>159</sup>

The Aland Islands and the linguistic communities in Belgium are concerned more strictly with questions of language, education, and culture than with religious or traditional structures of society. In the Alands, the islanders have been granted independent home rule in these specific areas of concern, *i.e.*, use of language and control over education,<sup>160</sup> while in Belgium the cultural autonomy enjoyed by the linguistic communities in large part stems from their formal political recognition by the national Government, as much as from the establishment of "cultural councils" within each community.<sup>161</sup> These cultural councils may determine by decree matters dealing, *inter alia*, with culture, education, the use and protection of language, museums, leisure facilities and travel, and radio and television broadcasting (subject to central governmental control over governmental communications and commercial advertising).<sup>162</sup>

The jurisdiction of the Ottoman millets and the Eritrean minorities was personal rather than territorial. In the Aland Islands and the New Zealand territory of Tokelau, on the other hand, territory is the basis for jurisdiction; an Alander or Tokelauan who leaves his traditional homeland presumably becomes subject to the general jurisdiction of the state (although it is unclear what effect might be given to, for example, a traditional marriage or divorce in Tokelau were the parties subsequently to leave and reside in New Zealand). The decrees adopted by the Belgian cultural councils are applied in both the French and the Dutch language regions, although there is provision for the exemption of communes technically within one region but linguistically linked to another, as well as for transregional and national institutions.<sup>163</sup> While basically territorial, the Belgian system thus allows for the exercise of some personal jurisdiction.

<sup>158</sup> ERITREA CONST., Art. 36.

<sup>159</sup> *Id.*, Arts. 37, 38.

<sup>160</sup> Aland Autonomy Law, Arts. 35, 37, 38, 39.

<sup>161</sup> Cf. CONST. OF BELGIUM, as amended in 1971, Arts. 3c, 59b, 59c, reprinted in 2 Blaustein & Flanz. For a history of the political and legal issues that eventually resulted in the 1971 constitutional changes, see Case Relating to Certain Aspects of the Laws on the Use of Language in Education in Belgium, [1966] Y.B. EUR. CONV. ON HUMAN RIGHTS 644 (Eur. Ct. of Human Rights), and the Report of the European Commission on Human Rights in the same case, "Linguistic Cases," Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, and 2126/63, June 24, 1965.

<sup>162</sup> BELGIUM CONST., Art. 59b; Act of July 1971 relating to the powers and procedures of the cultural councils for the French cultural community and for the Dutch cultural community (Belgium), Art. 2, reprinted in 2 Blaustein & Flanz.

<sup>163</sup> BELGIUM CONST., Art. 59b, sec. 4.

The range of autonomous functions these cultural or religious communities are permitted to exercise is indeed narrow, with the possible exception of the isolated, traditional societies of Tokelau. It might not be inappropriate in some cases to compare such "autonomy" to the scope of freedom from governmental control that might be found within a broadly construed right to freedom of religion or freedom of privacy. At the same time, however, state recognition of the binding nature of religious or cultural norms within particular communities goes beyond the mere noninterference that, in the United States, is generally associated with freedom of religion.

#### IV. CONCLUSION

This article has sought to survey a wide range of intergovernmental relationships in which one of the parties, although not fully independent, enjoys some degree of "autonomy" in the conduct of its own affairs. It is hoped that, in addition to contributing generally to the literature in this somewhat neglected area of public international law, and thus providing some guidance for decisionmakers considering the establishment of regional autonomous entities, the observations made here also may prove helpful to those seeking to define "full autonomy," as that term is used in the Camp David framework, in a historical and legal context.<sup>164</sup>

It must be remembered that autonomy is not a term of art or a concept that has a generally accepted definition in international law. While the degree of autonomy or self-government enjoyed by a territory often has been utilized by international legal scholars to determine in which category of special sovereignty or dependency—protectorate, vassal state, dependent state, colony, associated state, or other category—a territory should be placed, these categories often are overlapping and frequently subject to scholarly disagreement.<sup>165</sup> Thus, autonomy is a relative term that describes the extent or degree of independence of a particular entity rather than defining a particular minimum level of independence that can be designated as the status of "autonomy."

The related principle of self-government has been the subject since 1945 of a developing political "jurisprudence" within the context of the United Nations, although neither the precise definition nor the application of these norms of self-government has been fixed or is wholly consistent.<sup>166</sup> Nevertheless, one undoubtedly may conclude that an essential element in the achievement of self-governing status is the freely and democratically expressed wishes of the people concerned. Given this democratic choice, self-government then may be achieved, according to UN standards, by a territory's emergence as a sovereign independent state, by free association with an independent state, or by full integration with an independent state.<sup>167</sup>

<sup>164</sup> Note 2 *supra*.

<sup>165</sup> See generally I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 60–69 (3d ed. 1979); M. YDIT, *supra* note 12, at 16–21, 319–21; J. BRIERLY, *THE LAW OF NATIONS* 126–37 (6th ed. 1963); C. HYDE, *1 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 23–51 (1922); W. WILLOUGHBY & C. FENWICK, *supra* note 9, at 5–13, 89–112; C. FENWICK, *WARDSHIP IN INTERNATIONAL LAW* (1919).

<sup>166</sup> See Clark, note 13 *supra*; S. HASAN AHMAD, *THE UNITED NATIONS AND THE COLONIES* 220–82 (1974).

<sup>167</sup> Cf. GA Res. 1541 (XV), note 80 *supra*, and Principles VI–IX annexed thereto.

Autonomy and self-government, however, do not necessarily imply that a territory must be wholly independent and comparable to a sovereign state.<sup>168</sup> Among those kinds of subordination to a higher or principal governmental entity that clearly do *not* detract even from a territory's statehood, and that therefore cannot be said to be inconsistent with its full autonomy, are: common citizenship or nationality; delegation of competence in the area of foreign relations; delegation of competence in the area of defense, including the retention by other states of limited powers of intervention under specific circumstances, *e.g.*, Cyprus;<sup>169</sup> establishment of a common customs union or currency; and subordination to the highest judicial authority of the sovereign or principal state. Even associated statehood, which generally is accepted as a status of full self-government, recognizes the political and economic dependence of one territory on another, although at the same time acknowledging the dependent territory's existence as a discrete entity with at least some degree of international personality.

Full autonomy and self-government refer essentially to the *internal* government of a territory; in the majority of cases, the autonomous territories have no international personality and are not treated as "states" for the purposes of international law.<sup>170</sup> It is true, however, that in some recent instances limited authority has been granted to autonomous territories to join international organizations or to enter into international agreements.<sup>171</sup> An autonomous or self-governing territory, as exemplified by the ones included in the present survey, therefore would enjoy *less* independence than a "state."

Although arriving at a firm definition that is appropriate in all cases is impossible, it is helpful to identify the *minimum* governmental powers that a territory would need to possess if it were to be considered fully autonomous and self-governing. Based on the entities surveyed, it is suggested that the following principles would be applicable to a fully autonomous territory:

- (1) There should exist a locally elected body with some independent legislative power, although the extent of the body's competence will

<sup>168</sup> "Sovereignty" is a rather amorphous, if oft-used, term that may be defined in a somewhat circular manner as the totality of international rights and duties recognized by international law as residing in a state. *Cf.* J. CRAWFORD, note 8 *supra*; M. YDIT, *supra* note 12, at 16-18. A traditional definition would be that sovereign states are "those states which exercise supreme authority over all persons and property within their borders and are completely independent of all control from without." W. WILLOUGHBY & C. FENWICK, *supra* note 9, at 5. *But see* I. BROWNLIE, *supra* note 165, at 80-81; and J. BRIERLY, *supra* note 165, at 7-16.

<sup>169</sup> Greece, Turkey, and the United Kingdom each retained the right to intervene in Cyprus "with the sole aim of re-establishing the state of affairs established by the present Treaty." London-Zurich Accords, Treaty of Guarantee, signed Aug. 16, 1960, Art. 4, 382 UNTS 3. Cyprus has nevertheless been universally accepted as a sovereign independent state.

<sup>170</sup> The classic definition of a "state" is found in the Convention on Rights and Duties of States, signed at Montevideo on Dec. 26, 1933, 49 Stat. 3097, 165 LNTS 19, Art. 1: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."

<sup>171</sup> See, *e.g.*, Charter of the Kingdom of the Netherlands, Art. 28; Micronesia Compact, sec. 122.

be limited by a constituent document. Within the realm of its competence—which should include authority over local matters such as health, education, social services, local taxation, internal trade and commerce, environmental protection, zoning, and local government structure and organization—the local legislative body should be independent, and its decisions should not be subject to veto by the principal/sovereign government unless those decisions exceed its competence or are otherwise inconsistent with basic constitutional precepts.

(2) There should be a locally chosen chief executive, possibly subject to approval or confirmation by the principal government, who has general responsibility for the administration and execution of local laws or decrees. The local executive may be given the authority to implement appropriate national/federal laws and regulations, although this is not a necessary power to attain autonomy.

(3) There should be an independent local judiciary, some members of which may also be subject to approval or confirmation by the central/principal government, with jurisdiction over purely local matters. Questions involving the scope of local power or the relationship between the autonomous and principal governments may be considered by either local or national courts in the first instance and generally may be appealed to a nonlocal court or a joint commission of some kind for final resolution.

(4) The status of autonomy and at least partial self-government is not inconsistent with the denial of any local authority over specific areas of special concern to the principal/sovereign government, as opposed to the reservation by the sovereign of general discretionary powers. Among the cases surveyed, for example, specific provision has been made for central governmental participation in or control over matters such as foreign relations; national defense; customs; immigration; security of borders and frontiers; airports and ports; inter-provincial water and energy resources; general norms of civil, criminal, corporate, and financial behavior, as expressed in national legislation; restrictions on the taxing or debt-issuing authority of the autonomous entity; monetary, banking, and general economic policy; and inter-provincial or extraprovincial commerce. In addition, the central government has the power of eminent domain for public works and must approve any proposed amendment to the constitution or other basic constituent documents.

(5) Full autonomy and self-government also are consistent with power-sharing arrangements between the central and autonomous governments in such areas as control over ports and other aspects of transportation, police powers, exploitation of natural resources, and implementation of national/central legislation and regulations.

As noted in the introduction, one of the most significant distinctions to be borne in mind when assessing the degree of autonomy that is likely to be possessed by a territory is whether or not the territory forms part of a federal system. While the extent of internal autonomy enjoyed by a subfederal territory may vary considerably, on the international plane the central government will be supreme. If the subfederal entity possesses any degree of international personality, it is likely to be either contingent on

central government approval (*e.g.*, Greenland's participation in international negotiations<sup>172</sup>) or very restricted (*e.g.*, the right of individual emirates in the United Arab Emirates to retain their membership in OPEC<sup>173</sup>).

Federal states also are more likely to provide for joint or concurrent jurisdiction over areas of mutual concern than are nonfederal entities. These areas of shared jurisdiction include local implementation of national/federal laws (*e.g.*, the Basque country<sup>174</sup> and Eritrea<sup>175</sup>) as well as more formal arrangements (*e.g.*, joint Danish-Greenlandic control over Greenland's natural resources<sup>176</sup>).

The status of associated statehood can be rather easily distinguished from the other entities surveyed. In essence, associated states have all the powers and prerogatives of sovereign independent states, except for those powers they unilaterally choose to delegate to the principal government (typically foreign affairs and defense). An associated state's control over its internal affairs is unlimited, and it retains the power not only to alter unilaterally its own constitution, but also to sever its relationship with the principal entity. Thus, the line between full autonomy and statehood in the context of free association essentially disappears, as the associated state retains the potential of achieving full sovereignty and independent statehood at any time it so decides.

The granting of only cultural and religious autonomy, even if coupled with certain administrative responsibilities, would *not* seem to constitute "full" autonomy or self-government. The degree of religious or cultural independence enjoyed by, *e.g.*, the Ottoman millets,<sup>177</sup> or the authority over education granted to the Aland Islands<sup>178</sup> or the linguistic communities in Belgium,<sup>179</sup> simply does not include sufficient political or legal control over internal matters to constitute full autonomy as that term might be applied to, *inter alia*, Eritrea, the Swiss cantons, or the "internationalized territories" of Danzig, Memel, Trieste, Shanghai, and the Saar.

Nor does the distinction between personal and territorial jurisdiction appear to be crucial in attempting to define full autonomy. However, since many governmental powers are by their nature territorial, *e.g.*, control over internal trade, public works, zoning, and the exercise of general police powers, it is unlikely that a regime with purely personal jurisdiction over its members would be considered fully autonomous.

A distinction also should be drawn between transitional and permanent regimes. In practice, the former have granted a much more limited degree of autonomy to the local community during the transitional period; *de facto* government has often been in the hands of an administering authority responsible to the central/principal government. In addition, most transitional regimes have been established in the context of an agreed-upon

<sup>172</sup> Greenland Home Rule Act, *supra* note 88, sec. 16.

<sup>173</sup> UAE CONST., ART. 123.

<sup>174</sup> 1979 Basque Stat., Art. 12.

<sup>175</sup> Eritrea Federal Act, *supra* note 21, para. 3.

<sup>176</sup> Greenland Home Rule Act, *supra* note 88, sec. 8.

<sup>177</sup> See discussion in text at notes 157-163 *supra*.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*



future arrangement or at least a fairly well-defined set of options to be made available at the end of the transitional period.<sup>180</sup>

A summary can do little more than note the extreme diversity of the entities surveyed and the wide variations exhibited in the degree of autonomy or internal self-government each one enjoys. Certainly the concept of self-government and the right to participate meaningfully in those decisions that directly affect a local community are of growing importance, as evidenced by the many current proposals for "autonomy" referred to in the introduction. Also worthy of note, however, is what may be the beginning of a trend away from independence and full statehood as the only answer to the problems perceived either by ethnic communities within existing states or by non-self-governing territories that have yet to emerge fully on the international stage.<sup>181</sup> The proliferation of "mini-" or "micro-states," independent in name only, has been the subject of much critical comment; in many instances a form of associated statehood, for example, might reflect political realities more accurately.<sup>182</sup>

In sum, growing demands for regional self-government, the proliferation of small, newly independent states, and the increasingly complex interdependence of contemporary world politics no longer correspond to the sovereign nation-state simplicity of the nineteenth century. Autonomy remains a useful, if imprecise, concept within which flexible and unique political structures may be developed to respond to that complexity.

<sup>180</sup> E.g., the three options available to the Saar at the end of the 15-year period of League administration were set forth in the Treaty of Versailles, Art. 49, note 25 *supra*, and in the Saar Stat., Arts. 34-39; and the permanent regime for Trieste was substantially defined in the Trieste Statute approved prior to the projected entry into force of the transitional regime.

<sup>181</sup> It is practically impossible to estimate the number of non-self-governing territories that might attain independence or self-government in the future, and the likelihood of such change evidently varies greatly from case to case. Cf. E. PLISCHKE, *MICROSTATES IN WORLD AFFAIRS*, App. B. (1977); G. PEARCY, *WORLD SOVEREIGNTY*, App. 4 (1977). Independence is anticipated in 1980 for the New Hebrides (*see* letter dated Feb. 26, 1979, from France and the United Kingdom to the UN Secretary-General, UN Doc. A/34/103 (1979)); associated statehood in 1981 for the districts of the Trust Territory of the Pacific Islands (*see* Clark, note 13 *supra*, and sources cited at note 44 *supra*); and full de facto independence for Brunei in 1983, when the United Kingdom's responsibility for Brunei's foreign relations and defense will terminate (*see* letter dated Feb. 23, 1979, from the United Kingdom to the UN Secretary-General, UN Doc A/34/98 (1979), and Note Verbale dated Sept. 26, 1975, from the United Kingdom to the UN Secretary-General, UN Doc. A/10269, Annex (1975)).

<sup>182</sup> Panel, *The Participation of Ministates in International Affairs*, ASIL, 62 PROC. 155-88 (1968). Compare E. PLISCHKE and sources cited therein, note 181 *supra*.

## EDITORIAL COMMENTS

RICHARD R. BAXTER

The death of Judge Richard R. Baxter on September 26, 1980 brought to an untimely end a life dedicated to international law and distinguished for scholarly contributions and leadership of the profession. Richard Baxter will long be remembered and admired for that, and even more for his remarkable personal qualities. His eloquence, wit, and infectious high spirits would enliven the dullest of meetings. Serious as he was about international law, he never failed to see its lighter and humorous side. He was learned not only in the law but in the humanities generally. One could tell by his graceful turn of phrase and apt quotation. This breadth was also evidenced by his sympathetic understanding of varied points of view and widely diverse personalities. He had close friends all over the world; those friendships transcended political or ideological differences. His own views were deeply held. They reflected the commitment to the ideals of individual dignity, rationality, and decency that he exemplified in his own life.

Richard Baxter served as the Editor-in-Chief of this *Journal* from 1970 to 1978, and prior to that he was for many years on its Board of Editors. The *Journal* was for him a labor of love. He always carried manuscripts with him. He was often seen in the Harvard Law Library after midnight checking citations. Many a published article could properly have carried his name as coauthor. When he rejected an article, he would write an encouraging and sympathetic letter, often suggesting how a better piece might be written. Perhaps only his successors have been fully aware of the vast extent of his correspondence and the care he took with each of his responses. In this way, as through his teaching, his personality and his commitment to high standards influenced international lawyers throughout the world.

That influence was also seen in the wide range of his activities in professional organizations. He was long a leader in the American Society of International Law, serving on numerous committees, frequently sending his ideas to others, and giving generously of his already fully committed time. He was the President of the Society from 1974 to 1976 and an honorary Vice-President since then. As Professor Baxter, he also played a leading role in the International Law Association and rarely missed its international conference. As chairman of the international committee on extraterritorial jurisdiction, he was largely responsible for one of the most valued studies of the ILA.

Richard Baxter's primary identification for the greater part of his career was with the Harvard Law School. He joined its faculty in 1954 and was the first holder of the Manley Hudson Chair of International Law. As a teacher, he helped launch numerous international lawyers upon their careers. Busy as he was, he always had time for help and guidance to them. Many have attested to the decisive role he played in inspiring them to continue their work in international law.

Professor Baxter's own research and writing was prodigious. One cannot

do justice to it without writing a long article. His contributions were in many fields. One thinks of him as one of the leading experts in the humanitarian law of war, a field he worked in while in the U.S. Army and Department of Defense. He is also known for the influential Draft Convention and Commentary on Responsibility of States for Injuries to Aliens, which Professor Louis Sohn and he prepared in the late 1950's. One of his major works was his authoritative monograph *The Law of International Waterways* (1964). His several studies on the relation of treaty and customary law are among the most cited works in contemporary international law. He wrote numerous reports for governmental agencies and international organizations on a variety of subjects. He served on State Department committees and as a United Nations expert. His counsel was often sought and, virtually tireless, he frequently responded.

When he was nominated and elected to the International Court in 1978, his selection was universally acclaimed by international lawyers. It was no secret in the profession that the U.S. nominating group had demonstrated its independence of the Government and had chosen Professor Baxter over a candidate supported by the President and Secretary of State. There was every reason to expect that Judge Baxter would prove to be one of the great figures on the Court. In the event, he had only an opportunity to take part in the case concerning the Tehran hostages. Several of his fellow judges have commented privately on the excellent impression he made during the Court's deliberations for his well-reasoned and objective analysis of the issues.

His passing is a grievous loss to the Court, as it is to all who are devoted to the cause of international law.

OSCAR SCHACHTER

#### ALONA EVANS

Professor Alona E. Evans, President of the American Society of International Law and a member of the Board of Editors of this *Journal*, died on September 23, 1980. Her death is a cruel blow to the Society and this *Journal*. As a scholar, teacher, and leader in professional organizations, Alona Evans was held in the highest esteem. She was also a gracious, warm, and devoted friend and colleague.

Alona Evans had a lifelong interest in international affairs. She received her undergraduate degree and Ph.D. from Duke University, served for 2 years in the State Department during World War II, and began her teaching career in 1944. In 1945 she joined the faculty of Wellesley College and remained there until her death. For the last 15 years, she was the Elizabeth Kimball Kendall Professor of Political Science. She was the recipient of many awards and fellowships, including the Achievement Award of the American Association of University Women. As a teacher of undergraduates, she inspired many to undertake careers in law and political science. Her students were invariably enthusiastic about the courses they took with her.

Professor Evans was a productive scholar in international law. She was

a leading authority on extradition and in recent years contributed significantly to studies on legal means to combat terrorism. She was chairman of the ASIL Committee on Terrorism and a coeditor of the highly praised publication that resulted from that committee's work. As a member of the Board of Editors of the *American Journal of International Law*, she had the not inconsiderable task of editing the Judicial Decisions department. It was a task she performed in her characteristically reliable and intelligent manner.

Alona Evans's qualities of leadership and her valued service to the American Society of International Law were recognized by her election as President of the Society in April 1980. She was the first woman to hold that post. One of her first acts as President was to appoint a special committee to review the organization and activities of the ASIL. She expected that the results of that committee would invigorate the Society and particularly improve it as an instrument for public education. A second important step she took was to move ahead with plans for a 75th anniversary program in 1981. She had high hopes for the contribution that could be made by that program toward clarifying the role of international law and broadening public awareness of that role. Professor Evans was determined to ensure that both of these special undertakings would be landmarks in the development of the Society. It is profoundly sad that she will not be able to see the fruits of these initiatives, but her memory should inspire all concerned to strive for the aims she valued so highly.

OSCAR SCHACHTER

### THE DOCTRINE OF SELF-EXECUTING TREATIES AND *U.S. v. POSTAL*: WIN AT ANY PRICE?

In *United States v. Postal*<sup>1</sup> the U.S. Court of Appeals for the Fifth Circuit held that seizure by the U.S. Coast Guard of a foreign flag vessel on the high seas in violation of the Convention on the High Seas,<sup>2</sup> and, in particular, of its Article 6,<sup>3</sup> did not deprive a U.S. court of jurisdiction over persons arrested aboard the foreign vessel so seized. The U.S. Supreme Court denied the writ of certiorari.<sup>4</sup> The judgment of the appellate court rested on the ground "that article 6 is not self-executing and that, by virtue of the *Ker-Frisbie* doctrine, the defendants cannot rely upon a mere violation of international law as a defense of the court's jurisdiction."<sup>5</sup> In my opinion this holding is subject to legitimate doubt and criticism despite the U.S. Supreme Court's denial of the writ of certiorari.

#### I.

The facts of the case, in the language of the court, were "somewhat bizarre" and deserve to be set out in detail. The *La Rosa*, the captured vessel

<sup>1</sup> 589 F.2d 862 (5th Cir. 1979).

<sup>2</sup> 450 UNTS 82, 13 UST 2312, TIAS No. 5200.

<sup>3</sup> Article 6 provides: "1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. . . ."

<sup>4</sup> 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 40 (1979).

<sup>5</sup> 589 F.2d at 884.

in question, was a 51-foot Morgan sailboat of Grand Cayman registry.<sup>6</sup> Thus she was a foreign private pleasure craft rather than a commercial merchant vessel.<sup>7</sup> When she was first sighted by the Coast Guard, she displayed no flag and exhibited neither name nor home port on her stern. She was boarded by the Coast Guard while approximately 10.5 miles off the coast of Florida. Upon showing her documentation the boarding crew departed and the vessel continued her voyage. Because of her erratic course the vessel remained under surveillance, followed by a second boarding ordered by the Coast Guard Operations Center in Miami. At that time the vessel was some 16.3 miles from the nearest United States coastline. The Coast Guard on that occasion conducted a customs search and discovered about eight thousand pounds of marijuana. Upon that event the crew of the *La Rosa* was arrested and transferred to the Coast Guard vessel *Cape York* which was involved in the venture. The *La Rosa* was taken in tow and vessel and crew were brought to the United States for criminal prosecution.

The defendants were convicted of conspiring to import marijuana into the United States in violation of 21 U.S.C., section 963, and of conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C., section 846. On appeal, a panel of the U.S. Court of Appeals, consisting of Judges Tjoflat, Wisdom, and Vance, affirmed the judgment of the district court and rejected various grounds for reversal urged by defendants. *Inter alia*, appellants contended that the U.S. courts lacked jurisdiction over the defendants because the seizure of the *La Rosa* on the high seas was in violation of the Convention on the High Seas, that the Coast Guard had no statutory authority to seize foreign private vessels outside the territorial waters or the contiguous zone of the United States, that the statutory provisions upon which the conviction was based had no extraterritorial application, and that the arrest was in violation of defendants' Fourth Amendment rights. The court rejected all arguments. This comment deals only with the issue whether U.S. courts possessed jurisdiction over defendants even though the seizure of the *La Rosa* was held to be in violation of the Convention on the High Seas.<sup>8</sup>

In discussing the jurisdictional issue the court determined that the second boarding of the *La Rosa* and the attendant seizure of the vessel "cannot be justified as within the hot pursuit provisions of article 23 of the Convention on the High Seas or the right of approach provisions of article 22" and therefore found "that article 6 of the Convention on the High Seas was violated."<sup>9</sup> Nevertheless the court held that the illegality of the seizure did not deprive the court of jurisdiction, because the jurisdiction was covered by the so-

<sup>6</sup> *Id.* at 865.

<sup>7</sup> The court held that Articles 6, 22, and 23 of the Convention on the High Seas apply to pleasure craft as well as privately owned merchant vessels with respect to the recovery of a penalty against the master.

<sup>8</sup> For a lengthy comment on the substance of the fourth contention, see Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725 (1980).

<sup>9</sup> 589 F.2d at 873.

called *Ker-Frisbie* doctrine<sup>10</sup> and not defeated by the special *Cook* exception.<sup>11</sup> *Ker-Frisbie* furnishes authority for the rule that personal jurisdiction over an accused is not defeated by the fact that the presence of the accused is due to illegal arrest, including seizure in violation of the territorial sovereignty of a friendly nation. The *Cook* exception precludes the application of this doctrine in cases where a self-executing treaty expressly limits the jurisdiction of the contracting parties.

In a lengthy discussion the court concluded that the *Cook* exception was not applicable because Article 6 of the Convention on the High Seas was not self-executing and thus did not prevail over 14 U.S.C., section 89(a), which empowers the Coast Guard to "make . . . seizures and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States." Had the court considered Article 6 to be self-executing, a different result might have been indicated since the Convention on the High Seas entered into force for the United States on September 30, 1962, while 14 U.S.C., section 89(a) was originally enacted in 1933 as an act to define the jurisdiction of the Coast Guard.<sup>12</sup> Accordingly, Article 6 of the convention would have been the *lex posterior* and thus superseded the statute to the extent of a conflict. The court clearly recognized this result. It decided, however, that Article 6 of the Convention on the High Seas was

<sup>10</sup> In *Frisbie v. Collins*, 342 U.S. 519, 522, 72 S.Ct. 509, 511, 96 L.Ed. 541 (1952); and *Ker v. Illinois*, 119 U.S. 436, 444, 7 S.Ct. 225, 229, 30 L.Ed. 421 (1886), the U.S. Supreme Court held that illegal arrest of a defendant did not deprive U.S. courts of jurisdiction over the defendant for crimes committed by such defendant within the jurisdiction of the United States or an individual state; reaffirmed in *Gersten v. Pugh*, 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54 (1975). The illegality of the arrest in *Ker v. Illinois* consisted in the forcible abduction of defendant from Peru without resort to extradition procedures.

<sup>11</sup> In *Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933), the U.S. Supreme Court held that seizure of a foreign vessel in violation of a treaty between the United States and the flag state defeated jurisdiction of the courts of the United States over the vessel in proceedings against the vessel. The opinion of Justice Brandeis rested, *inter alia*, on *Ford v. United States*, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927), in which the Court upheld a conviction of British subjects of a conspiracy to violate the National Prohibition Act, although defendants claimed that the seizure of the vessel on which they were located at the time of their arrest was unlawful because they were not within the zone of the high seas prescribed by the same treaty involved also in the *Cook* case. Mr. Chief Justice Taft intimated that if that issue had been raised by a timely plea to the jurisdiction of the court, the Court might have made a different disposition of the case.

The issue whether the ship was seized within the prescribed limit . . . only affected the right of the court to hold [defendants'] persons for trial. . . . The proper way of raising the issue of fact of the place of seizure was by a plea to the jurisdiction. . . . And a plea was not filed.

273 U.S. at 606.

<sup>12</sup> 49 Stat. 1820. The purpose of that legislation, which was endorsed by the Department of Commerce and the Treasury, is explained in the report of the Committee on Merchant Marine and Fisheries on H.R. 12305, H.R. REP. NO. 2452, 74th Cong., 2d Sess. (1936). It was occasioned by certain dicta in *Maul v. United States*, 271 U.S. 501, 47 S.Ct. 735, 71 L.Ed. 171 (1927). While that case involved the seizure on the high seas of an American vessel, the statute extended to "any vessel, subject to the jurisdiction or to the operation of any law, of the United States." The scope of the new jurisdiction of the Coast Guard over foreign vessels on the high seas was not discussed in the congressional report. No record of the hearing is still available.

merely executory. The pivotal statement of its reasoning reveals its adherence to a unilateral "intent" test.

The Convention on the High Seas is a multilateral treaty which has been ratified by over fifty nations, some of which do not recognize treaties as self-executing. It is difficult therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations. This is not to say that by entering into such a multilateral treaty the United States cannot without legislation execute provisions of it, but one would expect that in these circumstances the United States would make that intention clear. The lack of mutuality between the United States and countries that do not recognize treaties as self-executing would seem to call for as much. Here there was no such manifestation.<sup>13</sup>

In sum, we do not believe that the United States intended to limit its traditionally asserted jurisdiction over foreign vessels on the high seas by adopting article 6 of the High Seas Convention. The determination of this intent must be the touchstone of our interpretation.<sup>14</sup>

It is respectfully submitted that in its application of the intent test the court "missed the boat" and confused distinct issues. The intent of the parties to an international treaty is relevant only to the question of whether private individuals shall have the right of protection in domestic courts against violations of a treaty provision. Whether this result is to be achieved by

<sup>13</sup> 589 F.2d at 878.

<sup>14</sup> *Id.* at 884. The panel in *U.S. v. Postal* apparently was unaware of the fact that its line of reasoning had been anticipated, more than 180 years earlier, by Mr. Justice Iredell, when he sat as judge on the Circuit Court for the District of Virginia in the case of *Ware v. Hylton*, but that it had been rejected by the U.S. Supreme Court when the case came before that Court on writ of error; 3 U.S. (3 Dall.) 199, 1 L.Ed. 568 (1796). That celebrated controversy involved the self-executing character of Article IV of the Treaty of Peace with Great Britain of 1783, which provided "that creditors of either side shall meet with no lawful impediments to the recovery of . . . all bona fide debts." Mr. Justice Iredell, adopting the distinction between executed and executory treaty provisions suggested by one of the counsels for the British plaintiffs, concluded that the article in question called for legislation by the individual states repealing inconsistent legislation because such action would have been necessary under British law; 3 U.S. 256, 279. The Supreme Court nevertheless held that the intent and purpose of Article IV was to nullify directly all existing impediments. Chief Justice Marshall, who was one of the counsels for the American debtors in *Ware v. Hylton*, did not resurrect Justice Iredell's analysis when he forged the intent test in his seminal opinions in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829), and *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1833).

The conclusions of the panel in *U.S. v. Postal* as to the non-self-executing nature of Article 6 of the Convention on the High Seas were cited with apparent approval by the majority opinion of the Court of Appeals for the Fifth Circuit, sitting en banc in *U.S. v. Williams*, 617 F.2d 1063 (5th Cir. 1980), after the grant of a rehearing, 600 F.2d 18 (5th Cir. 1979), following the panel decision in that case, 589 F.2d 210 (5th Cir. 1979). *U.S. v. Williams*, however, involved the seizure on the high seas of a foreign vessel whose flag state was not a party to the convention and, moreover, had consented to the search and seizure by the Coast Guard. A concurring opinion of 6 members of the court disassociated itself from the majority and relied exclusively on that consent, especially since "the law of nations generally does not afford individuals remedies against violations of international law"; 617 F.2d at 1092 n.9. Another group of 4 judges, speaking through Judge Rubin, dissented, and noted expressly that they "differ with the majority's analysis of international law and the discussion of self-executing treaties"; 617 F.2d at 1094 n.2.

legislation or by the treaty itself is a question of constitutional law and not within the purview of the intent either of all parties to the treaty or of a particular ratifying power. An explanation in greater detail seems to be in order.

## II.

The doctrine of self-executing treaties is relevant not only in the law of the United States but also in many other legal systems, including that of the Federal Republic of Germany, Austria, Switzerland, the European Communities and, since the reform of the preliminary title to the Civil Code, Spain.<sup>15</sup> For that reason it has produced extensive writings by American authors<sup>16</sup> as well as by foreign scholars.<sup>17</sup>

From a survey of the copious literature it emerges that the concept of self-executing treaties is in need of clarification. It has separate international and domestic constitutional aspects. The international aspect focuses on the issue of whether the treaty aims at the immediate creation of rights and

<sup>15</sup> The Preliminary Title to the Spanish Civil Code was revised by the Spanish Law 3/1973, March 17, 1973, and the Decree 1.836/1974, May 31, 1974. The new Article 1(5) provides as follows: "The legal rules contained in international treaties have no direct application in Spain, unless they have come to form part of the domestic legal order by means of their publication in their entirety in the Official Bulletin of the State" (translation by the author). For a detailed analysis of this provision and its background, see Gonzales-Campos, *Commentary to Article 1(5)*, in VARIOS AUTORES, *COMENTARIOS A LAS REFORMAS DEL CÓDIGO CIVIL Y LA LEY DE 2 DE MAYO DE 1975*, at 78-131 (Amorós Guardiola et al., Madrid 1977). The reform in 1974 of the status of treaties was one of the last steps in the series of measures taken since 1942 to define governmental powers and functions under the previous regime, including the treaty-making process as regulated by the important Decree 801/72 of March 24, 1972; see Gonzales-Campos, *supra* note 15, at 84-86. Article 96(1), first sentence, of the new Constitution of 1978 retains the provision of the Civil Code in slightly modified language: "Los tratados internacionales válidamente celebrados, una vez publicados oficialmente en España formarán parte del ordenamiento interno" (Validly concluded international treaties, once officially published in Spain, form part of the domestic law). For further commentaries, see ALZAGA VILLAAMIL, *COMENTARIO SISTEMÁTICO A LA CONSTITUCIÓN ESPAÑOLA DE 1978*, comments to Art. 96 (1978); F. Santaolalla López, *Los Tratados como fuente del Derecho en la Constitución*, 90 REV. DE ADMINISTRACIÓN PÚBLICA 7 (1979).

<sup>16</sup> See especially Claudy, *The Treaty Power and Human Rights*, 36 CORN. L.Q. 699, 713-28 (1951); Evans, *Some Aspects of the Problem of Self-Executing Treaties*, ASIL, 45 PROC. 66 (1951); Evans, *Self-Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178 (1954); Preuss, *The Execution of Treaty Obligations Through Internal Law—System of the United States and of Some Other Countries*, ASIL, 45 PROC. 82 (1951); Preuss, *On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties*, 51 MICH. L. REV. 1118 (1953); Reiff, *The Enforcement of Multipartite Administrative Treaties in the United States*, 34 AJIL 661, 668-79 (1940).

<sup>17</sup> Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge*, in 123 SCHRIFTEN ZUM ÖFFENTLICHEN RECHT (1970); A. Koller, *Die unmittelbare Anwendbarkeit völkerrechtlicher Verträge und des EWG-Vertrages im innerstaatlichen Bereich*, in 8 SCHWEIZERISCHE BEITRÄGE ZUM EUROPARECHT (1971); M. Waelbroeck, *Traité Internationaux et Juridictions Internes dans les Pays du Marché Commun* (1969); Wildhaber, *Treaty-Making Power and Constitution*, in SCHRIFTENREIHE DES INSTITUTS FÜR INTERNATIONALES RECHT UND INTERNATIONALE BEZIEHUNGEN (Univ. Basel, Heft 16, 1971); P. de Visscher, *Les Tendances internationales des constitutions modernes*, 80 RECUEIL DES COURS 511, 558-63 (1952 I); Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 COMM. MKT. L. REV. 425 (1972).



duties of private individuals which are enforceable and to be enforced by domestic tribunals. The domestic constitutional aspect deals with the question whether and under what circumstances such enforceability and enforcement needs separate legislative action to accomplish this aim.

The international aspect deals with the content or nature of the treaty obligation: what is to be accomplished and what is the time frame for such accomplishment. The domestic means for such accomplishment will usually not be of international concern. Of course, whether a treaty aims at the creation of *domestically* enforceable rights and duties of private parties depends on the treaty stipulation and in that respect on the intent of the state parties to the treaty, as ascertained by the applicable international rules of treaty interpretation.<sup>18</sup> The same holds true with respect to the related question, whether such creation should be "forthwith" or "in due course." The view here proposed conforms to the approach of the International Law Commission in its Draft Articles on State Responsibility.<sup>19</sup> The ILC draft nowhere refers to self-executing stipulations but differentiates between treaty provisions requiring the achievement of a specific result<sup>20</sup> and treaty provisions requiring the adoption of a particular course of conduct.<sup>21</sup> In the former case each state has the choice of the appropriate action for the achievement of the stipulated result, although its range of options may be limited by its constitutional law. In such a situation, as the ILC's commentary to proposed Article 21 observes, "the commands of international law . . . stop short at the outer boundaries of the State machinery."<sup>22</sup> As the commentary of the ILC also notes, obligations "of result" are much more common in international law than in internal law.<sup>23</sup> There are, however, cases in which problems of interpretation may arise that sometimes are not easily resolved.<sup>24</sup> Moreover, "it may also be that, within a system of rules governing an institution of international law, there are obligations 'of conduct' or 'of means' alongside other obligations which have the characteristics of an obligation 'of result.'"<sup>25</sup> As an example, the commentaries of the ILC to proposed Article 21 cite Article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.<sup>26</sup> In that article, the general rules governing the right of innocent passage through the territorial sea are formulated in terms of obligations "of result" rather than of "conduct" or "of means." But the particular case of the innocent passage of submarines is stated as an obligation "of conduct" or "of means," these vessels being required to navigate on the surface and to show their flag.<sup>27</sup> Of course, even where the obligation is one of result, the precise character of this "result" may still be difficult to determine, especially the question of whether that result consists merely in

<sup>18</sup> Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27, Arts. 31 and 32, reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).

<sup>19</sup> See Report of the International Law Commission on its twenty-ninth session, ch. II, [1977] 2 Y.B. INT'L L. COMM'N, pt. 2, at 13 *et seq.*

<sup>20</sup> *Id.*, proposed Art. 21.

<sup>21</sup> *Id.*, proposed Art. 20.

<sup>22</sup> Commentary to Art. 21, *supra* note 19, at 19.

<sup>23</sup> *Ibid.*

<sup>24</sup> Commentary (4) to Art. 20, *supra* note 19, at 13.

<sup>25</sup> Commentary (3) to Art. 20, *supra* note 19, at 12.

<sup>26</sup> 516 UNTS 205, 214, 15 UST 1606, TIAS No. 5639.

<sup>27</sup> Commentary (3) to Art. 20, *supra* note 19, at 12.

refraining from certain exercises of jurisdiction or also in providing domestic sanctions. At any rate, that determination concerns the true ambit of the international obligation.

Conversely, the way in which the internal domestic law of a nation must be brought into conformity with the mandates of a treaty provision is a matter governed solely by the constitutional law of each state party. To that extent, the intent of other state parties is irrelevant, and even the treaty-making authorities of that state party whose domestic law is involved may have little or no choice according to the governing constitutional provisions.

This is the interface where the constitutional aspects of the doctrine of self-executing treaties come into play. These aspects will vary with the constitutional regime governing the treaty-making power. Three main systems must be distinguished in that respect:

(1) In some nations the power to conclude treaties is vested in the executive and any treaty concluded by the executive in conformity with the applicable international rules is binding on the nation. If, however, the treaty provides for the creation of rights and duties of individuals, separate parliamentary action is necessary to accomplish this effect.<sup>28</sup>

(2) In the United States the treaty-making power is shared by the Executive and one House of the legislature. Under appropriate conditions,<sup>29</sup> a treaty so concluded may create rights and duties of individuals or have other domestic effects without legislation unless the treaty concerns specific matters recognized to require action by the entire legislature.<sup>30</sup>

(3) In an increasing number of nations having a bicameral system, the treaty-making power is shared by the executive and the entire legislature, at least with respect to treaties affecting subjects that otherwise would require legislative rather than executive action. An exception is Austria where only the principal legislative chamber, the *Nationalrat*, must give its approbation.<sup>31</sup> Unless a different form of action is authorized, as for instance, tacit approval in the Netherlands,<sup>32</sup> the approval is given by means of a statute or concurrent resolution.<sup>33</sup>

<sup>28</sup> E.g., Canada and the United Kingdom. See A. M. JACOMY-MILLETTE, *L'INTRODUCTION ET L'APPLICATION DES TRAITÉS INTERNATIONAUX AU CANADA* (1971); A. E. GOTLIEB, *CANADIAN TREATY-MAKING* (1968).

<sup>29</sup> I.e., the treaty must aim at the domestic effects of that type and be specific enough not to need further concretization by domestic action. See Riesenfeld, Note on *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 *AJIL* 548 (1971).

<sup>30</sup> It seems to be settled that very few, if any, areas are constitutionally withheld from the reach of self-executing treaties. See, e.g., Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 *CALIF. L. REV.* 643, 651 (1937), listing the appropriation of money and the imposition of penalties for criminal offenses as such subjects. See also *U.S. v. Postal*, 589 F.2d at 877 and authorities cited.

<sup>31</sup> AUSTRIAN CONST., Art. 50, as amended in 1964. See L. ADAMOVICH, *HANDBUCH DES ÖSTERREICHISCHEN VERFASSUNGSRECHTS* 331, 368-76 (6th ed. 1971).

<sup>32</sup> See M. Waelbroeck, *supra* note 17, at 51 and 52.

<sup>33</sup> See the discussions of the need for and form of the legislative approval in various countries by Bleckmann, *supra* note 17, at 186-96; M. Waelbroeck, *supra* note 17, at 47-121; Wildhaber, *supra* note 17, at 35-59. In Austria the approval by the National Council is not a law but merely a resolution since in that instance the Council does not "act together with the Federal Council," as Article 24 of the Austrian Constitution requires for legislation; see L. ADAMOVICH, *supra* note 31, at 331.

Despite the necessity of a legislative act, which like ordinary statutes is usually published in the respective official journal,<sup>34</sup> the "assent laws" are often distinguished from ordinary statutes as "laws in form" rather than "laws in substance" because ordinarily they do not have a separate prescriptive content. They are merely required for the international validity and, according to some theories, also for the internal effectiveness of the treaty, as governed by the controlling constitutional provisions. Some constitutional documents or doctrines do not recognize this "dual effect"<sup>35</sup> of the assent law, but attribute the internal effect entirely to the constitutional mandate.<sup>36</sup> Although this debate in the abstract seems to be quite academic, a real difference becomes manifest in those countries where the domestic effect of a valid and operating international treaty cannot be abrogated or superseded by an ordinary subsequent statute. This is the case, for instance, in Belgium and France and, with respect to treaties creating supranational organizations, in Germany and Italy.<sup>37</sup> The priority of international treaties over prior and subsequent statutes is also anchored in the new Spanish Constitution.<sup>38</sup> In Austria a treaty may be elevated to constitutional rank by a resolution of the National Council passed by a qualified majority.<sup>39</sup>

A survey of the constitutions, cases, and scholarly writings in other countries leads to the conclusion that even in countries in which legislative approval is needed for the conclusion of international treaties, the creation of rights, privileges, duties, and immunities cognizable in domestic courts is primarily a function of the particular treaty provision. The power of parties to invoke it in domestic courts depends upon its import, as determined from its language, context, purpose, negotiating history, and general background. The internal applicability is created *by virtue of* and—save where

<sup>34</sup> This does not apply to Austria where the assent resolutions, not being legislation, are not published as such; see Bleckmann, *supra* note 17, at 188. Treaties, however, that require assent by the National Council must be promulgated with reference to the approval of the National Council and published in the *Gazette of Federal Laws*; AUSTRIAN CONST., Arts. 48 and 49.

Most countries require publication of treaties, especially before they are capable of creating individual rights and duties; M. WAELBROECK, *supra* note 17, at 123–40; Wildhaber, *supra* note 17, at 205, 208, 210, 214, 216, 218, 223; ALZAGA VILLAAMIL, *supra* note 15, in comments to Art. 96 of the Spanish Constitution. In the United States, treaties are proclaimed by the President and published pursuant to the act of Sept. 23, 1950, 64 Stat. 979. See Reiff, *The Proclaiming of Treaties in the United States*, 30 AJIL 63 (1930).

<sup>35</sup> The "dual effect" doctrine was adopted by the German Constitutional Court, e.g., in the case 2 BvL 3/68, 30 BVerfGE 272, 7 FONTES JURIS GENTIUM A II, at 97 (1971). See M. WAELBROECK, *supra* note 17, at 67.

<sup>36</sup> This position is taken by the Federal Court of Switzerland and by Swiss authors, in view of the special mandate of Article 113, para. 3 of the Swiss Constitution. See Koller, *supra* note 17, at 64–67, 113.

<sup>37</sup> See *Etat Belge, Ministre des Affaires Economiques c. Soc. An. "Fromagerie Franco-Suisse Le Ski,"* 158 Pasicrisie Belge 886 (Cour de cass. 1971); *Administration des Douanes c. Soc. Cafés Jacques Vabre et S.A.R.L. J. Weigel & Cie.,* [1975] J.D. 497 (Cour de cass., Ch. mixte 1975); Case No. 2 BvL 52/71, 37 BVerfGE 271 (B. Verf. G. 1974); Frontini et al., 18 *Giurisprudenza Costituzionale* 2401 (Corte cost. 1973).

<sup>38</sup> SPANISH CONST. of 1968, Art. 96(1). See Santaolalla López, *supra* note 15, at 16.

<sup>39</sup> AUSTRIAN CONST., Art. 50. The European Convention on Human Rights was given constitutional rank by the constitutional amendment of 1964. See Khol, *The Influence of the Human Rights Convention on Austrian Law*, 18 AM. J. COMP. L. 237, 241, 243 (1970).

publication requirements dictate otherwise<sup>40</sup>—upon the international entry into effect of the treaty provision with respect to the nation involved. The legislative approval is a condition for the valid conclusion of the treaty. Normally it does not determine the domestic applicability of the treaty provisions.<sup>41</sup> Of course, this does not exclude the possibility that the legislature, in giving approval to the international engagement of the nation, may prescribe its domestic cognizability irrespective of the treaty's mandate.<sup>42</sup> Conversely, where the treaty expressly or by implication provides for domestic protection of the rights and privileges created thereby, the parliamentary approval of its conclusion may not deny such cognizability, unless the legislature is empowered to prescribe internationally valid reservations<sup>43</sup> or is constitutionally authorized to postpone domestic applicability until the passage of further legislation.<sup>44</sup>

This analysis compels a further semantic consequence: Strictly speaking, the term "self-executing" is not a notion whose meaning is determined by international law. The self-executing nature of a treaty provision is a product of international and domestic constitutional rules. Internationally relevant is merely the determination whether the treaty provision in question mandates the cognizability in and protection by domestic tribunals of the rights, duties, privileges, and immunities created thereby. Reservations or interpretative declarations, to the extent that they are internationally permissible and effective, may only relate to that aspect.<sup>45</sup>

### III.

From what is said under II, it follows that the panel of the United States Court of Appeals for the Fifth Circuit erred egregiously in the choice of the criteria for the determination of whether or not Article 6 of the High Seas Convention is self-executing. A treaty provision which by its terms and purpose is *meant* to stipulate the immediate and not merely progressive creation of rights, privileges, duties, and immunities cognizable in domestic

<sup>40</sup> See *supra* note 34. Whether absence of publication defeats applicability in domestic courts is decided differently in the various countries; see Wildhaber, *supra* note 17, as cited in note 34.

<sup>41</sup> See especially Bleckmann, *supra* note 17, at 189.

<sup>42</sup> Thus Italy has attributed domestic cognizability to provisions of the GATT that in other nations are not deemed to be self-executing; see Bleckmann, *supra* note 17, at 25.

<sup>43</sup> In many nations the legislature may only vote yes or no and may not add conditions, such as the negotiation of amendments or the formulation of reservations by the executive. In France the matter is controversial; see Wildhaber, *supra* note 17, at 40.

<sup>44</sup> This was done in Austria by means of the constitutional amendments of 1964. See L. ADAMOVICH, *supra* note 31, at 374; Ermacora, *Die UN-Menschenrechtspakete*, JUR. BL. 1979, issue 7/8.

<sup>45</sup> For that reason, President Carter's request in his Message of Feb. 23, 1978 (S. EXEC. DOCS. C, D, E, and F, 95th Cong., 2d Sess., at iv, viii, xi, and xv) that the United States Senate give advice and consent to the ratification of the three UN human rights conventions transmitted, subject to the *declaration* by the United States that a number of provisions specifically listed are not self-executing, is both infelicitously phrased and not conclusive for the appropriate interpretation of the articles involved on either the international or the domestic level. In the absence of a valid reservation or a joint resolution mandating an authentic interpretation, the proper construction of the domestic effects of a treaty provision rests with the courts. For doubts on the validity and effect of the declaration, see also Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 70 (1978).

courts and is *capable* of being applied by the courts without further concretization is self-executing by virtue of the constitutional mandate of Article VI of the U.S. Constitution.<sup>46</sup> The intent or understanding of the Executive is at best an element in the interpretative task of the court. In the absence of a valid *reservation*, even a formal *declaration* of a party as to the nature and import of a multilateral treaty would not be conclusive on either the international or—at least in the United States—the domestic judicial level.<sup>47</sup> Nothing in prior practice compels or supports a different conclusion.<sup>48</sup>

<sup>46</sup> In nations which do not recognize self-executing treaties, the mandated domestic cognizability is usually achieved by the necessary legislation prior to the effective date of the ratification. The United States has occasionally pursued this technique. Perhaps the most famous instance is the ratification of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels, Aug. 25, 1924, 51 U.S. Stat. 233, TS No. 931, 2 Bevans 430. The first advice and consent to the ratification of this convention was given by the Senate on April 1, 1935, subject to an "understanding," referred to by the Senate as a "reservation," as to liability per unit. 76 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE, 74th Cong., 1st Sess. 492, 493 (1935). Prior to the execution and deposit of the instrument of ratification, Congress enacted the Carriage of Goods by Sea Act, 49 Stat. ch. 299, p. 1207 (1936), which incorporated the provisions of the convention with minor clarifications and coordinating additions. As a result, the President resubmitted the convention to the Senate. The Senate repeated its former resolution, adding a further provision designated as an "understanding," specifying "[t]hat should any conflict arise between the provisions of the convention and the Act of April 16, 1936, known as Carriage of Goods by Sea Act the provisions of that Act shall prevail"; 78 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE, 75th Cong., 1st Sess. 278, 316, 324 (1937). The President ratified the convention subject to the two understandings. In transmitting the instrument of ratification to the depositary government, the U.S. Embassy annexed a State Department "Memorandum of Comparison," indicating the differences in the wording of the statute and the convention, ending with the comment:

The differences from the Convention made in the Carriage of Goods by Sea Act are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning, thereby avoiding expensive litigation in the United States for the purpose of interpretation and (2) to coordinate the Carriage of Goods by Sea Act with other legislation of the United States.

51 Stat. 233, 261, 269, 274 (1937). In properly assessing the legal effects of this "understanding," notice must be taken of the protocol annexed to the convention as an integral part thereof, which provided: "The high contracting parties may give effect to this convention either by giving it the force of law or by including in their national legislation *in a form appropriate to that legislation*, the rule adopted under this convention" (emphasis added). In other words, the domestic cognizability of the convention rules could be subject to *appropriate* formulation. The "understanding" exercised that option and conditioned the domestic applicability of the convention on the absence of any conflict with the prior legislation.

<sup>47</sup> A declaration, as contrasted with a reservation, does not purport to *modify* the legal effect of a treaty provision; cf. Vienna Convention on the Law of Treaties Art. 2(1) (d). It is significant for the international interpretation of a treaty provision only as provided by Article 31(2) and (3) of the Vienna Convention. In the domestic sphere the ultimate power of interpretation rests with the U.S. courts; *Sullivan v. Kidd*, 254 U.S. 433, 41 S.Ct. 158, 65 L.Ed. 344 (1921); *Kolovrat v. Oregon*, 366 U.S. 187, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961). Since Congress, by statute or joint resolution, may abrogate the internal applicability of a treaty provision, it may do so in form of an authoritative interpretation. A Senate resolution, however, not resulting in a binding treaty amendment, cannot have this effect. See *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 182, 22 S.Ct. 59, 46 L.Ed. 138 (1901, conc. op.); *United States v. American Sugar Co.*, 202 U.S. 563, 26 S.Ct. 717, 50 L.Ed. 149 (1906).

<sup>48</sup> The position here taken does not accept the views of Professor Schachter in *International Human Rights Treaties: Hearings before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 278 (1979). The witness stated that a declaration by the President made pursuant to the Senate's advice and consent to the ratification on that condition "would very likely render the

While it is true that the determination of whether a particular treaty provision purports to create rights, duties, privileges, or immunities cognizable by domestic tribunals imposes a difficult task for a domestic court, the open attitude of U.S. law to accommodating rules of international law, whether customary or conventional,<sup>49</sup> is apt to confront the courts with that necessity. The court of appeals placed excessive weight on the traditional practice of the United States in determining the scope of its present jurisdiction over foreign flag vessels on the high seas under the Law of the Sea Conventions that should properly be applied in the light of customary international law and subsequent developments.<sup>50</sup> Conversely, the possibility that the State Department witnesses in the hearings before the Senate Foreign Relations Committee<sup>51</sup> may not have realized the impact of Article 6 on the Coast Guard's authority under 14 U.S.C., section 89(b), with its obscure tie of enforcement jurisdiction to legislative jurisdiction over foreign vessels,<sup>52</sup>

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[respective] Treaties non-self-executing," without amounting to a reservation. The declaration "would constitute an authoritative political decision" which would be binding on the courts "on the way in which the Treaty should be given effect in the United States." Schachter admitted:

One may possibly argue that this political decision would be contrary to the Constitutional mandate that treaties shall be the supreme law of the land since the declaration would have the effect of preventing the Treaty from being treated as the law of the land until implementing legislation were enacted.

But while Professor Schachter conceded that "this argument is not entirely devoid of merit," he suggested that "it is not likely to be accepted in view of the precedents in which executive and congressional determinations that treaty provisions are not self-executing have been given full effect." Of course if "congressional" means action by both Houses to take effect after the ratification, no authority needs to be cited. But there are no conclusive precedents which give effect to a political decision by the President or the Senate alone, unless that decision is incorporated in a permissible or accepted reservation. Schachter unfortunately did not disclose his precedents. The cases cited in Henkin, *Foreign Affairs and the Constitution* (1972), ch. V, n. 23 in support of the proposition that the Senate can decide that the treaty shall not apply domestically until Congress has legislated are not apposite because they (1) concern bilateral treaties where a communicated and accepted declaration may modify the scope of the respective treaty provision; (2) mandated formal amendments; (3) affected revenues, which may be one of the subjects constitutionally outside the reach of self-executing treaties; and (4) specifically postponed the effect of the treaty until legislation was enacted. All this was clearly stated in *Jurisdiction of the Senate to Act Upon Reciprocity Treaties*, S. Doc. No. 47, 57th Cong., 2d Sess. (1902). Of course, to the extent that a treaty itself postpones certain effects until the passage of necessary legislation, the treaty is not self-executing by its terms; see *Convention between Mexico and the United States on the Solution of the Problem of the Chamizal*, Aug. 29, 1963, 15 UST 21, TIAS No. 5515, Art. 6. But the mere fact that a treaty by its terms mandates a result by legislation should not be sufficient to destroy its self-executory nature; but cf. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

<sup>49</sup> See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 1 L.Ed. 568 (1796); *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

<sup>50</sup> As to the present status of the Law of the Sea Conventions, see *United Kingdom-France Continental Shelf Arbitration*, Decision of 30 June 1977, para. 47, reprinted in 18 ILM 397, 417 (1977).

<sup>51</sup> 589 F.2d at 881.

<sup>52</sup> As was mentioned before (see text at note 12), the court considered the jurisdictional grant over "vessels subject to the jurisdiction, or to the operation of any law, of the United States," 14 U.S.C. §89 (a), as a grant of enforcement jurisdiction over foreign flag vessels on the

was underplayed by the court, as was the fact that another panel of the same court had intimated that Article 22 of the High Seas Convention was self-executing.<sup>53</sup>

This does not mean that the result reached was necessarily wrong. There existed serious doubts that the *La Rosa* possessed the necessary "genuine link" with the Grand Cayman Islands.<sup>54</sup> The facts show that the vessel was purchased and outfitted for the illegal voyage in the United States by persons acting as agents of a corporation formed and registered in Grand Cayman Island who were not shown to be citizens of that territory and apparently controlled the corporations.<sup>55</sup> Regrettably, this aspect was not pursued by the Department of Justice, nor was an attempt made to seek consent to the prosecution from the Government of the Grand Cayman Islands which might well have mooted the issue of jurisdiction.<sup>56</sup> It might perhaps even have been arguable that Article 6 of the High Seas Convention did not mean to protect citizens or alien residents of the capturing nation against wrongful capture on the high seas. A flat rejection, however, of any domestic relevance of the jurisdictional limitations enshrined in the High Seas Convention seems to be inconsistent with the purpose of the work of Geneva and with a constructive development of the international legal system.

What is so disturbing is that apparently at no stage of the proceedings was the advice of the State Department sought with respect to the national interest in the proper construction of the import of Article 6,<sup>57</sup> and that the Department of Justice apparently was bent on winning at any price.

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high seas. It followed in that respect recent constructions of that statute by other panels of the court; *United States v. Cadena*, 585 F.2d 1252, 1259 (5th Cir. 1978), *rehearing denied*, 588 F.2d 100 (5th Cir. 1979); and *United States v. Cortes*, 588 F.2d 106 (5th Cir. 1979). Prior case law had applied that statute only to domestic vessels; see authorities cited in *United States v. Cadena*, 585 F.2d at 1257. Moreover, 18 U.S.C. §7(1) defining the special maritime jurisdiction of the United States (in the sense of legislative jurisdiction), although phrased as including "the high seas . . . and any vessel belonging in whole or in part to the United States or any citizen thereof," has been held not to cover foreign vessels; *U.S. v. Cadena*, 585 F.2d at 1259. While this restriction is not dictated by the text or the statutory history and is probably subject to reconsideration, especially if compared with the increased scope of the special aircraft jurisdiction of the United States, as defined in 18 U.S.C. §7(5) and 49 U.S.C. §1301(34) (see *Chumney v. Nixon*, 615 F.2d 389 (6th Cir. 1980)), it certainly cannot be assumed that the State Department witnesses were cognizant of the potential scope of these statutes.

<sup>53</sup> See the comments on the authority of the "suggestion" by the panel that decided *U.S. v. Cadena*, 585 F.2d at 1260 and n.17, made by the panel that decided *U.S. v. Postal*, 589 F.2d at 884 and n.35.

<sup>54</sup> Convention on the High Seas, *supra* note 2, Art. 5.

<sup>55</sup> This follows from the statement of facts by the court; 589 F.2d at 886.

<sup>56</sup> It is not unusual and is authorized by statute to seek the prior consent of the foreign flag state to the boarding and seizure of a vessel having the nationality of that state. Such consent would remove the illegality of the enforcement; *United States v. Williams*, 589 F.2d 210, 212 n.1 (5th Cir. 1979), 617 F.2d 1062 (5th Cir. 1980, en banc on rehearing); *United States v. Dominguez*, 604 F.2d 304 (4th Cir. 1979); *United States v. Rubies*, 612 F.2d 397, 403 (9th Cir. 1980). There is no reason why subsequent assent to the seizure should not have the same effect.

<sup>57</sup> Even when the case was brought to the U.S. Supreme Court by petition for a writ of certiorari the Department of Justice argued against the self-executing nature of Article 6,

Regrettably, this attitude is manifested also in other cases. In *U.S. v. Enger*<sup>58</sup> the Department of Justice argued that the Vienna Convention was not self-executing, a view that was wisely rejected by the court<sup>59</sup> and was obviously inconsistent with the approach taken by the Diplomatic Relations Act.<sup>60</sup> Recent case law reveals a certain hostility of the courts to the domestic applicability of customary international law or treaties.<sup>61</sup> The purpose of this comment is to call attention to this regrettable and unsalutary trend.

STEFAN A. RIESENFELD

### THE LEGAL EFFECT OF VETOED RESOLUTIONS

On December 31, 1979, the United Nations Security Council, at the initiative of the United States, adopted Resolution 461. It deplored the continued detention of the U.S. hostages in Iran and called on the Government of the Islamic Republic to secure their release. Operative paragraph 6 of the resolution stated that the Council would meet on January 7, 1980, "in order to review the situation and, in the event of non-compliance with this resolution, to adopt effective measures under Articles 39 and 41 of the Charter of the United Nations."<sup>1</sup> As the hostages had not been released, the United States on January 10, 1980, submitted draft resolution S/13735 to the Security Council detailing a sanctions program against Iran.<sup>2</sup> The question was called on January 13. Ten members voted for the resolution, whereupon it was vetoed by the Soviet Union.<sup>3</sup>

After the veto, Donald McHenry, U.S. Ambassador to the United Nations, told the Council that

under resolution 461 (1979) the Council undertook a binding obligation to adopt effective measures and under Article 25 of the Charter all Member States are obliged to respect the provisions of resolution 461 (1979). The Soviet veto now attempts to block the membership from fulfilling that obligation. The question then arises what a member bound by resolution 461 (1979) and acting in good faith pursuant to its obligations under Article 2 (2) of the Charter, should do to implement that resolution.

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without having sought or urging that advice be sought from the Department of State as to the foreign policy implications of such a position; Brief for the United States in Docket No. 78-1714.

<sup>58</sup> 472 F.Supp. 490 (D.N.J. 1978).

<sup>59</sup> *Id.* at 542.

<sup>60</sup> 92 Stat. 808 (1978). The act formally repealed certain statutes superseded by the Vienna Convention on Diplomatic Relations and provided, *inter alia*, for the dismissal of any action or proceeding against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention; §§3(a) and 5.

<sup>61</sup> See, e.g., *Dreyfuss v. Von Finck*, 534 F.2d 24 (2d Cir. 1976) (customary international law); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (treaty provisions); *Canadian Transport Co. v. United States*, 430 F.Supp. 1168, 1172 (D.D.C. 1977) (treaty violation). For a praiseworthy contrast, see the recent judgment of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala* of June 30, 1980, 49 U.S.L.W. 2034 (1980), reprinted in 19 ILM 966 (1980).

<sup>1</sup> Resolution 461 (1979), adopted by the Security Council at its 2184th meeting, Dec. 31, 1979, reprinted in 19 ILM 250 (1980).

<sup>2</sup> UN Doc. S/13735 (Jan. 10, 1980). See also UN Doc. S/PV.2191, at 2 (Jan. 11, 1980).

<sup>3</sup> UN Doc. S/PV.2191/Add.1, at 54-55 (Jan. 13, 1980).



... the membership of the United Nations at large remains obligated to review the situation and the event of Iran's non-compliance with it, an event that has come to pass, and to take effective measures consistent with the Charter to implement that resolution.<sup>4</sup>

That view was not universally held. The Soviet Union responded in the strongest terms.<sup>5</sup> Chen Chu of China recalled, in more moderate tones, that his Government had voted for Resolution 461 (1979) but had been rather reserved, at the time, about any subsequent automatic adoption of measures in accordance with its operative paragraph 6.<sup>6</sup> Now, some 2 weeks later, he felt that sanctions would not contribute to a resolution of the situation.<sup>7</sup> Hence China's abstention.

Thus it appeared that S/13735, like other vetoed Security Council resolutions, was dead. In fact, reports of its death proved greatly exaggerated.

On April 7, 1980, President Carter announced, coincidentally with the termination of diplomatic relations with Iran, the initiation of a number of programs against Iran and Iranian nationals.<sup>8</sup> With respect to economic sanctions, Mr. Carter associated himself with S/13735, in part, it would seem, to gain added authority for his action. The President said: "[T]he Secretary of the Treasury will put into effect official sanctions prohibiting exports from the United States to Iran, in accordance with the sanctions approved by 10 members of the United Nations Security Council on January 13 in the resolution which was vetoed by the Soviet Union."<sup>9</sup> Even more explicit in its use of the vetoed Council resolution was the resolution of the European Common Market Foreign Ministers (ECMFM) adopted on April 22, 1980.<sup>10</sup> Paragraph 5 of the dispatch provided, in relevant part:

The Foreign Ministers of the Nine, deeply concerned that a continuation of this situation may endanger international peace and security, have decided to request their national Parliaments immediately to take any necessary measures to impose sanctions against Iran in accordance with the Security Council resolution on Iran of 10 January 1980, which was vetoed, and in accordance with the rules of international law.

ECMFM's citation of the vetoed Security Council resolution, like President Carter's, may be construed in one sense as no more than an incorporation by reference of the factual program envisaged in the ill-fated resolution. But the ECMFM paragraph also implies that the vetoed resolution is, with "the rules of international law," a coequal basis for the contemplated sanctions program. If the Ministers' view was that a Security Council resolution was not needed for the initiation of trade and other export controls by one or more states against another state engaged in a serious and continuing violation of international law, then the reference to the vetoed resolution was gratuitous and confusing. If their view was that the Charter and inter-

<sup>4</sup> *Id.* at 61.

<sup>5</sup> *Id.* at 61-62.

<sup>6</sup> UN Doc. S/PV.2184, at 11 (1979).

<sup>7</sup> UN Doc. S/PV.2191/Add.1, at 56 (1980).

<sup>8</sup> Sanctions Against Iran: Remarks Announcing U.S. Actions, April 7, 1980, 16 WEEKLY COMP. OF PRES. DOC. 611 (Apr. 14, 1980).

<sup>9</sup> *Ibid.*

<sup>10</sup> New York Times, April 23, 1980, at 12, col. 1.

national law require Council authorization for such sanctions, the invocation of a *vetoed* resolution may have had more significant legal implications. President Carter's language was more cautious than ECMFM's. Though perhaps intended to do no more than gild his decision, it too seemed to imply that an action, otherwise unlawful, might acquire a certain lawfulness because ten states voted for it in the Security Council. There are, in short, a number of indications suggesting that the customary processes of international law are beginning to install, at the international constitutive level, a new modality of Security Council lawmaking. We might refer to it as the "majoritarian" system, for it tends to transpose the majority decision dynamics of the General Assembly to the Security Council, ignoring the veto, and ascribing prescriptive and authorizing power to proposals supported by a majority in the Council but formally ineffective. A consideration and appraisal of the political and legal implications of the innovation would appear urgent.

In general, a proposal that has almost been accepted under the rules of the arena in which it was lodged has no legal effect itself, though it may contribute to the consolidation of a customary norm. Whether it has fallen just short of a majority or been virtually unanimous and then vetoed, it has, under the rules of the arena in which it was forwarded, no prescriptive force. After rejection, it is no longer called a "resolution," but is referred to as a "draft" or "*projet*." Yet because of the many ambiguities in the ethics of organized democracy, proponents who have lost on an issue sparking violent emotions may often feel that there is something inherently unjust in the way the decision procedure worked. This feeling of dissatisfaction will be even stronger when the rules of the arena allow a *liberum veto*, for then it is possible that a nearly unanimous expression will be negated by a single actor. Displeasure notwithstanding, if the arena rules continue to express the common interests of most of the politically relevant actors, no one will insist that a democratic "spirit" overrides a procedural "letter" and that the proposal has actually passed and become law. Indeed, where one of the functions of the veto is to maintain ongoing coordination between the outcomes of the formal arena and processes of effective power, acknowledgement of the lawfulness of the veto, as distasteful as it may be in the particular case, may be necessary for the formal arena's ongoing viability, if not existence.

In the United Nations, the institution of the veto in the Security Council was created as a genetic feature. Charter Article 27 limits decision by majority to procedural matters. "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." Like Article 5 of the Covenant of the League of Nations, this regime expressed a conception of the inexorable relations between authority and control and a shared feeling about the indispensability of great power consensus both for the effectiveness of individual decisions as well as for the continuing viability of the Organization. The innovation of a majoritarian system as a customary revision of the Charter with regard to Security Council lawmaking is radical

and can be expected to be acceptable only if the features and dynamics of the effective power process have changed.

It is understandable that states denied the veto privilege in an organized arena should chafe at their disability and seek to minimize its legal effect. But it is, to say the least, surprising to find states with the veto consciously undertaking to minimize its effect in order to achieve short-term and quite transient objectives. It is especially disconcerting when the denigration of the veto is not necessary to achieve those ends.

When wielded by adversaries, the veto has worked against the United States. But in a curious way it may have preserved the United Nations by allowing or forcing it to yield to reality. As the relative influence of the United States in the General Assembly has waned, the veto has increasingly served American interests. Indeed, it may now contribute to the ability of the United States to continue to be an active supporter of the Organization. Departures from the veto regime, such as the General Assembly's "Uniting for Peace" Resolution<sup>11</sup> (an American initiative), in retrospect are viewed by many in the foreign affairs establishment with very mixed feelings.

Obviously, none of the permanent members of the Security Council is about to surrender the veto. But careless language can erode its effectiveness. Some stand to gain much more than others by the addition of a Security Council majoritarian system that ascribes some legal power to important questions even after they have been vetoed. The United States and Western Europe might well pause and reflect on the long-term constitutional and political implications of installing a majoritarian system in the Security Council before they endorse a revision which may prove irreversible.

W. MICHAEL REISMAN\*

### THE CASE OF THE NONPERMANENT VACANCY

Five states are permanent members of the United Nations Security Council.<sup>1</sup> Ten others, characterized in Charter Article 23 as "non-permanent members,"<sup>2</sup> are elected by the General Assembly for a term of 2 years; no nonpermanent member may be immediately reelected.<sup>3</sup> Under Rule 144 of the Assembly's Rules of Procedure, five nonpermanent members are elected each year.<sup>4</sup> Under Rule 85, election of nonpermanent members is an "important question" requiring a two-thirds majority of Assembly members

<sup>11</sup> GA Res. 377A (V), Nov. 3, 1950, 5 GAOR, Supp. (No. 20) 10-12.

\* This comment draws on work done under a grant from the National Science Foundation. Helpful comments by my colleague, Myres S. McDougal, are gratefully acknowledged.

<sup>1</sup> United Nations Charter Article 23(1). Permanent members designated in that provision are the "Republic of China," France, the USSR, the United Kingdom, and the United States.

<sup>2</sup> Article 23(1) establishes qualitative criteria to guide the Assembly in the election of the nonpermanent members, the most politically significant being that of geographical distribution. In 1963, Article 23 was amended to expand the number of nonpermanent members from 6 to 11. See *infra*.

<sup>3</sup> Charter Article 23(2).

<sup>4</sup> UNITED NATIONS, RULES OF PROCEDURE OF THE GENERAL ASSEMBLY (1972).

"present and voting," *i.e.*, "casting an affirmative or negative vote."<sup>5</sup> Voting continues, under Rule 96, until the vacancy is filled. In terms of current numbers, about 50 states (in the rather unusual circumstance in which all Assembly members choose to vote) could prevent the election of one or more nonpermanent members of the Council. There are already voting blocs that exceed this numerical threshold, likely coalitions of smaller blocs or ad hoc alignments that could attain it, and larger states that, because of their military power, might win over to their view a sufficient number of voters or abstainers. In short, the possibility is not remote that the Security Council could fall below its full complement of nonpermanent members for an extended period of time as a result of a premeditated maneuver by one or more states. The strategic advantages in UN politics that might accrue to the blocking minority will depend in part on the legal consequences attendant on nonpermanent vacancies in the Security Council.

The inability of the General Assembly to fill a vacancy on the Security Council in December 1979 and early January 1980 raised in sharp fashion a number of questions about the competence of a Council whose quantitative composition is or becomes less than the complement designated in the Charter. Cuba and Colombia were competing for the last of the nonpermanent seats—the so-called Latin American seat—on the Council, but neither was able to secure a majority. By December 9, a record 58 ballots had been cast by 152 members of the General Assembly.<sup>6</sup> In a ballot on December 17, Cuba failed to win the seat by only 4 votes.<sup>7</sup> Allegations of fraud were lodged and Under-Secretary General William Buffum was asked to monitor further voting.<sup>8</sup> By December 29, the Assembly was still deadlocked.<sup>9</sup> Hence the Council commenced its meetings in January 1980 short of its full complement for the first time in its history.<sup>10</sup> But on January 6, Cuba abandoned its effort to obtain the vacant seat, apparently fearing, the *New York Times* reported, that the Soviet invasion of Afghanistan might result in a landslide of votes for Colombia.<sup>11</sup> On January 7, Mexico was elected to the vacant seat, after Cuba and Colombia had reached a compromise under the terms of which they would both withdraw.<sup>12</sup> During the short period of the rump Council, no votes were taken. Hence there is no decisive precedent on the competence of the Council when its designated membership is incomplete. The possibility in the future of such occurrences makes clarification of the law and policy of the matter most urgent.

## I.

A jurisprudence, now apparently generally accepted, holds that abstention or withdrawal of a permanent member is neither an automatic veto nor a con-

<sup>5</sup> Rule 88, *id.* at 19.

<sup>6</sup> *New York Times*, Dec. 10, 1979, at 11, col. 1.

<sup>7</sup> *Id.*, Dec. 18, 1979, at 8, col. 6.

<sup>9</sup> *Id.*, Dec. 30, 1979, at 3, col. 2.

<sup>11</sup> *Id.*, Jan. 7, 1980, at 2, col. 3.

<sup>8</sup> *Id.*, Dec. 20, 1979, at 11, col. 1.

<sup>10</sup> *Id.*, Jan. 1, 1980, at 6, col. 1.

<sup>12</sup> *Id.*, Jan. 8, 1980, at 2, col. 3.

tinuing impediment to Council decision competence.<sup>13</sup> Is there a comparable rule with regard to nonpermanent members? Specifically, is a Security Council that does not have the requisite number of nonpermanent members to be considered a Council fully competent to discharge all the functions and powers delegated to it by the Charter of the United Nations? Or is it to be considered disabled from applying its powers under the Charter? If it is disabled, how, if at all, will the Charter powers be executed? Given the central role of the Security Council in the maintenance of international peace and security, the answers to these questions are of great political importance.

Vacancies in the Security Council occur for different reasons. A nonpermanent member might withdraw or otherwise lose some membership privileges in the course of its 1- or 2-year tenure; the Council would continue to be depleted, from the moment withdrawal was legally accomplished, until the General Assembly elected and installed a replacement.<sup>14</sup> Alternatively, the number of nonpermanent members of the Council could be expanded.<sup>15</sup> In 1963, the Charter was amended to increase, as of 1965, the number of members of the Security Council from 11 to 15.<sup>16</sup> In the interim between the moment the Charter amendment went into effect and the moment the General Assembly elected the additional four members, the Council's complement was less than statutorily required.<sup>17</sup> A third vacancy situation, much closer to the one actually presented to the United Nations in year-end 1979, arises when the General Assembly, perhaps unable to reach a majority decision, or animated by a conscious desire on the part of a majority of the Assembly or a blocking minority not to fill the complement of the Security Council, does not designate one or more nonpermanent members; as a result, the Council's number falls below the statutorily required complement.

## II.

On January 2, 1979, the Legal Counsel to the Secretary-General, Erik Suy, presented to the General Assembly an opinion regarding the legal and constitutional consequences that might arise from the inability of the Gen-

<sup>13</sup> Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, paragraph 3 of the Charter of the United Nations*, 61 AJIL 744 (1967).

<sup>14</sup> In addition to voluntary withdrawal, a state that, during its nonpermanent incumbency, became a target of United Nations preventive or enforcement action, could suffer suspension of its rights and privileges under Charter Article 5. That might be construed as vacating its place on the Security Council or as suspending its voting right there. *But cf.* L. GOODRICH, E. HAMBRO, & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 97 (3d rev. ed. 1969). Expulsion in accord with Charter Article 6 would most certainly vacate a nonpermanent member's seat on the Security Council.

<sup>15</sup> See note 2 *supra* and also Suy opinion, UN Doc. A/34/PV.118 (prov.) at 31-32 (1979).

<sup>16</sup> GA Res. 1991 (XVIII), Dec. 17, 1963.

<sup>17</sup> A legal opinion by the Legal Counsel of the United Nations on this point stated that in the interim the Security Council would not be prevented from operating: UNITED NATIONS, *JURIDICAL YEARBOOK*, 1965, at 224-25.

eral Assembly to elect the full complement of nonpermanent members to the Council.<sup>18</sup> Suy opined, on the basis of the general principle of effectiveness in treaty interpretation, that despite the fact that the Assembly's obligation to elect the nonpermanent members was absolute, the Assembly's failure to discharge its obligation would not paralyze the Security Council.

[A]n act of omission or the failure of the General Assembly to fulfill its constitutional obligations cannot be held to produce legal consequences so fundamental to the Organization as the paralysis of a principal organ. To argue otherwise would be to effect a constitutional amendment of the Charter through extra-constitutional means. Such a paralysis could have the gravest consequences for the whole system of the preservation of international peace and security, including a potential shift of well-established powers between the Security Council and the General Assembly.<sup>19</sup>

When pressed, the Legal Counsel refrained from elaborating on the consequence of vacancies on the Council's decision competence. As the representative of Guinea-Bissau put it:

Let us assume that within the next ten days the Council meets with 14 members and agrees to impose an embargo, or whatever, on any member state. Would it be legal, or would it be illegal? Would that member have any kind of obligation or any kind of duty to obey the decision of the Council with 14 members?<sup>20</sup>

Though the Legal Counsel did not answer, it would appear that the only conclusion compatible with his general opinion would be that a Security Council, with or without its full complement of nonpermanent members, would have full competence to discharge any of the functions accorded it under the Charter.

### III.

The Yalta formula,<sup>21</sup> which was enshrined in the Charter, assigned decision competence to the Security Council and an essentially hortatory role to the General Assembly. Although a numerical majority of the Council was nonpermanent, the veto privilege locked decisionmaking competence into the hands of the permanent members. Thus, for the major security issues that might come before the Security Council, it was, Charter rhetoric notwithstanding, essentially the great powers that decided.

<sup>18</sup> Opinion of Erik Suy, note 15 *supra*, at 30 *et seq.*

<sup>19</sup> *Id.* at 36. In Assembly discussion, subsequent to the presentation of the legal opinion, the representative of Guinea-Bissau sought clarification on the minimum numerical requirement: "What would be the minimum requirement? How about 13 members? Or 12, or 11, or 10, or 9—or only the five permanent members?" *Id.* at 57. The Legal Counsel did not answer this question, perhaps in response to the signal from the questioner that no answer would satisfy his delegation.

<sup>20</sup> *Id.* at 37–38.

<sup>21</sup> See U.S. DEP'T OF STATE, THE CONFERENCES OF MALTA AND YALTA, 1945, at 661–67, 711–12 (1955). See also L. GOODRICH, E. HAMBRO, & A. SIMONS, *supra* note 14, at 216–21, and R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 531–40 (1958).

In the early years, Soviet use of the veto (quite consistent with Charter law, whatever the merits of its exercise in individual cases) prevented the United States and its allies from making the United Nations an effective instrument of diplomacy. Because the United States could then anticipate majority support in the General Assembly, the Department of State, during the tenure of Dean Acheson, initiated the "Uniting for Peace" Resolution. Briefly, it "self-authorized" the General Assembly to exercise some of the security powers of the Council when the latter was blocked.

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in an emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.<sup>22</sup>

From the U.S. perspective, the function of Uniting for Peace was to revise the Security Council's powers by circumventing the Soviet veto.

Uniting for Peace and a number of other developments gradually enhanced the powers of the General Assembly, a development whose lawfulness was confirmed by the International Court of Justice in 1962.<sup>23</sup> During this same period, the membership in the Assembly increased rapidly, and many of the new states, variously styled "the Third World, the nonaligned states, the Group of 77," and so on, began to develop an identification distinct from the Western and Eastern blocs. The Third World viewed with considerable satisfaction the enhancing of General Assembly powers in competition with the Security Council. And as the power of the Assembly increased, the United States and the Soviet Union began to vie for influence within the General Assembly. The pattern of change can easily be traced in the evolution of Soviet attitudes regarding the General Assembly's competence. The USSR initially denounced Uniting for Peace,<sup>24</sup> but by 1967, it

<sup>22</sup> GA Res. 377A (V), Nov. 3, 1950, 5 GAOR, Supp. (No. 20) 10-12. Note, however, that the resolution does not authorize recommending armed force for a threat to the peace but only for a breach of the peace or act of aggression. In contrast, the Security Council retains the option of high coercion as one lawful response to a threat to the peace. The general problem of the legal effect of a resolution of the General Assembly is too complex to be entered into in a footnote. While it is not binding in the sense of a decision of the Security Council under Articles 25 and 26 of the Charter, it may achieve a certain substantial legal effect depending on the context.

<sup>23</sup> Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), [1962] ICJ REP. 151.

<sup>24</sup> See generally 5 GAOR, 1st Committee, 354th-371st mtgs. (Oct. 9-21, 1950).

felt sufficiently confident of its influence in the Assembly to initiate a special session itself, invoking the very resolution it had theretofore maligned.<sup>25</sup>

#### IV.

With this political background in mind, the significance of the case of the nonpermanent vacancies is apparent. If the Security Council has an inadequate complement and is then authoritatively interpreted as being unable to operate, it no longer means that those powers assigned under the Charter to the Council will simply not be exercised until the Council's complement is filled. What it means is that those powers will devolve to the General Assembly, to be exercised there without regard to the controls the Charter regime had assigned to the permanent members of the Council.

Given the increasingly disproportionate superpower influence in the erstwhile nonaligned world, the practical implication of that interpretation of nonpermanent vacancies is to permit an actor to use the General Assembly to accomplish what it is unable to win in the Security Council. A nonpermanent vacancy could then cease to be an unusual occurrence and become a routine tactic. One great power with a bloc or sufficient ad hoc influence in the Assembly could immobilize the Security Council by impeding the election of a nonpermanent member. It would then be rewarded for its efforts by having Security Council powers devolve to the General Assembly, where their exercise would be insusceptible to veto by another permanent member.

#### V.

It has become fashionable to criticize the institution of permanent membership and its special perquisites as regressive and undemocratic. The casual use of those terms in the context of international politics skewers and distorts them. Whether or not "one man, one vote" is an inherent principle of democracy (in a pluralistic system, a group of groups, the difficulties and inequities that would flow from its unqualified use are obvious), there is no correspondence between "one man, one vote" and "one state, one vote." If a micro-state of 100,000 and a medium-sized state of 50 million have one vote in a formal arena, every citizen in the micro-state has actually cast five hundred votes vis-à-vis each vote cast by a citizen of the larger state. Nor is there any meaningful democracy when the elites casting a vote "on behalf of" the citizens of their polity are dictatorial with no civic responsibility to their constituents, a situation prevailing in, alas, too many states. The fact that the most vocal critics of the permanent membership and veto institutions are often those who practice the most authoritarian politics must not be ignored. If the rhetoric is scaled off, this, as so many other new maneuvers, is little more than a tactic to aggrandize the power of new elites.

<sup>25</sup> See UN Doc. A/6717, letter of June 13, 1967, from the USSR. See also UN Doc. A/6718, letter from the United States expressing reservations regarding Soviet use of Uniting for Peace.



Given the extraordinarily varied circumstances internal to states of the world, the variations of size between them, and the disparate distribution of power among competing major states, a meaningful democratic goal would balance representation in formal arenas with the inexorable requirements of minimum order in an unfantastized world. Before the original Charter regime is radically changed, its conception of and grounding in the realities of power politics should be appreciated. It represents an effort, however imperfect, to seek a meaningful and realistic balance between the desire for power sharing in formal arenas and the unyielding practical restraints of effective power.

In terms of effective power, critical decisions continue to be largely influenced by a small number of states. If authoritative arenas are to be as effective as possible, they must accommodate themselves to this aspect of political reality. They may work to change it as best they can, but to ignore it simply dooms an arena to a semantic function and ultimately to the withdrawal of support by large powers persuaded that their vital interests can no longer be served by participation in it.

While there is certainly room for an enhancement and clarification of the prescriptive function of the General Assembly, the core distribution of power between the Security Council and the General Assembly with regard to primary security matters is both a fail-safe device for the United Nations and a constant monitor for realism in decision and congruence between authority and control. The most cogent criticism of the implications of the nonpermanent vacancy case is not the formalistic cavil that an unconstitutional amendment was being effected;<sup>26</sup> international lawmaking is rich in informality and innovation. The problem is the substance of the change and the disruptive, if not destructive, consequences it would have held for the Organization and for its still useful role in world politics.

W. MICHAEL REISMAN

## CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters shall be published and to edit any letters printed.

TO THE EDITORS-IN-CHIEF:

### *The Iran Hostage Crisis*

By way of editorial comment in the April 1980 issue of the *Journal* (74 AJIL 411), Professor Richard Falk, in his usual provocative manner, suggests that, with respect to the Iran hostage crisis, international law and procedures are "arbitrary and one-sided." He suggests further that we should "not sit too quickly in judgment of Ayatollah Khomeini for his evident refusal to shape Iranian policy by reference to the law on the books," citing in support of this proposition alleged violations of international law

<sup>26</sup> Opinion of Erik Suy, note 15 *supra*, at 36.

by the United States in Iran, Cuba (the missile crisis), the Dominican Republic, Vietnam, and elsewhere. To combat this one-sidedness of international law and of "international life in general," Falk proposes that "citizens through voluntary organizations should organize to regulate the behavior of the governments."

I would suggest that Falk has been a bit too harsh on existing international law and procedures as they apply to the Iran hostage crisis and a bit too sparing on the behavior of the Ayatollah Khomeini. It is instructive to remember that, in its order of December 15, 1979, the International Court of Justice, while declining to accept Iran's contention, transmitted by letter to the Court, that the seizure of the hostages was merely a "secondary" or "marginal" matter, noted that it was open to Iran to appear before the tribunal and raise, by way of either defense or counterclaim, its charges of alleged United States violations of international law. Iran has declined the Court's invitation to do so.

Iran has also declined to cooperate with the commission of inquiry established by the United Nations, although this commission would have afforded Iran an excellent opportunity to plead its case against alleged U.S. violations of international law. Iran's insistence that the commission interview only those hostages selected by the militants as being implicated in anti-Iranian activities would seem itself a fine example of "one-sidedness."

Falk argues that international law's prohibition on intervention is "fuzzy, vague, and necessarily conditional and contextual." Unfortunately, there is a measure of truth to this contention. Nonetheless, if the facts are as alleged, the case that the United States has violated international law by its activities in Iran is a strong one. Moreover, norms against torture appear sufficiently developed to support a case against the United States under international law, if, as alleged, the CIA supported and even participated in such activities by SAVAK. If Iran's case is a strong one, it is ironic that it has failed to plead it in available forums.

To some extent, citizens have already organized themselves through voluntary associations to regulate the behavior of governments. Amnesty International and other nongovernmental organizations associated with the United Nations come immediately to mind. Amnesty International, in fact, has reported alleged human rights violations under the Shah. One would hope that it will be possible for NGO's to do a report on the Ayatollah Khomeini's regime, which has summarily executed hundreds of persons without a semblance of due process and which shows disturbing signs of a fascist character.<sup>1</sup>

To be sure, Falk's observations on the failure of the world community to deal adequately with the heinous crimes of tyrants are well taken. Perhaps they will lead to redoubled efforts to effect reforms in international criminal law and procedures that would ensure "a fair trial under impartial auspices" for such individuals. Were such a millenium to arrive, it is likely that the Shah and the Ayatollah would appear in the same dock.

JOHN F. MURPHY  
*Naval War College*

<sup>1</sup> See Bordewich, *The Fourth Estate: Fascism Without Swastikas*, HARPER's, July 1980, at 65.

*Richard Falk replies:*

It must be a joy to understand the world as clearly, albeit as ahistorically, as Peter Sussman.<sup>1</sup> Where has he been?

Of course, governments share a need to communicate, and the doctrine of diplomatic immunity helps sustain this need. Yet, if that immunity is used to shield what has recently been called "vigilante diplomacy," then many governments, including the most rational of governments, would give up communicating, if necessary, to uphold such basic sovereign rights as political independence and territorial integrity.

There is nothing resembling what Sussman describes as "irrational Iranian revolutionary outrage" at stake here. Such a phrase is a massive evasion on his part, given the documental reality that the United States Embassy was used as a nerve center to subvert the Iranian constitutional order back in 1953 and then, subsequently, to stabilize the Shah's brutal tyranny, yes, tyranny. And is it so irrational to suspect that what happened in 1953 might not occur again in 1980? And is it so irrational to believe that the clear rules of international law are one-sided if they do so much to safeguard communication among diplomats and so little to uphold the sovereign rights of the peoples they represent?

Professor John Murphy's letter is characteristically temperate, and as such, raises serious problems about my position on the Iranian hostage crisis. My differences with him are ones of nuance and context. If I were living in Tehran during this period, I would have urged as an Iranian international lawyer the revolutionary Government there to avail itself of the opportunity to advance its grievances before the International Court of Justice and the United Nations commission of inquiry, but I'm not.

From the vantage point of the United States, it becomes important to grasp why the revolutionary leadership in Iran is skeptical about claims of fairness and justice advanced on behalf of international institutions. Where were these institutions during the long years of suffering resulting from the Shah's rule and, in part at least, experienced as a consequence of U.S. interventionary diplomacy? Ayatollah Khomeini made the same point last December when he responded to the Pope's emissary seeking release of the American hostages by asking why the concern now and why the long silence of the Catholic Church during the many prior years of brutal Pahlavi rule. Of course, accusations about the selective appreciation of legal and moral issues are not by themselves an adequate answer, but they are an understandable one, and it is well for international lawyers in this country to acknowledge their basis in reality. The refusal to acknowledge this one-sidedness of precept and practice fools no one but ourselves.

Finally, it is in my judgment a grave mistake to equate the Shah and Ayatollah Khomeini, or to speak of the revolutionary Government in Iran as "fascist." Of course, there have been revolutionary excesses that qualify as crimes of state. As well, there are disturbing signs that the new Constitution

<sup>1</sup> See letter from Peter M. Sussman, in response to the April 1980 editorial comment by Professor Falk, in the July 1980 *Journal* at p. 655.

and the powerful Islamic Republican Party endanger democratic prospects in Iran. True, Ayatollah Khomeini has not intervened to stop the revolutionary excesses, at least not effectively enough, but many of these excesses stem from literal enactments of Islamic law. Such a lineage does not excuse them, but it does make their international legal assessment more difficult, especially if some allowance is made for cultural variation, revolutionary turbulence, the absence of an established governing process, and an ongoing extralegal struggle for power in Iran.

#### CORRECTION

In the article *The Doctrine of Intertemporal Law* by T. O. Elias in the April 1980 issue of the *Journal*, the quotation defining intertemporal law from Georg Schwarzenberger's *Manual of International Law* (6th ed. 1978), which appeared in footnote 1 at page 285, should read as follows: "[intertemporal law is the] determination of rules of international law prevailing at successive periods in their application to a particular case."

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN L. NASH\*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

### INTERNATIONAL ORGANIZATIONS

(U.S. *Digest*, Ch. 2, §4.B)

#### *Privileges and Immunities—World Bank*

The staff of the General Counsel of the Equal Employment Opportunity Commission sought the views of the Office of the Legal Adviser of the Department of State regarding exercise of jurisdiction in an employee discrimination proceeding involving the World Bank, and were advised that relevant provisions of both domestic and international law, based upon sound policy considerations, precluded the Commission from asserting such jurisdiction. In a letter to Leroy D. Clark, General Counsel of the Commission, dated June 24, 1980, Roberts B. Owen, Legal Adviser of the Department, confirmed in writing the position previously communicated to the General Counsel's staff. The principal portion of his letter follows:<sup>1</sup>

In the absence of supervening treaty provisions, the privileges and immunities of public international organizations in the United States are governed by the International Organizations Immunities Act of 1945 (Pub. L. 79-291, as amended, 22 U.S.C. §288 *et seq.*) (the "IOIA"). Section 2(b) of the IOIA, 22 U.S.C. §288a(b), provides that international organizations which have been designated by the President:

"shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."

The World Bank was designated pursuant to this Act by Exec. Order No. 9751 on July 11, 1946 (3 CFR 558 (1943-48 Compl.)).

At the time the IOIA was enacted, foreign governments (and, by virtue of the IOIA, international organizations) were entitled, as a general matter, to absolute immunity from proceedings in our courts. The Foreign Sovereign Immunities Act of 1976 (Pub. L. 94-583, 28 U.S.C. §§1330, 1602 *et seq.*) ("FSIA") amended our law by codifying a more restrictive theory of immunity subjecting foreign states to suit in U.S. courts in respect of their commercial activities (acts *jure gestionis*), while continuing their exemption from U.S. jurisdiction for sovereign

\* Office of the Legal Adviser, Department of State.

<sup>1</sup> Footnotes to the quoted portion of the Legal Adviser's letter are as follows:

or governmental activities (acts *jure imperii*). By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character.

The U.S. Court of Appeals for the District of Columbia has recently held that disputes arising from the employment relationships between an international organization and its staff members are not "commercial" in nature and, absent a waiver, are therefore not subject to judicial review. See *Broadbent v. Organization of American States*, No. 78-1465, slip op. at 19 (Jan. 8, 1980). This decision was fully consonant with the views of the United States Government as presented *amicus curiae* in the litigation. A copy of the Government's brief on the issue is enclosed for your information. In our view, the ruling in *Broadbent* is binding upon the administrative agencies of the U.S. Government as well as upon the judicial branch and precludes the Commission from asserting jurisdiction in such cases.

Article VII(3) of the World Bank's Articles of Agreement<sup>a</sup> does not, in our judgment, constitute a waiver of immunity in respect of employment disputes. That Article provides as follows:

"Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

The language of the Article does not specify the exact scope of actions which may properly be brought against the Bank under its provisions. However, at the time the Articles of Agreement were negotiated, Article VII(3) was intended as a limited waiver of immunity specifically to permit suits by private lenders against the Bank in connection with the Bank's issuance of securities, and to specify the venue for such actions, in order to facilitate the Bank's access to capital markets. Cf. *Restatement (Second), Foreign Relations Law of the United States*, §84, Reporter's Note at 275 (1965). It was not designed (and should not now be construed) to subject the Bank to the full range of our domestic jurisdiction or to expose the Bank's internal personnel and administrative actions to review by our courts and administrative agencies.<sup>b</sup>

<sup>a</sup> The Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, TIAS No. 1502; as amended, 16 U.S.T. 1942, TIAS No. 5929. Authorization for U.S. participation in the Bank is set forth in the Bretton Woods Agreements Act of 1945, Pub. L. 79-171, as amended, 22 U.S.C. 286 *et seq.*

<sup>b</sup> *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454 (D.C. Cir. 1967), is not to the contrary. While affirming the dismissal of the complaint on other grounds, the court held that a provision in the IADB Charter similar to Article VII(3) permitted a loan recipient to challenge the Bank's lending practices vis-a-vis its competitors as a breach of its written loan agreement with the Bank—in effect placing the Bank's commercial debtors in the same position as its creditors. The opinion cannot reasonably be read to endorse jurisdiction over employment discrimination complaints brought by internal staff members.

That questions relating to the employment relationships between the Bank and its internal staff are and were intended to be beyond the jurisdiction of Member States is apparent, we believe, from the other relevant provisions of the Articles of Agreement. In particular, Article V(5) explicitly vests responsibility for "the organization, appointment and dismissal of the officers and staff" of the Bank in its President, subject only to the general control of the Executive Directors. Subsection 5(c) of the same Article provides that in the discharge of their official duties, the President, officers and staff of the Bank owe their duty "entirely to the Bank and to no other authority." It also states that "[e]ach member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties." These provisions were carefully crafted to insulate the Bank's administrative and personnel processes from interference by individual Member States, which are legally bound by their proscriptions. They cannot in our view be read consistently with an interpretation of Article VII(3) which would permit unilateral actions to regulate those processes or pass judgment upon specific decisions by the Bank's officers in the course of their duties. In any event, the explicit prohibition in Article VII(3) against actions by "members or persons acting for or deriving claims from members" would preclude the U.S. Government, or any of its agencies, from commencing such proceedings.

There are sound practical considerations which fortify these conclusions. To effectively carry out their responsibilities in the interests of all their members, public international organizations must have a considerable degree of autonomy in personnel matters. Unlike domestic entities, they operate in a unique multilateral environment, typically drawing their staff members from among their constituent Member States. In many cases they are required to take regional and geographical considerations into account in order to ensure balanced national representation.<sup>c</sup> The resulting diversity in background, training and experience among staff members often creates delicate administrative situations with sensitive political overtones, requiring the organizations to formulate and apply stable, uniform and equitable rules of personnel management on a global basis. Forcing the organizations to conform their personnel practices to the varying—and often conflicting—domestic laws of each country in which they operate would create unmanageable administrative burdens and could well prevent them from carrying out the functions for which they were created.

For these reasons there has emerged a widespread practice among States not to exercise jurisdiction over internal employment disputes in international organizations, regardless of whether national law specifically provides for immunity from jurisdiction. This practice has been recognized and given effect by many national courts and tribunals in dismissing claims brought by employees of international organizations<sup>d</sup> and has long been endorsed by preeminent scholars in

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<sup>c</sup> See, for example, Article V(5) (d) of the Bank's Articles of Agreement.

<sup>d</sup> E.g., *Heltzel v. Air Traffic Services Agency* (Nov. 30, 1979) (Federal Constitutional Court of Germany); *Intergovernmental Committee on European Migration (ICEM) v. Di Banella Shirone* (April 18, 1975) (Supreme Court of Italy, No. 1266); and *Chemidlin v. International Bureau of Weights and Measures*, 12 Ann. Dig. 281 (Case No. 94) (Tribunal Civil of Versailles, France, 1945). No U.S. courts have held to the contrary, and some have refused

the field.<sup>6</sup> As one leading commentator has put it, "the law governing conditions of service with international organizations is not the municipal law of any one country but the domestic law of the Organization concerned."<sup>7</sup>

Our own practice, as evidenced most recently in the *Broadbent* decision, has been in accord with this principle, and . . . I believe that it is incumbent on the U.S. Government to ensure that it remains so.

Finally, I want to emphasize that, in the view of the Department of State, the privileges and immunities enjoyed by public international organizations impose a special responsibility on them and their Member States to ensure that internal procedures provide effective methods of addressing and resolving "labor-management" disputes. The United States actively supported the recent establishment within the Bank of such a mechanism, the World Bank Administrative Tribunal. The Tribunal, which will become effective on July 1 with retroactive jurisdiction to January 1979, is not only competent to adjudicate employment-related disputes within the Bank but was created specifically to provide a binding and exclusive method of settling such disputes internally.<sup>2</sup>

#### ALIENS

(U.S. Digest, Ch. 3, §3)

##### *Legal Protection Accorded Iranians*

A high official of the Embassy of the Democratic and Popular Republic of Algeria, in its capacity as protecting power for interests of the Islamic Republic of Iran in the United States, expressed concern to Department of State officers about possible discriminatory treatment of, or other lack of legal protection being afforded to, Iranian nationals resident in the United States. In response, the Department of State gave assurances which were confirmed in a note dated June 20, 1980, reading as follows:

The Department of State wishes to assure the Embassy of the Democratic and Popular Republic of Algeria, in its capacity of protecting power for the interests of the Islamic Republic of Iran, of the con-

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to take jurisdiction over such disputes. See *Herbert Harvey Inc. v. NLRB*, 424 F.2d 770, 773 (D.C. Cir. 1969); *Weidner v. Int'l. Telecommunications Satellite Org.*, 392 A.2d 508 (D.C. 1978).

<sup>6</sup> See M. Akehurst, *The Law Governing Employment in International Organizations* (1967); W. Friedmann and A. A. Fatouros, *The United Nations Administrative Tribunal*, 11 Int'l Org. 13 (1957); C. W. Jenks, *The Proper Law of International Organizations* (1962); F. Seyersted, *Jurisdiction Over Organs and Officials of States, the Holy See and Intergovernmental Organizations*, 14 Int'l and Comp. L.Q. 493 (1965); F. Seyersted, *Settlement of Internal Disputes of Intergovernmental Organizations by Internal and External Courts*, 24 Zeitschrift für Ausländisches Recht und Völkerrecht (in English) (1964).

<sup>7</sup> Jenks, *supra* at 63. See also Seyersted, *Settlement of Disputes*, *supra* at 79-81.

<sup>2</sup> Dept. of State File No. P80 0108-2131.

On July 22, 1980, the Equal Employment Opportunity Commission voted to ratify the dismissal which had been issued by the director of its Washington area office on Feb. 12, 1980, because of lack of jurisdiction. Dept. of State File No. P80 0109-1562.



tinuing legal protection afforded to Iranian nationals in the United States pursuant to the Constitution and statutes of the United States. Throughout the crisis precipitated by the seizure of American citizens in Tehran and the persistent denial of their basic human rights by the authorities in that country, the Government of the United States has attached importance to assuring Iranians in the United States the continued enjoyment of full legal protection here.

In an official statement on November 27, 1979, Attorney General Benjamin R. Civiletti affirmed the determination of the United States Government to assure constitutional liberties and due process to Iranians. In particular, he stated the Government's opposition to discriminatory actions which may have been taken against Iranians.

A variety of federal laws prohibit discrimination based on national origin. These laws forbid treating people differently in such areas as employment, public education, housing, credit, and public accommodations like restaurants and hotels. These laws—which do not involve the immigration laws—generally protect both citizens and non-citizens.

It is the role of the Justice Department to go to court, when necessary, to prevent and to remedy illegal discrimination. In the current situation, this Government must do no less. The Department will continue to enforce these laws both here in Washington and through the United States Attorney's offices around the country.

The Government of Algeria may be assured that Iranian nationals in the United States remain entitled to the protection of the guarantees of the United States Constitution and to United States statutes prohibiting discrimination in various areas based on national origin.<sup>1</sup>

#### DIPLOMATIC MISSIONS

(U.S. *Digest*, Ch. 4, §1)

##### *Appointment, Accreditation, and Notification—"People's Bureaus"*

In a note dated September 4, 1979, the People's Bureau of the Socialist People's Libyan Arab Jamahiriya (located at the address of the Embassy of the Socialist People's Libyan Arab Jamahiriya) informed the Department of State that a People's Committee had been established "to maintain and administer the foreign affairs of the Socialist People's Libyan Arab Jamahiriya in the United States . . . effective September 1, 1979." The note set out the names of the Committee's five members, responsible until further notice for supervising and administering the People's Bureau affairs, and their respective supervisory jurisdictions: political affairs and "over-all coordinator," consular and commercial affairs, press affairs, administrative and financial affairs, and cultural and student affairs.<sup>1</sup>

<sup>1</sup> Dept. of State File No. P80 0084-1320.

<sup>2</sup> Dept. of State File No. P80 0097-0939.

Similar takeovers began to take place in Libyan Embassies in a number of European capitals. They paralleled structural changes in the Libyan Foreign Secretariat that the Libyan Government set in train.

The American Embassy at Tripoli received notification to the same effect from the Libyan Foreign Secretariat on September 19 and replied to it on October 10, stating on instruction from the Department of State that, as from September 19, the Libyan diplomatic office in Washington would be designated and regarded by the United States Government as the People's Bureau of the Diplomatic Mission of the Socialist People's Libyan Arab Jamahiriya. The Embassy's note read further:

This action is taken in accordance with the Vienna Convention's definition of a diplomatic mission and takes account of the Secretariat's reference to the People's Bureau being specifically "at the Diplomatic Mission of the Socialist People's Libyan Arab Jamahiriya". Further, the Government of the United States notes that "The People's Bureau of the Diplomatic Mission will exercise its responsibilities in the customary manner in the relations between the two countries" and wishes to emphasize that the "customary manner" of such relations is codified in the Vienna Convention.

The Government of the United States still awaits clarification of the status to be accorded the members of the People's Committee of the People's Bureau of the Diplomatic Mission. In order to deal formally with members of the People's Committee it is necessary that they be accorded official status and the United States Government would welcome a request from the Socialist People's Libyan Arab Jamahiriya for diplomatic status for those Committee members. It would also be necessary that one member of the People's Bureau of the Diplomatic Mission be formally designated the official spokesman for the People's Bureau of the Diplomatic Mission and be recognized as its Chairman, Coordinator, or other appropriate title. In this regard diplomatic titles *per se* present no particular problem and [the] title and position of such an individual within the People's Bureau of the Diplomatic Mission itself are purely matters to be left to the discretion of the Socialist People's Libyan Arab Jamahiriya.

In addition, while in no way affecting the name or designation of the People's Bureau of the Diplomatic Mission, for protocol purposes it would be helpful to know at what level the People's Bureau of the Diplomatic Mission should be regarded, i.e., at the level of an Embassy, Legation, etc. Upon the clarification of these points the United States Government will be in a better position to determine the wishes of the Government of the Socialist People's Libyan Arab Jamahiriya in this regard and how best to respond to those wishes.<sup>2</sup>

While a reply to the U.S. note was being awaited, the United States Government dealt with the "Over-All Coordinator" of the People's Bureau, Dr. Ali el-Houderi, as de facto chief of mission. On November 20, 1979, President Carter's Assistant for National Security Affairs, Dr. Zbigniew Brzezinski, requested that a meeting be arranged with Dr. el-Houderi in order to explore the possibility of obtaining Libyan Government support in urging Iranian release of the Americans taken hostage in the attack on the

<sup>2</sup> *Id.*, No. P80 0041-1652.

American Embassy at Tehran on November 4. The meeting was held on November 27.<sup>3</sup>

On December 2, 1979, a "student" mob attacked the American Embassy at Tripoli, ransacking and burning its contents. The Department of State immediately—on December 2—summoned Dr. el-Houderi to receive the U.S. protest against the Libyan Government's conduct in failing to repel the attack. On occasions during the following 3 days, Department officials reiterated to him the U.S. expectation that the Libyan Government would (1) formally apologize for the attack; (2) accept responsibility for not having provided adequate security for the Embassy; (3) pay compensation for the damage to the Embassy; and (4) offer acceptable assurances for the safety and security of U.S. personnel and property in Libya. The following day, December 6, Dr. el-Houderi went to the White House offices, and when he arrived, was brought to President Carter by direction of the President, as Press Secretary Powell subsequently related, "so that the President could let him know directly and personally the extent of our concern about the matter."<sup>4</sup>

Apart from the obvious authority of Dr. el-Houderi, the Department of State still received no reply to its request for information regarding the People's Committee, transmitted by the American Embassy at Tripoli to the Libyan Foreign Secretariat in its note of October 10, 1979. On March 10, 1980, the Department dispatched a note to the People's Bureau, reminding it, *inter alia*, that all dealings with it were to be governed by the 1961 Vienna Diplomatic Convention and that all its People's Committee members must have official status. The Department enclosed a copy of the note of October 10, 1979, and asked for a new and complete list of all Libyan and non-Libyan employees currently on the Bureau's staff, with a designation of the specific position held by each. The People's Bureau furnished the requested list under cover of a note dated March 17, 1980.<sup>5</sup>

In the meantime, the Department had begun to receive reports about the imminence of a campaign of threats and intimidation against Libyan opponents of the Qadhafi regime living in the United States, to be carried out by supporters of the regime sent from Libya. Colonel Qadhafi had reportedly announced publicly that the regime's opponents would be "liquidated." Late in March 1980, information sources indicated the possibility that kidnappings and, perhaps assassinations, of opponents of the Libyan regime might be attempted in the United States. (Several murders of Libyan dissidents took place in Europe.)

Department officials again summoned Dr. el-Houderi on April 4, 1980, and stated that the United States Government wished to make clear that (1) it would not tolerate such activity within its sovereign territory; (2) any such

<sup>3</sup> See White House Press Release, July 22, 1980, in *id.*, No. P80 0108-1155, and see transcript of White House briefing for reporters by Joseph L. Powell, Press Secretary to the President, July 24, 1980, in *id.*, No. P80 0108-1157.

<sup>4</sup> See transcript of White House briefing for reporters, *supra* note 3, at 2.

<sup>5</sup> Dept. of State File Nos. P80 0041-1649/0063-0203, and 0063-0206.

violations of United States law would be met by the full force of the law and would have grave consequences for United States/Libyan relations; and (3) any individuals involved—including those on the staff of the People's Bureau—would likewise place their status in extreme jeopardy. Dr. el-Houderi was presented a copy of the Department's note to the People's Bureau of the same date, declaring two of its officials (Mohammed S. A. Tarhuni and Muftah S. Ibrahim) *persona non grata*, in accordance with Article 9 of the 1961 Vienna Convention (*i.e.*, without having to explain the decision), for engaging in conduct that was unacceptable. The Department required them to depart the United States within 48 hours, after which they would no longer be regarded as members of the People's Bureau staff or be entitled to the privileges, immunities, and protection enjoyed by virtue of official status, and would be subject to immediate expulsion. The note added:

Prior to their departure, these persons will be restricted to travel only by regularly traveled routes between their homes and offices and travel within a one mile radius of their homes as is necessary in connection with final departure preparations. Failure to observe these restrictions will result in the immediate termination of official status and immediate expulsion of the individual concerned. The People's Bureau is further advised of its obligation to communicate to the Department of State the precise departure times of these persons.

The Department reminds the People's Bureau of the specific duty, as set forth in article 41 of the Vienna Diplomatic Relations Convention, of all persons enjoying privileges and immunities to respect the laws and regulations of the receiving State.<sup>6</sup>

Subsequently, by a note dated April 10, 1980, the Foreign Liaison Office at the (Libyan) General People's Congress informed the American Embassy at Tripoli that it was the appropriate authority to deal with the Embassy, that all Embassy business relations and contacts were to be carried out through it, and that it would render every assistance to enable the Embassy to perform its role in "suitable circumstances." Confirming the importance of friendly relations between the Libyan and American peoples and requesting similar assistance for the People's Bureau in the United States, the note also set out the names of the five People's Committee members notified to the Department by the People's Bureau at Washington on September 4, 1979.

The Department of State replied for the United States Government, by a note to the People's Bureau at Washington, dated April 24, 1980, directing the attention of the Libyan Government to the Department's previous notes of October 10, 1979, and March 14, 1980, and reiterating the U.S. position that the People's Bureau was to be regarded and treated as a diplomatic mission. Confirming that all appropriate courtesies and cooperation would be accorded the People's Bureau in accordance with customary practice in dealing with a diplomatic mission and its staff members, the note added:

The status, rights, obligations, privileges, and immunities of the Libyan Diplomatic Mission (the People's Bureau) in Washington and

<sup>6</sup> *Id.*, No. P80 0097-0940.

those of the head of that mission and its staff shall hereafter be determined in accordance with the Vienna Convention on Diplomatic Relations and the laws of the United States applicable to diplomatic missions and their personnel.

Ali El-Houderi, who is referred to in the Foreign Liaison Office note of April 10, 1980, as "Secretary of the People's Committee", will be regarded by the Department of State as the head of the Libyan Diplomatic Mission (the People's Bureau) in Washington.<sup>7</sup>

The note enclosed standard notification forms (Notification of Appointment of Foreign Diplomatic Officer, DS-1497, and Notification of Foreign Government Related Employment Status, DS-394) for completion and return, covering mission staff members for whom proper notification forms had not been submitted. The list included the five People's Committee members announced in the People's Bureau note of September 4, 1979, and six other persons.

The People's Bureau replied on May 1, transmitting a note from the Libyan Foreign Liaison Office in Tripoli, which made the following principal points: (1) People's Bureaus were the result of the "political experiment being exercised in the Jamahiriya"; and People's Committees, which had come into being as a result of the takeover by the masses, "mainly the Libyan student masses," were an extension of the people's authority and were accountable to the People's Congresses. (2) People's Bureaus had been established to replace traditional embassies and to establish friendship between the Libyan people and other people; they were not embassies and did not represent a government, "for the government in the traditional sense does not exist in the Jamahiriya." (3) People's Bureaus were run by popularly chosen People's Committees in accordance with a "philosophical framework of collective action" under which decisions were reached "on the basis of the democratic rule of majority," each People's Bureau having a secretary who coordinates its actions ("in Washington D.C., Dr. Ali el-Houderi"). The note added:

The Office of Foreign Liaison is the connecting point and the channel of contact between the People's Bureaus outside Libya and the People's Congresses inside it. The head of the Office of the Foreign Liaison is brother Ahmed Shahati.

The traditional Secretariat for Foreign Affairs will disappear in Libya when the masses complete their takeover of the Embassies, and then turn them into People's Bureaus, run by People's Committees, chosen openly and directly by the masses. The concept and the existence of the Secretariat for Foreign Affairs has in practice disappeared as it relates to your country, with the completion of the taking-over of the former Embassy and turning it into a People's Bureau, run by a People's Committee.<sup>8</sup>

The Department of State continued to receive reports that Libyan Government activity against dissident Libyan nationals in the United States was relatively unabated. Some specifically implicated the four members of

<sup>7</sup> *Id.*, No. P80 0059-1045.

<sup>8</sup> *Id.*, No. P80 0063-1211.

the People's Committee other than Dr. el-Houderi. On May 2, 1980, the Department again summoned him to a meeting and read him the Department's note to the People's Bureau of the same day, informing it of the Department's awareness that the four (Nuri Sweden, Ali Ramram, Mohammed Gammudi, and Abdulla Zbedi) had engaged in conduct the United States deemed unacceptable; that in accordance with Article 9 of the Vienna Convention on Diplomatic Relations, they were declared not acceptable; and that they were required to depart the United States within 72 hours. The note contained the same conditions that had been imposed on the two officials earlier declared *persona non grata*.<sup>9</sup>

Dr. el-Houderi refused to accept the note's contents and claimed that he did not represent the Socialist People's Libyan Arab Jamahiriya in any official diplomatic capacity and was merely a Libyan citizen on a valid passport and visa in the United States.

A further discussion ensued on May 4, at which Dr. el-Houderi and an attorney representing the four argued to Department officials that they were not diplomats, etc., and requested additional information about the activities the United States had found unacceptable. A follow-up note from the People's Bureau to the Department, dated May 5, confirmed the various representations made to the Department the preceding day and "totally rejected" the "unilateral action of the United States Government" in having determined that the People's Bureau was to be treated as a diplomatic mission. The note also confirmed that the Forms DS-1497 and DS-394 had not been completed, and offered "resumés" (name, date, and place of birth, address in the United States, passport number, visa expiration date, and date of entry into the United States), which gave as the occupation of each, "student." In the note the Bureau rejected the "request of the United States Government to expel the four individuals specified herein as unacceptable for the very basic reason that these individuals are not diplomats and are not governed by the Vienna Convention on Diplomatic Relations," etc., and warned that "should Libyan citizens be unlawfully expelled without cause from the United States, such action would be ill-advised and could have additional, undesired consequences."<sup>10</sup>

On the same day, May 5, the Department of State dispatched a note to the People's Bureau that (1) refused its request for additional information on the activities of the four individuals; (2) reminded it of the Libyan Government's obligation under Article 9 of the Vienna Convention to recall them since they had been declared not acceptable; (3) informed the Bureau that their visas had been revoked; and (4) announced that if they did not voluntarily depart by the following afternoon, they would be taken into custody and removed involuntarily.<sup>11</sup>

The People's Bureau reply of May 6 reiterated its claim that it was not a diplomatic mission within the meaning of the Vienna Convention and that Article 9 was not applicable to it. In addition, the People's Bureau deplored the revocation of the visas, referred to its note of May 5 suggesting "possible

<sup>9</sup> *Id.*, No. P80 0063-0235.

<sup>10</sup> *Id.*, No. P80 0063-0213.

<sup>11</sup> *Id.*, No. P80 0063-0234.

consequences," and concluded: "These individuals will not depart voluntarily and it is hoped and desired by the Bureau that they will not be taken into custody and involuntarily removed without due process being accorded to these individuals. . . ." <sup>12</sup>

On May 7, police officers and FBI agents were stationed at the Libyan People's Bureau with instructions to detain the four if they left the building and to escort them to the airport for immediate deportation. On the same day, Dr. el-Houderi called in members of the press and repeated the Libyan arguments claiming nondiplomatic status for the People's Committee. He also denied any wrongdoing by the four, whom President Carter described the following day, May 8 (at Secretary of State Edmund S. Muskie's swearing-in ceremony), as "would-be assassins . . . now hiding in the Libyan Embassy."

Also on May 8, Department officials informed Dr. el-Houderi that if the four individuals failed to depart by the following afternoon, the People's Bureau and its staff would no longer be authorized to function in the United States, the Bureau would be required to terminate its activity, and its personnel would be required to depart. <sup>13</sup>

On May 9, Dr. el-Houderi called upon a high Department official and stated that the four individuals would depart. In regard to the status of the People's Bureau and its staff, he indicated that the matter of diplomatic titles presented a problem but that the Libyan Government wished to find an accommodation.

As a result of discussions the following week between Department officials and the People's Bureau, the protracted dialogue regarding the status of, and the documentation applicable to, the People's Bureau and its personnel was concluded by an agreement, the terms of which the Department described in a note sent to the People's Bureau, dated May 15, reading in part:

1. The Department will continue to apply to the People's Bureau the laws, regulations and procedures applicable to diplomatic missions in Washington and their members. In particular, the People's Bureau and its personnel will, on the basis of reciprocity, be accorded the privileges, exemptions, immunities and protection accorded to foreign diplomatic missions and their personnel. For these purposes, the Secretary of the People's Committee will be treated as equivalent to a chief of a diplomatic mission; the members of the People's Committee will be treated as equivalent to members of the diplomatic staff of a diplomatic mission; and the other members of the People's Bureau will be treated as equivalent to members of the administrative and technical staff or the service staff of a diplomatic mission, as appropriate to their functions. However, in keeping with the expressed wishes of the People's Bureau, the Department will no longer refer to the People's Bureau as "the People's Bureau of the Diplomatic Mission of the Socialist People's

<sup>12</sup> *Id.*, No. P80 0063-0227.

<sup>13</sup> For the Department's note of May 8, embodying the notification given personally to Dr. el-Houderi, see *id.*, No. P80 0063-0228.

Libyan Arab Jamahiriya," but rather as the "People's Bureau of the Socialist People's Libyan Arab Jamahiriya."

2. The People's Bureau will promptly inform the Department of the entry on duty and departure of all members of the People's Bureau, utilizing standard Department of State Forms 1497, 1497a, 394 and 394a, which may be modified, as agreed, to reflect acceptable terminology. The Department will utilize the data submitted by the People's Bureau on its personnel to make appropriate determinations as to the inclusion of the personnel on either the "Blue" or "White" lists.

3. The United States will issue visas in accordance with its laws and regulations to permit the members of the People's Bureau to enter and to maintain the correct status while in the United States. Without regard to the specific character of the representation of the Socialist People's Libyan Arab Jamahiriya in the United States, such visas will ordinarily be issued pursuant to section 101(a)(15)(A) of the United States Immigration and Nationality Act.

The Department is pleased to confirm that the foregoing understandings are acceptable to the Government of the United States of America. The Department would appreciate being informed that these understandings are also acceptable to the Socialist People's Libyan Arab Jamahiriya.<sup>14</sup>

A review of United States relations with Libya since the advent of Colonel Moammer Qadhafi to power in September 1969, given in testimony by Under Secretary of State David D. Newsom before a special subcommittee of the Senate Committee on the Judiciary on August 4, 1980, presented the overall context in which the Department's experiences with the People's Bureau had taken place.<sup>15</sup>

#### OFFICIAL COMMUNICATIONS AND INFORMATION

(U.S. *Digest*, Ch. 4, §1)

##### *Communications to Courts*

By a letter dated May 6, 1980, to U.S. District Judge Prentice H. Marshall, Associate Attorney General John H. Shenefield made a formal statement of interest by the United States in *Westinghouse, Inc. v. Rio Algom, Ltd., et al.*, No. 76 C 3830 (N.D. Ill.). The letter related to conflicts between discovery orders of U.S. courts (directed toward activities of foreign persons outside the territory of the United States) and foreign criminal laws. It also suggested to the court that views and representations advanced by foreign

<sup>14</sup> *Id.*, No. P80 0069-0911.

<sup>15</sup> See 80 DEPT. STATE BULL., No. 2043, Oct. 1980, at 60.



governments "are entitled to appropriate deference and weight in resolving legal questions that turn, at least in part, on considerations of international comity," and none the less so for having been presented directly to the court rather than through the Department of State. The full text of the letter follows:

This letter constitutes a formal statement of interest by the United States in the above-captioned litigation. The case implicates foreign policy concerns of both the United States and foreign governments. Australia, Canada, France, South Africa, and the United Kingdom have all expressed serious concern at what they see as the exercise of the United States jurisdiction over activities of foreign persons outside the territory of the United States challenging their authority to establish national policies for corporate activity in their countries. The recent adoption of administrative and legislative measures by some foreign governments in response to the initiation of this lawsuit testifies to the intensity and authenticity of their respective interests. The views and representations advanced by these foreign governments are entitled to appropriate deference and weight in resolving legal questions that turn, at least in part, on considerations of international comity. See, e.g., *Societe Internationale v. Rogers*, 357 U.S. 197 (1958); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979); Section 40 of the Restatement (Second) of the Foreign Relations Law of the United States.

Foreign governments may perceive particular federal litigation to which they are not parties as threatening to their sovereign interests. At one time, it was customary for foreign governments to communicate such concerns through diplomatic notes, delivered to the federal courts by the Department of State. In 1978, however, the Clerk of the United States Supreme Court notified the Solicitor General that a foreign government that desired to present its views to the federal courts on a pending case should do so by way of a brief *amicus curiae*. Accordingly, since that time, both the Department of State and the Department of Justice have consistently encouraged interested foreign governments to submit their positions directly to the courts as *amici*. It would be improper, therefore, to discount the importance of international comity in a particular case simply because foreign governments have expressed their views to the court without the intercession of the Department of State.

Finally, the United States urges that it would be inappropriate, in the absence of bad faith, to inflict punishment against a defendant in the above-captioned case for inability to comply with a discovery order of the court because of a contrary foreign criminal law; the consequences of the absence of complete discovery should be assessed by reference to the multiple factors identified in *Societe Internationale v. Rogers*, *supra*.<sup>1</sup>

<sup>1</sup> Dept. of State File No. P80 0108-2005. See further 74 AJIL 665 (1980), and 73 AJIL 124, 678 (1979).

## DIPLOMATIC MISSIONS

(U.S. *Digest*, Ch. 4, §1)*Protection of Interests—United States/Iran*

Following termination by the United States of diplomatic and consular relations with the Government of Iran, on April 7, 1980, because of the continuing unlawful detention of U.S. citizens as hostages in Iran, the United States Government asked the Government of Switzerland to assume diplomatic and consular representation on its behalf in Iran, subject to agreement by the Government of Iran.

The formal request was conveyed in a note from Secretary of State Cyrus R. Vance to the Ambassador of Switzerland, Raymond Probst, dated April 8, which Under Secretary of State David D. Newsom gave to Ambassador Probst that same day. It read in part:

[T]he United States Government desires that when possible, the Swiss Government render the following services in the Islamic Republic of Iran:

(1) In the case of indigent United States citizens, to offer such financial assistance as has received prior approval in each case from the Department of State;

(2) To answer inquiries concerning welfare and whereabouts of United States citizens;

(3) In the event of distress or physical danger, to render all possible assistance to United States citizens and make detailed reports in each case to the Department of State;

(4) To report to the Department of State the death of United States citizens and, as necessary, inventory and take into provisional custody the personal effects of such deceased citizens;

(5) To perform notarial services on the basis of accommodation;

(6) To make payments to the payees of federal benefits as and when requested by the Department of State;

(7) To forward visa and passport applications, and correspondence pertaining thereto, to the Department of State;

(8) To inform the Department of State of any requests or representations made by the Government of Iran under any agreements between the United States and Iran.

The Swiss Government is also requested, at such time as shall become possible, to accept custody and undertake protection of all official property of the United States Government in the Islamic Republic of Iran. To the extent possible, the Department of State shall provide to the Swiss Government relevant inventories and descriptions.

It will also be appreciated if the Swiss Government will undertake to supervise to the extent feasible the packing and forwarding of remaining personal effects of United States official personnel.

The Swiss Government is requested to arrange payment and termination of services of non-American employees in accordance with instructions to be furnished by the Department of State. It is anticipated

that the Swiss Government may desire to employ certain of these personnel. In that event it is understood that such personnel become Swiss employees who will be responsible to the Swiss authorities and who will be paid with funds which the United States makes available to the Swiss Government for that purpose. These salaries will be subject, as applicable, to deductions for United States Civil Service retirement.

All communications with respect to the protection of United States interests in the Islamic Republic of Iran will be conveyed through the Ministry of Foreign Affairs in Bern.<sup>1</sup>

On April 24, 1980, the Department of State also replied to a request from the Embassy of the Democratic and Popular Republic of Algeria, made by a note of April 9, for the United States Government's agreement to Algerian representation of interests of the Islamic Republic of Iran in the United States.<sup>2</sup>

#### THE LAW OF TREATIES

(U.S. *Digest*, Ch. 5, §1)

##### *Provisional Application*

Following testimony before the Senate Committee on Foreign Relations on June 30, 1980, in support of maritime boundary agreements with Mexico, Cuba, and Venezuela,<sup>1</sup> Mark B. Feldman, Deputy Legal Adviser of the Department of State, submitted written replies to four questions presented in writing by Senator Jacob K. Javits, two of which concerned provisional application of treaties.<sup>2</sup> The questions and Mr. Feldman's replies were as follows:

Question 2. What are the precedents for "provisional application" of treaties and what criteria do you use in deciding when that approach is appropriate? Is it necessary to have an explicit provision in a treaty

<sup>1</sup> Dept. of State File No. P80 0113-0230.

In a note to Secretary of State Edmund S. Muskie, dated May 21, 1980, the Chargé d'Affaires of Switzerland, Franz E. Muheim, confirmed that the Iranian Government's agreement to Swiss representation of U.S. interests in Iran had been given to the Embassy of Switzerland in Tehran by the Iranian Foreign Ministry in a note dated Apr. 24, 1980. *Id.*, No. P80 0113-0228. The information had been communicated to the Department of State earlier.

<sup>2</sup> *Id.*, Nos. P80 0113-0236 and 0113-0235. The United States did not consent to transfer of custody of the premises of the Iranian diplomatic mission and consular posts in the United States.

<sup>1</sup> See for the Treaty on Maritime Boundaries between the United States and the United Mexican States, signed May 4, 1978, S. EXEC. DOC. F, 96th Cong., 1st Sess. (1979); for the Maritime Boundary Agreement between the United States and the Republic of Cuba, signed Dec. 16, 1977, S. EXEC. DOC. H, 96th Cong., 1st Sess. (1979); and for the Maritime Boundary Treaty between the United States and Venezuela, signed March 28, 1978, S. EXEC. DOC. G, 96th Cong., 1st Sess. (1979).

<sup>2</sup> For Mr. Feldman's explanation of "the practical necessity and legal justification for 'provisional application' of the boundary treaty with Cuba," see Dept. of State File No. P80 0110-1460.

regarding its provisional application or can the parties simply agree outside of the treaty to do so?

*Answer:* A provisional maritime boundary might be established by an executive agreement separate from a treaty—as is the case in the current situation with Mexico. A provisional maritime boundary might be established by a provision on “provisional application” in a treaty—such a provision itself constitutes a binding international agreement and can only be included in a treaty signed by the United States if the obligations undertaken in accordance with “provisional application” are obligations within the President’s competence under U.S. law. It is also possible for the President to determine, as a matter of policy and without reaching agreement with other Parties, that the United States will “provisionally apply” a treaty signed by the United States so long as the obligations undertaken are all within the competence of the President under U.S. law.

The primary factor for determining the appropriateness of provisional application relates to the immediate need to settle quickly matters in the interest of the United States which are within the President’s domestic law competence.

Some precedents for provisional application of treaties other than maritime boundary treaties include:

—International Sugar Agreement of 1958 (TIAS 4389; 10 UST 2189);

—International Wheat Agreement of 1962 (TIAS 5115; 13 UST 1571);

—International Coffee Agreement of 1962 (TIAS 5505; 14 UST 1911).

Question 3. What is the domestic legal status of a treaty applied provisionally? How is provisional application related to the obligation of treaty partners not to take any action prior to final ratification to defeat the “object and purpose” of the agreement?

*Answer:* A treaty applied provisionally has the same legal status as any agreement of the United States concluded by the President on his own authority. The American Law Institute, in a draft commentary on provisional application of treaties for the United States, stated:

If consent of the Senate or Congress is required for the conclusion of an agreement but has not yet been obtained, agreement by the United States for provisional effect must normally rest on the President’s authority.

(Tentative Draft No. 1, *Foreign Relations Law of the United States (Revised)*, p. 117.)

A provisional application of a treaty, even though it might commit the nation to a particular course, does so temporarily and does not represent the final commitment of the nation. As such, it is closely tied to the negotiation process. While the President may not, through provisional application of treaties, change existing law, treaties applied provisionally within the President’s authority have full effect under

domestic law pending a decision with respect to ratification. The provisional application is terminated if the United States or its treaty partner informs the other of its intention not to become a party to the agreement. The treaty enters into force definitively if the Senate approves and the President formally ratifies the treaty.

If the United States enters into a commitment with its treaty partner to apply a treaty provisionally pending ratification, the legal effect is the same as an executive agreement to apply the treaty provisionally. If there is no commitment to another state, but simply a unilateral policy decision by the President to apply the treaty provisionally, the President's power must be derived entirely from his domestic law authority. A unilateral provisional application would present a question of domestic Constitutional law separate from the President's treaty or agreement power.

There is no direct relationship between provisional application and the obligation of treaty partners not to take actions prior to ratification that would defeat the object and purpose of the treaty. Provisional application means that treaty terms are applied temporarily pending final ratification. The obligation not to defeat the object and purpose of the treaty prior to ratification could, in theory, necessitate pre-ratification application of provisions, if any, where non-application from the date of signature would defeat the object and purpose of the treaty. Such provisions are rare. In the majority of cases the obligation not to defeat the object and purposes of the treaty means a duty to refrain from taking steps that would render impossible future application of the treaty when ratified.

Both provisional application of treaties and the obligation not to defeat the object and purpose of treaties prior to ratification are recognized in customary international law, in the Vienna Convention on the Law of Treaties (Articles 18 and 25), and in U.S. law (Tentative Draft No. 1, *Foreign Relations Law of the United States (Revised)*, pp. 110, 116).<sup>3</sup>

#### FISHERIES

(U.S. *Digest*, Ch. 7, §4)

##### *Foreign Fishery Conservation Zones*

In response to a written question from Senator Jacob K. Javits, following testimony before the Senate Committee on Foreign Relations on June 30,

<sup>3</sup> *Ibid.*

On August 5, 1980, the Senate Committee on Foreign Relations reported the 3 maritime boundary agreements favorably without reservation and recommended Senate advice and consent to their ratification. The committee registered "concern," however, at the administration's responses to Senator Javits's questions about provisional application of treaties, even though the committee did not "dispute the practical necessity of reaching limited practical accommodations between treaty signatories prior to Senate action." S. EXEC. REP. NO. 96-49, 96th Cong., 2d Sess. 4 (1980).

1980, Mark B. Feldman, Deputy Legal Adviser of the Department of State, explained the U.S. view on the fishery conservation zones claimed by Cuba, Mexico, and Venezuela as follows:

Cuba, Mexico, and Venezuela all assert jurisdiction within their declared 200 mile zones that are not acceptable to the United States. Accordingly, each of the maritime boundary treaties under consideration contains a provision which makes clear that by ratification of the treaty the United States does not recognize the jurisdictional content of the 200 mile zone claimed by the neighboring state. It would be unrealistic to assert that the 200 mile zones of our neighbors do not exist. It remains open to us, however, not to recognize assertions of jurisdiction within their zones which do not comport with international law as understood by the United States. On the other hand, the United States will recognize those aspects of a neighboring state's jurisdiction which are consistent with international law.<sup>1</sup>

<sup>1</sup> Dept. of State File No. P80 0110-1460. This was the last of the four questions submitted by Senator Javits; see chapter 5, §1 *supra*.

## JUDICIAL DECISIONS

ALONA E. EVANS

*Extradition—offense extraditable under later treaty where extradition request and proceedings began after treaty became effective*

MARKHAM v. PITCHESS. 605 F.2d 436.

U.S. Court of Appeals, 9th Cir., Aug. 7, 1979. *Rehearing denied* Oct. 9, 1979.

Petitioner was arrested in Canada in 1975 on a charge of importing hashish oil. He fled to the United States where, after he was stopped for a traffic violation in 1978, the Canadian arrest warrant came to light. After extradition proceedings were begun, also in 1978, petitioner sought habeas corpus relief (28 U.S.C. §2241), contending that traffic in marijuana was not an extraditable offense under the Webster-Ashburton Treaty of 1842 (8 Stat. 572, TS No. 119, 12 Bevans 82) as amended in 1925 (44 Stat. 2100, TS No. 719, 6 Bevans 5, 43 LNTS 233). Marijuana-related offenses were included in the Treaty on Extradition of 1971 with Canada (27 UST 983, TIAS No. 8237) (Treaty), which became effective in 1976. Petitioner argued that this Treaty could not be invoked in his case as the charge against him antedated the effective date of the Treaty. The district court denied habeas corpus relief. On appeal, the court of appeals affirmed this decision.

District Judge Turrentine, sitting by designation, held that the marijuana provision in the later Treaty would apply to the offense charged against petitioner because the Canadian extradition request and the proceedings thereon took place after the effective date of the Treaty.

Petitioner contended, however, that according to the terms of the Treaty, it would not apply to offenses listed in earlier treaties and committed prior to its entry into force (Art. 18(2)). The court said: "In the instant case, only the requirement that the crime be committed prior to the date of the newly-amended Treaty has been satisfied. Therefore, because marijuana trafficking is not listed in the original 1842 Treaty, application of the newly-amended Treaty is not barred."<sup>1</sup>

*Jurisdiction—assault on board aircraft in international flight—special aircraft jurisdiction of United States*

CHUMNEY v. NIXON. 615 F.2d 389.

U.S. Court of Appeals, 6th Cir., Jan. 24, 1980.

Plaintiffs brought an action against certain passengers, a travel agency that had chartered the aircraft, and the carrier, for damages for physical assault on board an aircraft. The incident occurred on board a chartered flight from Rio de Janeiro to Memphis, Tennessee. Plaintiffs argued that the federal court had jurisdiction over their complaint because it involved a

<sup>1</sup> 605 F.2d 436, 437.

federal question (28 U.S.C. §1331(a)): the incident constituted a violation of 18 U.S.C. §113, punishing assaults committed within the special maritime and territorial jurisdiction of the United States, which applied to an aircraft registered in the United States and "in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." (18 U.S.C. §7; 49 U.S.C. §§1472(k)(1), 1301(34)(d)(i).) The district court dismissed the complaint for want of jurisdiction. On appeal, the court of appeals vacated this judgment in part and remanded the case for further proceedings.

The question before the court was whether the federal criminal statute also provided the basis for a civil action for damages which would be within the court's jurisdiction under 28 U.S.C. §1331(a) as a civil action that "arises under the . . . laws . . . of the United States." An examination of relevant judicial decisions led Chief Judge Edwards to conclude that plaintiffs had a federal cause of action. The court said:

In our instant case, each plaintiff is clearly "one of the class for whose especial benefit" the statutes here involved were created. We find no specific language in the legislative history of the statutes previously cited which shows specific intent to create a civil remedy or which prohibits inference of such intent. It is clear to us that Congress has taken care in comprehensive legislation to protect the safety of passengers flying on United States airlines or flying on aircraft intended to land at United States airports or on aircraft bound for foreign lands after departure from an airport in the United States. A clear-cut purpose has been defined in federal legislation and the federal courts have been given specific jurisdiction to impose criminal penalties against those who commit simple or felonious assaults on aircrafts under the conditions described above. A civil action for damages would certainly be consistent with the overall congressional purpose and we believe should be inferred therefrom.

Indeed the existence or nonexistence of a civil cause of action in this case may create a legal precedent which will affect other possible fact situations (aircraft kidnapping or terrorism) some of which may well cry out for more than the criminal remedy.

Finally, the maintenance of civil peace on airlines flying to and from the United States and foreign lands is clearly a topic of federal, not state, significance. The State of Tennessee has not legislated on this subject and we believe that most state courts would be loathe to reach for jurisdiction over the results of an altercation which occurred at 29,000 feet over the Brazilian jungle. This problem is certainly not one "traditionally relegated to the state courts."

It seems to this court to be an appropriate step under the legal doctrines which we have outlined above to approve a civil cause of action for damages derived from criminal statutes which plaintiffs alleged were violated in this case.<sup>1</sup>

The court found that plaintiffs had no cause of action against the charterer or against the carrier for failure to prevent the assault. On the

<sup>1</sup> 615 F.2d 389, 394-95.



other hand, the court observed that there was a need to examine the facts as to the consumption of liquor on board the aircraft during the flight and the carrier's responsibility therefor. This matter was remanded to the district court.

*Jurisdiction—attempt made wholly outside United States to import drugs into the country*

UNITED STATES V. PEREZ-HERRERA. 610 F.2d 289.  
U.S. Court of Appeals, 5th Cir., Jan. 23, 1980.

Appellants, American nationals, were arrested on board a vessel of American registry at a point approximately 70 miles off the coast of the United States. They were convicted on a charge of attempting to import marijuana into the United States (21 U.S.C. §963). On appeal, the court of appeals affirmed the convictions.

Appellants contended that they had been wrongly convicted because their attempt to import the marijuana had not been shown to have been made within the United States. The question here was not whether Congress could regulate the extraterritorial activities of United States nationals but rather whether Congress had intended the prohibition in section 963 to apply to attempts made wholly outside the borders of the United States. In the opinion of Circuit Judge Henderson, the legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 showed a strong concern on the part of Congress to control all phases of the international traffic in drugs. The court observed:

Limiting the application of section 963 to attempts committed at least partially in the United States would not eliminate all prosecutions, but, by setting up a free-zone just beyond our territorial waters where smugglers could safely await opportunities to move drugs to the mainland, such a construction would substantially impair enforcement activities. We conclude that the realities of drug smuggling are such that Congress must have intended section 963 to apply in the context of this case.<sup>1</sup>

Following *Strassheim v. Daily* (221 U.S. 280 (1911)), "a person may be guilty of a crime, even though he never entered the prosecuting state, if he intends his acts outside the jurisdiction to produce effects therein, and those consequences do in fact follow."<sup>2</sup>

*Jurisdiction—dual nationality—foreign domicile—access to federal diversity of citizenship jurisdiction*

SADAT V. MERTES. 615 F.2d 1176.  
U.S. Court of Appeals, 7th Cir., Feb. 19, 1980.

Plaintiff, a naturalized United States citizen of Egyptian origin, brought an action for damages for injuries he had sustained in an accident in the United States involving automobiles operated by two of the defendants.

<sup>1</sup> 610 F.2d 289, 292.

<sup>2</sup> *Ibid.*

At the time of the action, plaintiff was residing in Egypt. The suit was predicated upon federal diversity of citizenship jurisdiction (28 U.S.C. §1332(a)(1)). Defendants moved to dismiss the action on the ground that because of his foreign domicile plaintiff was not a "citizen of a state" as required for diversity jurisdiction. Plaintiff claimed that he maintained a domicile in Pennsylvania and, in the alternative, he argued that he was also an Egyptian national, so that he could invoke diversity jurisdiction pursuant to 28 U.S.C. §1332(a)(2), which authorized suits between "citizens of a State and citizens or subjects of a foreign state." The district court, granting defendants' motions, held that plaintiff did not qualify as a citizen of a state within the meaning of the statute and that he could not invoke dual nationality in order to obtain access to a federal court under diversity jurisdiction (464 F.Supp. 1311 (E.D. Wis. 1979)). On appeal, the court of appeals affirmed this judgment.

In a per curiam opinion, the court of appeals pointed out that the main issue before the court was whether plaintiff at the time of filing his complaint in 1976 was a citizen of one of the United States, *i.e.*, domiciled in a state. The record indicated that plaintiff had lived in Pennsylvania in 1973 when he became a naturalized citizen. He and his family had then been sent to Lebanon by the firm for which he was working. By 1976, he had established his residence in Egypt. Despite plaintiff's assertion that he always intended to return to Pennsylvania, he offered no evidence to support his contention that his domicile had continued in that state; indeed, the facts indicated that when the complaint was filed in 1976, plaintiff was domiciled in Egypt. It followed that he did not qualify as a "citizen of a state" for the purpose of diversity jurisdiction under 28 U.S.C. §1332(a)(1).

Plaintiff's alternative argument was that, as he had dual United States-Egyptian nationality, he could invoke diversity jurisdiction under section 1332(a)(2). The record showed that Egypt had consented to plaintiff's acquisition of United States nationality and had, at the same time, notified him that he could retain his Egyptian nationality. The court observed that the United States Government was not favorably disposed toward dual nationality, as was evidenced in a letter to the court from the Department of State:

The United States does not recognize officially, or approve of dual nationality. However, it does accept the fact that some United States citizens may possess another nationality as the result of separate conflicting laws of other countries. Each sovereign state has the right inherent in its sovereignty to determine who shall be its citizens and what laws will govern them.<sup>1</sup>

Observing that the question of whether a dual national could invoke section 1332(a)(2) was one of first impression in the courts of appeals, the court pointed out that this theory would enable the dual national to have unlimited access to federal courts to the disadvantage of the native-born national domiciled in the same state, an extension of diversity jurisdiction

<sup>1</sup> 615 F.2d 1176, 1184 (quoted by court) (footnotes by court omitted).

which was not consonant with current thinking on the function of diversity jurisdiction. In the opinion of the court, the ambiguity involved in determining the right of a dual national to invoke section 1332(a)(2) could be resolved by determining which nationality was the effective or dominant one.<sup>2</sup> An examination of the record indicated that plaintiff had made every effort to maintain his American citizenship after his naturalization in 1973; consequently, it should be concluded that the American nationality was dominant, so that plaintiff could not invoke his Egyptian nationality solely in order to take advantage of section 1332(a)(2).

*Jurisdiction—kidnapping on high seas—prosecution in foreign country—whether second trial constituted double jeopardy*

UNITED STATES v. MCRARY. 616 F.2d 181.

U.S. Court of Appeals, 5th Cir., April 30, 1980.

Defendants, husband and wife, forced the captain of a fishing vessel of United States registry to take them and their family to Cuba in July 1974. While in Cuba, the husband served 7 months of a 3-year sentence on charges that were not specified but were apparently based on the kidnapping. In 1978, both defendants returned to the United States. The husband was charged with kidnapping (18 U.S.C. §1201(a)). He pleaded insanity at the time of the trip to Cuba. The jury found defendant guilty. On appeal, the court of appeals vacated the verdict and remanded the case because certain essential evidence had been excluded by the trial court.

Circuit Judge Clark found that evidence that defendant and his wife suffered from a mental condition known as "folie à deux" at the time of the kidnapping should have been admitted in the trial pursuant to the rule that all of the facts relative to a defense of insanity should be before the jury.

Appellant contended that his trial in Florida violated the double jeopardy rule of the Fifth Amendment as he had already been tried for the same offense in Cuba. Relying upon the rule of *Abbate v. United States* (359 U.S. 187 (1959)), the court held that an individual could be prosecuted on the same charge in two different jurisdictions and that appellant had not shown that understandings between Cuba and the United States made Cuba "merely a tool" of the U.S. Government and rendered the Cuban prosecution the equivalent of a prosecution by the United States.

*Jurisdiction—minimal contacts with forum—Foreign Sovereign Immunities Act of 1976*

THOS. P. GONZALEZ CORPORATION v. CONSEJO NACIONAL DE PRODUCCION DE COSTA RICA. 614 F.2d 1247.

U.S. Court of Appeals, 9th Cir., March 10, 1980.

Plaintiff, a California corporation engaged in international trade in grain, sued defendant, a Costa Rican governmental agency, for breach of contract. It was shown that although there was frequent mail and telex communica-

<sup>2</sup> Citing *Nottebohm Case* (Liechtenstein v. Guatemala), [1955] ICJ REP. 4, 22.

tion between plaintiff's California office and defendant and that defendant paid through letters of credit confirmed by a California bank, grain shipments to defendant did not originate in California nor did defendant maintain a place of business or an agent in that state. The present case arose out of defendant's cancellation of a grain purchase contract on grounds of delays in shipments and failure of plaintiff to post a completion guarantee. Process was served on the Costa Rican Consul General at Los Angeles with the request that he notify the Ministry of Foreign Affairs of the action and later on the legal adviser to defendant who was in California on another matter. When no response was received, after due warning, a default judgment was entered against defendant. Subsequently, defendant moved to set aside this judgment and sought to dismiss the action for want of personal jurisdiction. The district court granted both motions. On appeal, the court of appeals affirmed this decision.

District Judge East, sitting by designation, pointed out that personal jurisdiction could be asserted only where defendant maintained minimal contacts with the forum. (*International Shoe Co. v. Washington*, 326 U.S. 310 (1945).) The question was whether it could be shown that the contacts of defendant with California were so substantial and systematic as to warrant the assertion of personal jurisdiction over it. In the opinion of the court, the requisite minimal contacts were not shown. District Judge East said:

[T]he economic reality is that the Consejo has not performed any act relating to the contract at issue by which it purposefully availed itself of the privilege of conducting business in California. Its actions within the state were unrelated to Gonzalez's present claim. Requiring the Consejo to submit to the jurisdiction of the court in this case would thus be unreasonable and violative of due process.<sup>1</sup>

Plaintiff contended that under the Foreign Sovereign Immunities Act of 1976 (Act), defendant's contacts with California would justify the assertion of personal jurisdiction over it. The Act conferred personal jurisdiction over foreign states where there was no entitlement to sovereign immunity under the Act or under an international agreement (28 U.S.C. §1330(b)) and where service could be made (§1608). The court took the view, however, that even if defendant could be classified as a "foreign state," the legislative history of the Act made it clear that personal jurisdiction thereunder was limited by the minimal contacts standard of *International Shoe*.

*Jurisdiction—political assassination—tort action against foreign state—Foreign Sovereign Immunities Act of 1976*

LETELIER V. REPUBLIC OF CHILE. 488 F.Supp. 665.  
U.S. District Court, D.D.C., March 11, 1980.

Representatives of Orlando Letelier, former Chilean Foreign Minister and sometime Ambassador to the United States, and Ronni Moffitt, an American national, brought an action against the Republic of Chile for damages arising out of the deaths of Letelier and Moffitt as a result of the

<sup>1</sup> 614 F.2d 1247, 1254.

bombing of the automobile in which they were riding. The bombing was allegedly perpetrated at the instance of the Republic of Chile. The suit was brought pursuant to the provision of the Foreign Sovereign Immunities Act of 1976 (Act) which makes a foreign state liable for the "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." (28 U.S.C. §1605(a)(5).) The Republic of Chile refused to appear. However, in diplomatic correspondence, while disclaiming any responsibility in the matter, Chile indicated that in its view the court lacked subject matter jurisdiction: if Chile was responsible for the two deaths, it was entitled to sovereign immunity from suit because political assassinations were acts of a public or governmental nature. A default judgment was entered against Chile. After the case was reassigned for further proceedings on the issue of jurisdiction, the district court held that it had the requisite subject matter jurisdiction.

In a memorandum opinion, District Judge Green examined the legislative history of the Act and found that only section 1605(a)(5) was relevant to the issue here. The question was whether Chile could invoke the "discretionary function" exception to this provision, *i.e.*, that section 1605(a)(5) would not apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . ." (Section 1605(a)(5)(A).) The court said:

While it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision and thus exempt as a discretionary act under section 1605(a)(5)(A), that exception is not applicable to bar this suit. As it has been recognized, there is no discretion to commit, or to have one's officers or agents commit, an illegal act. *Cruikshank v. United States*, 431 F.Supp. 1355, 1359 (D. Hawaii 1977); see *Hatahley v. United States*, 351 U.S. 173, 181 . . . (1956). Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there would be no "discretion" within the meaning of section 1605(a)(5)(A) to order or to aid in an assassination and were it to be demonstrated that a foreign state has undertaken any such act in this country, that foreign state could not be accorded sovereign immunity under subsection (A) for any tort claims resulting from its conduct. As a consequence, the Republic of Chile cannot claim sovereign immunity under the Foreign Sovereign Immunities Act for its alleged involvement in the deaths of Orlando Letelier and Ronni Moffitt.<sup>1</sup>

Chile also sought to rely upon the act of state doctrine as a bar to the assertion of the court's jurisdiction, arguing that if it had indeed been

<sup>1</sup> 488 F.Supp. 665, 673.

involved in the acts charged, these were public acts undertaken in Chile. The court said:

Although the acts allegedly undertaken directly by the Republic of Chile to obtain the death of Orlando Letelier may well have been carried out entirely within that country, that circumstance alone will not allow it to absolve itself under the act of state doctrine if the actions of its alleged agents resulted in tortious injury in this country. To hold otherwise would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the Act "through the back door, under the guise of the act of state doctrine." H.R. Rep. No. 94-1487 . . . [94th Cong., 2d Sess. (1976)] at 20 n. 1 (quoting Amicus Brief of United States at 41, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 . . . (1976)); S. Rep. No. 94-1310, . . . [94th Cong., 2d Sess. (1976)] at 19 n. 1 (same).<sup>2</sup>

*Jurisdiction—stateless vessel on high seas—warrantless search—Convention on High Seas of 1958*

UNITED STATES V. MONROY. 614 F.2d 61.

U.S. Court of Appeals, 5th Cir., March 19, 1980.

Appellants, crew members of the *Heidi* a/k/a *American Merchant* or *Mereghan II*, were convicted in a jury trial on a charge of importing marijuana into the United States. They sought to suppress the admission of 225,469 lbs. of marijuana as evidence, contending that it had been seized by the Coast Guard in a warrantless search of the *Heidi* in violation of the Fourth Amendment while the vessel was on the high seas off the east coast of Florida. It appears that the Coast Guard had been apprised by the Drug Enforcement Administration that the *Heidi* was a mother ship engaged in drug trafficking. When the Coast Guard contacted the *Heidi*, it claimed to be of Netherlands Antilles registry, with a United Kingdom call number, en route from Panama to Bermuda. On inquiry, the Coast Guard learned that this identification was false. The Coast Guard then boarded the *Heidi* as a stateless vessel. In searching for registration papers, the Coast Guard came across the cargo of marijuana. Appellants argued on the bases of dicta in *United States v. Conroy* (589 F.2d 1258 (5th Cir. 1979), 73 AJIL 696 (1979)) and *United States v. Cadena* (585 F.2d 1252 (5th Cir. 1978), 73 AJIL 512 (1979)) that a warrantless search was illegal in the absence of exigent circumstances, which they said did not exist here as the Coast Guard had had ample warning about the activities of the *American Merchant*, later known as *Heidi*. The court of appeals affirmed the convictions below.

Chief Judge Coleman found, on the basis of *United States v. Cortes* (588 F.2d 106 (5th Cir. 1979), 73 AJIL 514 (1979)), that the Coast Guard was fully justified in boarding a stateless vessel for identification purposes under the "rule of international law known as the Right of Approach"<sup>1</sup> and, after having ascertained the presence of marijuana, in searching the ship. Exigent circumstances were present because of the inherent mobility of the vessel.

<sup>2</sup> *Id.*, 674.

<sup>1</sup> 614 F.2d 61, 64.

Appellants also argued that the boarding and search violated the Geneva Convention on the High Seas of 1958 (13 UST 2312, TIAS No. 5200, 450 UNTS 82) (Convention). The court pointed out that there was no merit in this argument because the Convention did not apply to a stateless vessel. The court also observed that neither Colombia, the state of nationality of appellants, nor Panama, the state in which the *Heidi* was ultimately determined to be registered, had ratified the Convention, so that it could not be invoked here.

*Jurisdiction—transfer of prisoners—Treaty on the Execution of Penal Sentences with Mexico of 1976*

PFEIFER v. UNITED STATES BUREAU OF PRISONS. 615 F.2d 873.  
U.S. Court of Appeals, 9th Cir., March 26, 1980.

Petitioner was prosecuted in Mexico on charges of importing cocaine and possessing counterfeit American currency and was sentenced to 12 years in prison. He was transferred to the United States to serve his sentence pursuant to the Treaty on the Execution of Penal Sentences with Mexico of 1976 (28 UST 7399, TIAS No. 8718) (Treaty). Following his transfer, petitioner sought habeas corpus relief, arguing that his imprisonment in the United States violated his due process rights, that the Treaty and its implementing legislation were unconstitutional in that transferred prisoners were forbidden to challenge their detention in United States courts, that he had been convicted in Mexico in violation of his due process rights, and that his consent to the transfer had not been voluntarily or knowingly made. The district court denied the petition for habeas corpus (468 F.Supp. 920 (S.D. Cal. 1979), 74 AJIL 202 (1980)). On appeal, the court of appeals affirmed this decision.

Circuit Judge Farris observed at the outset that the only issue here was the constitutionality of those parts of the Treaty challenged by petitioner. The circumstances of petitioner's conviction in Mexico were not at issue. In the opinion of the court, where it was shown that petitioner had voluntarily and knowingly consented to his transfer following a hearing before a United States magistrate and with right to counsel, this constituted a valid waiver of any constitutional rights regarding his conviction. The court said:

Further, the requirement that an offender agree not to challenge his or her conviction in a United States court is not an unconstitutional condition. A constitutional question arises when a party is required to relinquish a *vested* right as a condition for obtaining a benefit. . . . Americans who are incarcerated in Mexican prisons, however, have no right to relief from United States courts. Those who accept the opportunity presented by the Treaty lose nothing by consenting to limit themselves solely to Mexican remedies after the transfer.<sup>1</sup>

The court found no merit in petitioner's argument that Mexican prison conditions left a prisoner no alternative except to consent to transfer.

Petitioner contended that while his waiver might bar him from challenging his Mexican conviction in a United States court, he could do so pursuant

<sup>1</sup> 615 F.2d 873, 876 (emphasis by court).

to the "joint venture doctrine." He argued that "because the place of punishment is part of the sentence and therefore part of the judgment, the United States 'participated' in his Mexican conviction by allowing the sentence to be carried out in the United States."<sup>2</sup> Petitioner also contended that "the United States 'participated' because the Treaty encourages Mexico to arrest United States citizens who violate its laws."<sup>3</sup> In the opinion of the court, "[t]hese types of 'participation' are insufficient to invoke the joint venture doctrine."<sup>4</sup> The court also agreed with the district court that petitioner's contention that a U.S. Drug Enforcement Agent had been present when he was interrogated by Mexican authorities was without foundation.<sup>5</sup>

*Jurisdiction—vessel of United States registry—safety inspection—suspicion of drug trafficking*

UNITED STATES v. MANN. 615 F.2d 668.

U.S. Court of Appeals, 5th Cir., April 17, 1980.

Defendants were convicted on charges of conspiracy to import marijuana (21 U.S.C. §963), conspiracy to possess marijuana with intent to distribute it (21 U.S.C. §846), and carrying firearms in the commission of a felony (18 U.S.C. §924(c)(2)). They were members of the crew of the *Texas Star*, a shrimp vessel of United States registry, which had been boarded for a routine safety inspection by the Coast Guard on the high seas off Yucatan, having given no indication that it was engaged in shrimping. The inspection revealed 22,590 lbs. of marijuana, two .22 calibre pistols, a shotgun, and 980 rounds of ammunition. Defendants appealed, seeking to suppress the evidence of the marijuana and questioning the charge of illegal possession of firearms. The court of appeals affirmed the convictions on the possession of marijuana but reversed and remanded the convictions on possession of firearms.

There was no question about the authority of the Coast Guard to stop a vessel of American registry on the high seas for a safety inspection. Appellants argued, however, that the Coast Guard's real reason for boarding was to look for contraband. In a per curiam opinion, the court found that the Coast Guard had reasonable suspicion that the *Texas Star* might be carrying contraband, which was confirmed by the odor of marijuana aboard. Given the amount of marijuana, there was no doubt that appellants had intended to import it for distribution. The court found no basis for appellants' argument that there was only one conspiracy and that their convictions on two counts of conspiracy violated the double jeopardy rule. Appellants also questioned the jurisdiction of the court on the grounds that they had not been shown to have committed an overt act in the United States in pursuance of the conspiracy charges. The court said: "When a conspiracy statute does not require proof of overt acts, the requirement of territorial effect

<sup>2</sup> *Id.*, 877.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Transfer of prisoners under the Treaty was also challenged in *Rosado v. Civiletti*, Nos. 80-2001/3 (2d Cir. April 23, 1980), 74 AJIL 679 (1980).



may be satisfied by evidence that the defendants intended their conspiracy to be consummated within the nation's borders."<sup>1</sup>

With regard to the weapons charges, the court pointed out that one can be convicted of carrying firearms in the commission of a felony only "if the act of carrying the firearm is in and of itself a violation of federal, state or local law."<sup>2</sup>

*Jurisdiction—unidentified vessel—boarding and search by Coast Guard—grounds for warrantless search*

UNITED STATES v. RUBIES. 612 F.2d 397.

U.S. Court of Appeals, 9th Cir., Sept. 10, 1979. *Rehearing denied* Feb. 11, 1980.

The U.S. Coast Guard cutter *Yocona*, while on a routine patrol off the coast of Washington, sighted the *Helena Star* headed toward the mouth of the Strait of Juan de Fuca. As the *Helena Star* displayed no flag, the Coast Guard requested identification and was informed that the vessel was of British registry bound for Victoria, B.C. A closer view of the *Helena Star* indicated that the permanent name, which had been painted over, was *Fraternité* and that the home port was Road Harbour, B.W.I. Later that evening, the *Yocona* again sighted the *Helena Star*, now outbound from the coast of Washington. The *Yocona* followed the *Helena Star*, which did not use navigation lights. On being informed the next morning that the *Helena Star* was not registered in the United Kingdom and that it was not expected in a Canadian port, the Coast Guard boarded the vessel. There were no permanent registration papers on the vessel. In an effort to check the main beam number, the Coast Guard came across a cargo of marijuana. The crew was arrested and the vessel seized. Defendants were convicted on charges of conspiracy and attempt to import marijuana into the United States. On appeal, the court of appeals affirmed the convictions.

The first question before the court was whether the Coast Guard had the requisite authority to board, search, and seize the *Helena Star*. District Judge Belloni, sitting by designation, was satisfied that the Coast Guard had ample grounds for the action in that the *Helena Star* flew no flag, claimed a false state of registry and false destination, and navigated in a suspicious manner. As a stateless vessel, the *Helena Star* was subject to the jurisdiction of the United States on the high seas and could properly be boarded, searched, and subsequently seized by the Coast Guard. (14 U.S.C. §89(a).)

Granting that the Coast Guard was authorized to board the vessel, appellants argued that the search and seizure violated the Fourth Amendment. The court took the view, however, that the necessary exigent circumstances for a warrantless search existed here, given the fact that the *Helena Star* was stateless and that it had attempted to flee in the night in violation of safety regulations.

<sup>1</sup> 615 F.2d 668, 671.

<sup>2</sup> Quoting *United States v. Bower*, 575 F.2d 499, 501 (5th Cir. 1978).

*Jurisdiction—visit, and search of foreign ship on high seas—permission from state of registry—drug trafficking—non-self-executing treaty—Convention on High Seas of 1958*

UNITED STATES v. WILLIAMS. 617 F.2d 1063.  
U.S. Court of Appeals, 5th Cir., May 12, 1980.

Defendant-appellant, a United States national, was convicted in a bench trial of conspiracy to import marijuana into the United States (21 U.S.C. §963). It appeared that he had come aboard the *PHGH*, a vessel of Panamanian registry engaged in carrying sulphur, when the vessel was off the coast of Colombia in circumstances that the Drug Enforcement Administration considered to involve drug trafficking. The Coast Guard cutter *Acushnet* began surveillance of the *PHGH*, which hoisted a distress signal and reported generator trouble but sought no help. The Coast Guard maintained its surveillance and, the following day, received distress signals from the crew of the *PHGH*, one of whom swam to the *Acushnet* to complain about conditions aboard the *PHGH*. On the next day, Panamanian authorities gave permission for the Coast Guard to board and search the *PHGH* and, if need be, to seize the vessel. A search revealed the presence of 21,680 lbs. of marijuana in addition to the cargo of sulphur. Documents on the *PHGH* showed that its destination was Mobile, Alabama, although the sulphur was consigned to Peru. Appellant contended, *inter alia*, that the Coast Guard did not have the authority to board and search a foreign ship on the high seas and that the search violated the Fourth Amendment. A panel of the court of appeals affirmed his conviction (589 F.2d 210 (5th Cir. 1979), 73 AJIL 701 (1979)). In an en banc hearing, the court of appeals affirmed the previous judgment.

The principal problems before the court en banc were to clarify the application of the standards of search under the Fourth Amendment to cases involving ships on the high seas and to establish some consistency in the case law in the Fifth Circuit, especially regarding the definition of exigent circumstances in which a warrantless search may be made. In the opinion of the court, the rule of such cases as *Terry v. Ohio* (392 U.S. 1 (1968)) concerning land-based searches could not "apply automatically to a seizure on the high seas."<sup>1</sup>

Following the general analysis by the Supreme Court in *United States v. Ramsey* (431 U.S. 606 (1977), 71 AJIL 787 (1977)), the court observed that there were two points to be considered in evaluating a high seas search: whether statutory authority existed for a search and whether an authorized search violated the Fourth Amendment. The effect of Panama's consent to the boarding and search also had to be weighed. In the opinion of Circuit Judge Tjoflat, the Coast Guard had ample authority under 14 U.S.C. §89(a) to board and search a vessel of American or foreign registry if the Coast Guard had reasonable suspicion that the vessel was engaged in a conspiracy to violate United States laws by importing contraband into the country. Noting that Article 22 of the Geneva Convention on the High Seas of 1958

<sup>1</sup> 617 F.2d 1063, 1071 (footnotes by court omitted).

(13 UST 2312, TIAS No. 5200, 450 UNTS 82) (Convention) provided exceptions to the general rule of noninterference with ships on the high seas, the court said:

Congress, in enacting section 89(a), created an exception to the principle of non-interference that is analogous to the exceptions contained in article 22. That is, both article 22 and section 89(a) identify circumstances in which a foreign vessel in international waters is subject to seizure. Because article 22 embodies time-honored, internationally accepted principles of maritime common law, we think it appropriate to construe section 89(a), like article 22, to require that a seizure of a foreign vessel in international waters be founded on reasonable suspicion.<sup>2</sup>

It followed that the Coast Guard had statutory authority to board and search the *PHGH*, quite apart from the authorization granted by Panama.

The next question was whether, in the exercise of its authority, the Coast Guard had violated the search and seizure standards of the Fourth Amendment in a case involving a foreign vessel located beyond the 12-mile limit. The panel had not reached the matter because it had decided that appellant had no privacy interest in the contents of the ship's hold that was violated by the search. The court en banc chose not to consider the privacy issue but rather to focus upon the constitutionality of the search and seizure. After examining the historical background of current search and seizure statutes, Circuit Judge Tjoflat pointed out that the case law in the Fifth Circuit indicated that for purposes of the Fourth Amendment the Coast Guard's authority to seize a ship could be derived from federal law or from international law. Article 22 of the Convention authorized boarding on the high seas if

there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy; or
- (b) That the ship is engaged in the slave trade; or
- (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.<sup>3</sup>

The court said:

We agree with the [*United States v.*] *Cortes* [588 F.2d 106 (5th Cir. 1979), 73 AJIL 514 (1979)] panel that a boarding of a vessel pursuant to subsection (c) is constitutional despite the fact that the source of the Coast Guard's authority is a non-self-executing treaty rather than a statute. See *United States v. Postal*, 589 F.2d 862 [(5th Cir. 1979), 73 AJIL 698 (1979)]. Subsection (c) is reasonable, we think, because it advances an internationally recognized national interest—the policing of domestic flag vessels; because the provision is necessary if flagless vessels are to be policed at all; because the seizure permitted is but a limited intrusion in a maritime context where such intrusions are common and well accepted; and because of the sanction of history.<sup>4</sup>

<sup>2</sup> *Id.*, 1076–77.

<sup>3</sup> *Id.*, 1082.

<sup>4</sup> *Ibid.*

The court also observed that another treaty, the Convention with the United Kingdom for the Prevention of Smuggling of Intoxicating Liquors of 1924 (43 Stat. 1761, TS No. 685, 12 Bevans 414, 27 LNTS 182), had also provided for boarding and search of vessels in the absence of suspicion that they were engaged in criminal activity. The court found that the Coast Guard's seizure of the *PHGH* under Article 22 of the Convention or section 89(a) met the standard of reasonableness of the Fourth Amendment. In the situation of the *PHGH*, Panama's consent to visit and search also provided sufficient authority for the Coast Guard.

In regard to the legality of the Coast Guard's search of the *PHGH* and whether appellant's privacy interest in the contents of the hold had been violated, the court observed that both section 89(a) and Article 22 authorized such searches for purposes of identification in the absence of suspicion of criminal activity and that no one could assert "any legitimate expectation of privacy with regard to any objects that would be in the plain view (or smell) of a person conducting such an identification check."<sup>5</sup> If the search had been for the purpose of determining the existence of criminal activity, then the Coast Guard would have had to show reasonable suspicion of such activity before entering a private area of the hold. The court said:

We have concluded that "reasonable suspicion" is the appropriate fourth amendment standard by which to judge section 89(a) searches of the "private" areas—if there can be such areas—of the holds of vessels in international waters conducted for the purpose of discovering contraband or evidence of criminal activity. It is appropriate because the standard reflects a reasonable balancing of the government's interest in enforcing its criminal laws and the individual's interest in his dignity and privacy, . . . giving weight to the special problems of law enforcement, . . . and to the highly regulated nature of shipping and boating.<sup>6</sup>

Such grounds existed here and justified the Coast Guard's search of the *PHGH*.

With regard to Panama's consent to visit and search of the *PHGH*, the court observed that "[a]lthough the approbation of international law is a factor suggesting that a search or seizure is reasonable within the meaning of the fourth amendment, a search or seizure that violates international law may yet be both constitutional and permissible under the laws of the United States."<sup>7</sup> Following the reasoning of *United States v. Postal* (589 F.2d 862 (5th Cir. 1979), 73 AJIL 698 (1979)), this situation would exist where a treaty provision such as Article 6 of the Convention was not self-executing. The court explained that "[t]he rationale of this conclusion is the notion that a treaty that is not self-executing is generally an agreement governing the rights of sovereign nations, not the rights of individuals."<sup>8</sup> If the foreign state objected to the Coast Guard's search of its vessel, it could protest to the United States and ask for dismissal of the case. Circuit Judge Tjoflat said with respect to the Panamanian consent to the search:

<sup>5</sup> *Id.*, 1086.

<sup>7</sup> *Id.*, 1089.

<sup>6</sup> *Id.*, 1088.

<sup>8</sup> *Ibid.*

In the present case, Panama, the country of the PHGH's registration, was not a signatory to the Convention on the High Seas. [*United States v. Williams*] 589 F.2d [210] at 212 n. 1 [5th Cir. 1979]. Nevertheless, according to its preamble, the Convention is but a codification of established principles of international law. This suggests that a seizure of a Panamanian vessel on the High Seas may violate Panama's rights under the "common law" of the sea. Panama's consent to the search constituted a waiver of any such common law rights. It makes no difference that those aboard the PHGH were not parties to Panama's consent, since rights under international common law must belong to sovereign nations, not to individuals, just as treaty rights are the rights of the sovereign. Thus, Panama's waiver of its common law rights completely removed any international law concerns from the case. Even if Panama had not consented to the seizure and search, however, the *Postal* analysis clearly indicates that a violation of international common law, which obviously could not be "self-executing" in the sense that a treaty might be, would not affect the legality or constitutionality of the Coast Guard's actions and would not affect the court's jurisdiction. *United States v. Postal*, 589 [F.2d] at 884.<sup>9</sup>

Chief Judge Roney and Circuit Judges Godbold, Hill, Fay, Tate, and Clark, concurring specially, observed, *inter alia*, that the Coast Guard's authority to board, search, and seize a foreign ship on the high seas is founded in international law and that the Fourth Amendment does not apply in these circumstances. In any case, Panama's consent to the boarding and subsequent actions of the Coast Guard precluded any question as to whether international law had been violated thereby.

Circuit Judges Rubin, Kravitch, Johnson, and Randall, concurring in the result, questioned appellant's standing to challenge the validity of the search of the PHGH and pointed out that exigent circumstances justified the Coast Guard's action under the Fourth Amendment and that the consent of Panama eradicated the basis for a motion to suppress on grounds of international law.

*Jurisdiction—wrongful detention—Interpol—extradition procedure*

SAMI v. UNITED STATES. 617 F.2d 755.

U.S. Court of Appeals, D.C. Cir., Dec. 28, 1979.

Plaintiff brought suit against the International Criminal Police Organization (Interpol), the United States Government, and the chief of the United States National Central Bureau (USNCB), an agency in the Treasury Department (now in the Department of Justice) that maintains liaison with Interpol, alleging false arrest, false imprisonment, libel, slander, and deprivation of his rights under the Fourth and Fifth Amendments to the Constitution. This action arose out of a child custody dispute between plaintiff, an Afghan national who was employed by the International Monetary Fund, and his wife, an American national. Plaintiff's wife had been given custody of their two children by a court in Florida, while plaintiff had been given

<sup>9</sup> *Id.*, 1090. Compare Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal*, *supra* at 892.

custody by a Maryland court. Plaintiff removed the children from Florida to Maryland, whereupon a warrant for his arrest was issued in Florida. He was arrested in Maryland and released on bond but was not required to remain in the United States. Plaintiff then left the country with the children. The wife asked the USNCE to approach Interpol liaison offices abroad with a view to intercepting plaintiff and the children. In a series of confusing messages to London, Rome, and Wiesbaden, USNCB asked for the provisional arrest of plaintiff on the basis of the Florida warrant, pending the issuance of a formal extradition request. These communications seemed to suggest that the extradition request would emanate from the State of Florida rather than from the Department of State. At no time did USNCB consult the Department of State or the Department of Justice about the legality of the representations being made by USNCB to the other Interpol liaison offices.

Plaintiff was arrested in Frankfurt by the German authorities, and the children were delivered to the wife. He was held for 4 days during which time the Department of State informed the German authorities that plaintiff was not charged with an extraditable offense under the Extradition Treaty of 1930 (47 Stat. 1862, TS No. 836, 8 Bevans 214, 119 LNTS 247) and that he should be released. Representations from the Afghan Embassy at Washington led to the admission by the Department of State that plaintiff's detention had been "improper."

Plaintiff's suit against USNCB and others was dismissed by the district court. On appeal, the court of appeals affirmed the decisions below as to the actions against Interpol and the chief of USNCB but reversed the dismissal of the action against the United States and remanded the case for further proceedings.

With regard to plaintiff's claim against Interpol, Circuit Judge Wald held that the court could not exercise personal jurisdiction over Interpol regardless of the method of service used because that organization did not do business in the District of Columbia. Moreover, USNCB did not act as Interpol's agent in the United States but rather as the agent of the United States Government authorized to deal with agents of other governments regarding Interpol business. The minimum contacts necessary to establish jurisdiction over Interpol were not shown here (*International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

Plaintiff's claim against the United States was based upon a 1974 amendment to the Federal Tort Claims Act (Act) (28 U.S.C. §2680(h)) which authorized claims against federal investigative or law enforcement officers on such charges as false arrest and false imprisonment. The Government contended that section 2680(h) could not be invoked here because the chief of the USNCB served only as liaison to Interpol and not as an investigative or law enforcement officer. The Government also argued that plaintiff's claim was barred by the Act's specific provision that it did not reach "[a]ny claim arising in a foreign country." (28 U.S.C. §2680(k).) Reasoning that the claim had arisen in a foreign country because the false arrest had taken place in the Federal Republic of Germany, the district court had dismissed the claim against the United States on the basis of section 2680(k). Circuit

Judge Wald was not convinced by this reasoning. An examination of the legislative history of section 2680(k) and relevant judicial decisions indicated that the United States would be liable for an act or omission that occurred in this country but whose "operative effect"<sup>1</sup> was felt in another country. The court also concluded that the chief of the USNCB was an investigative or law enforcement officer within the meaning of section 2680(h).

The Government contended that it was immune from suit under the "discretionary function exemption" in section 2680(a)(2).<sup>2</sup> After examining a variety of instances in which this exemption had been invoked, the court pointed out that it was not clear from the record that

the decisions by *this* USNCB official concerning the nature of the information transmitted abroad, including the status of an extradition request, were essentially "political," "social" or "economic" or necessarily involved any policy-making function at all. Indeed the scope of the USNCB official's discretion is disputed on this record; it is of course partly a question of law but also partly a question of fact, on which we do not feel the evidence is sufficiently undisputed for us to make the initial decision here.<sup>3</sup>

The court also observed that the legislative history of section 2680(h) raised some doubt as to whether the discretionary function exception of section 2680(a) was intended to apply to suits against law enforcement officers for false arrest or imprisonment under section 2680(h). In these circumstances, the court ordered further proceedings on this matter at the trial level.

As for plaintiff's defamation claim against the chief of USNCB, Circuit Judge Wald agreed with the district court that as this officer had acted within his discretionary authority, he was immune from such a claim. On the other hand, plaintiff's claim that this officer was responsible for his false arrest and for violations of his constitutional rights raised questions which required further examination. In the opinion of the court, the circumstances of the provisional arrest, especially given the absence of any guidelines on how such a proceeding should be initiated by the chief of USNCB, distinguished this case from the ordinary case of arrest without probable cause; consequently, the court allowed the chief absolute immunity from liability in this particular situation. Plaintiff's constitutional claims were based on the theory that the provisional arrest was in error as no extraditable offense had been charged against him. Circuit Judge Wald observed:

We cannot, on this record, agree with the suggestions implicit in plaintiff's argument that the fourth amendment necessarily prohibits arrests which are on probable cause but which may not be extraditable under the applicable treaty.

<sup>1</sup> 617 F.2d 755, 762 (footnotes by court omitted).

<sup>2</sup> The United States shall not be liable for acts "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or any employee of the Government, whether or not the discretion involved be abused." (28 U.S.C. §2680(a).)

<sup>3</sup> 617 F.2d at 767 (emphasis by court).

Erroneous or wrongful loss of liberty does not *ipso facto* amount to a constitutional violation. Several cases under 42 U.S.C. §1983 (1976) have held that it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation, despite the loss of liberty that may be involved.<sup>4</sup>

In the opinion of the court, the sending of erroneous information by USNCB about plaintiff's legal status to an Interpol liaison office abroad did not constitute a violation of his constitutional rights. The court concluded that plaintiff did not "have a cognizable constitutional claim based on any violation of the German-American Extradition Treaty. There was no shocking behavior characterized by abduction or brutality which would support an actionable constitutional claim."<sup>5</sup>

#### EUROPEAN ECONOMIC COMMUNITY CASE NOTE

*European Economic Community—treaty power—jurisdiction of Court of Justice*

Advisory Opinion No. 1/78.

Court of Justice of the European Communities, Oct. 4, 1979.\*

Advisory Opinion No. 1/78, rendered by the Court of Justice of the European Communities on October 4, 1979, deals with an important aspect of the scope of the treaty powers of the European Communities in the economic field and constitutes a new milestone in the Court's clearing the road to a greater role of the Communities in international affairs.

The opinion was requested by the Commission of the European Communities pursuant to Article 228(1) of the Treaty establishing the European Economic Community of 1957 (298 UNTS 11) (Treaty), which specifies:

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers conferred upon the Commission in this field, such agreements shall be concluded by the Council after the Assembly has been consulted in the cases provided for by this Treaty.

The Council, the Commission or a Member State may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility of the contemplated agreements with the provisions of this Treaty.

The request of the Commission for an advisory opinion by the Court was prompted by a controversy between it and the Council over the functions of the European Community and its member states in the negotiation and ultimate conclusion of the International Agreement on Natural Rubber, which was in the process of being drafted under the auspices of UNCTAD.

The Council, questioning the appropriateness of bringing the matter before the Court pursuant to Article 228(1), paragraph 2, argued that the proposed International Agreement on Natural Rubber exceeded the ambit of purely commercial policy, which admittedly is within the exclusive jurisdiction of the

<sup>4</sup> *Id.*, 773.

<sup>5</sup> *Id.*, 774.

\* Report by Stefan A. Riesenfeld, Esq.



European Economic Community by virtue of Article 113 of the Treaty. In the opinion of the Council, it constituted, at least in part, "a matter of particular interest to the Common Market . . . within the framework of an international organization of an economic character" or a matter of general economic policy, and it was therefore subject to coordinated action by the individual member states in accordance with Articles 116 or 145.

The Court held that it had jurisdiction under Article 228(1), paragraph 2, and that, subject to certain qualifications, the negotiation and conclusion of the Natural Rubber Agreement was within the exclusive power of the European Economic Community. The Court rejected the Council's position that matters of general economic and commercial policy are mutually exclusive subjects and that the former remain within the powers of the individual member states, subject at the most to coordination pursuant to Articles 116 and 145. It ruled that the common commercial policy attributed to the European Economic Community must be given an "open perspective," including the conclusion with developing countries of agreements aiming at market stabilization. The fact that agreements of that type may also affect certain political interests of the member states, such as availability of strategic materials, is no reason to exclude them from the applicability of Article 113. An exception to the sole jurisdiction of the Community over the negotiation and conclusion of the proposed agreement would exist only if the agreement were to include financial provisions that would impose a burden on the individual member states rather than on the Community as such.

The opinion thus makes it clear that in all matters affecting international trade the European Economic Community is the sole legitimate partner, unless the Treaty provides for specific exemptions such as might arise, for example, under Article 224 (economic sanctions).

## CURRENT DEVELOPMENTS

### RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)

On June 10, 1980, the reporters of the *Restatement of the Foreign Relations Law of the United States (Revised)* presented Tentative Draft No. 1 to the American Law Institute. In accordance with usual procedures, the reporters had had the advice of its Board of Advisers and of the Council of the Institute, and had been authorized by the Council to present the draft to the Institute. A day's discussion produced a number of suggestions which the reporters indicated they would consider in preparing the final draft.

To guide the members of the Institute through the successive tentative drafts, the reporters included a preliminary draft of an introduction to the completed work and a tentative table of contents for the project as a whole. The tentative table of contents is:

#### INTRODUCTION TO THE REVISED RESTATEMENT SCOPE OF THE RESTATEMENT

#### PART I RELATION OF INTERNATIONAL LAW TO UNITED STATES LAW

#### PART II INTERNATIONAL PERSONS

#### PART III INTERNATIONAL AGREEMENTS

#### PART IV JURISDICTION

#### PART V THE LAW OF THE SEA

#### PART VI THE LAW OF THE ENVIRONMENT

#### PART VII THE PROTECTION OF PERSONS (NATURAL AND JURIDICAL)

#### PART VIII SELECTED LAW OF INTERNATIONAL ECONOMIC RELATIONS

#### PART IX REMEDIES

Tentative Draft No. 1 includes two of the parts, "Relation of International Law to United States Law" and "International Agreements." An introductory note on the scope of the *Restatement* contains summary notes on the constitutional law of U.S. foreign relations, including the powers of Congress, the President, and the courts, and the role of the states of the United States. A note on political questions alludes to the uncertainty en-

gendered by the contrasting views of Justices Rehnquist, Burger, Stewart, and Stevens on the one hand, and Brennan and Powell on the other, in *Goldwater v. Carter* (100 S.Ct. 533 (1979); see 74 AJIL 441 (1980)).

Part I, chapter 1 of the Tentative Draft is entitled "International Law: Character and Sources." It is introduced by notes on the international political system; on international law as law, based on state acceptance; on the observance of international law. Section 101 defines international law, but members of the Institute suggested that it was a description rather than a definition. Section 102 sets forth the sources of international law and section 103 deals with evidence of international law.

Chapter 2 deals with the status of international law and agreement in United States law. The Tentative Draft firmly declares customary international law as well as international agreements of the United States to be law of the United States, supreme over the law of the states. Here the draft built on the implications of the Supreme Court opinion in *Banco Nacional de Cuba v. Sabbatino* (376 U.S. 398, 425 (1964)). Customary international law, then, is federal law, and cases arising under it, like cases arising under international agreements of the United States, are within the judicial power of the United States and, subject to statutory limitations, within the jurisdiction of the federal courts (§131(2)). The determination and interpretation of international law presents federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States. Section 133 states that the determination or interpretation of international law or agreement is a question of law and is appropriate for judicial notice, but courts may in their discretion consider any relevant material or source, including expert testimony.

An introduction to Part III, "International Agreements," states:

This Restatement accepts the Vienna Convention as presumptively codifying the customary international law governing international agreements, and therefore as foreign relations law of the United States even before the United States adheres to the Convention. . . . In a few instances, the rule of the Convention is at variance with the United States understanding of customary international law, and the Restatement therefore departs from the Convention, pending U.S. adherence to it. . . . In a few other instances, however, the difference between the Convention and customary law as the United States sees it is more subtle, being a matter of emphasis and degree. There, since the United States view can be accommodated within the text of the Convention, and especially since the United States may soon become a party to the Convention, this Restatement adopts the text of the Convention with appropriate indications in Comment and Reporters' Notes.

Thus, for example, while sections 329 and 330 follow Articles 31 and 32 of the Vienna Convention, a Reporters' Note states (pp. 147-48):

1. *American and other approaches to interpretation.* The thrust of this section and §330 is somewhat different from the American tradition. It highlights the concept of interpretation in accordance "with the ordinary meaning" of the text of the agreement; the "object and purpose" of the agreement is ancillary, casting light on the "ordinary

meaning." §330 subordinates evidence such as preparatory materials as only "supplementary means of interpretation." By way of contrast, the American tradition (compare previous Restatement §146) makes the attempt to "ascertain the meaning intended by the parties" the primary object of interpretation; "the ordinary meaning of the words of the agreement" (previous §147) was one of the factors to be taken into account in the interpretative process, as were the preparatory materials. The previous Restatement reflected the strong tendency in American case law to reject literal-minded interpretation of statutes, a tendency that is not yet dominant in the jurisprudence of many other countries.

The difference in result between the international and the American approaches, however, should not be exaggerated. On the one hand, even an American court will say, invoking the Vienna Convention: "It seems elementary to us that the language [of a treaty article] must be the logical starting point." *Day v. Trans World Airlines*, 528 F. 2d 31, 33 (2d Cir. 1975) (citing Article 31(1) of Vienna Convention). On the other hand, both the Vienna Convention and the American approach strive to determine the intention of the parties; neither favors "teleological" interpretation to achieve some purpose overriding that intention. "The meaning intended by the parties" and "the ordinary meaning to be given to the terms" do not normally differ. Since the "ordinary meaning" of terms, moreover, is to be determined in context and in the light of its object and purpose, both "context" and "object and purpose" may have to be identified and often cannot be determined without recourse to the preparatory materials and to other "extraneous" evidence. But there may be a difference in emphasis and presentation, and the American lawyer trying to anticipate (or influence) the interpretation of an international agreement by an international tribunal will have to be aware of these preferences. For classic statements of the European tradition on interpretation see C. de Visscher, *Problèmes d'Interpretation Judiciaire en Droit International Public* (1963); Degan, *L'Interpretation des Accords en Droit International* (1963).

The Tentative Draft expresses caution also in section 339, "Conflict with a peremptory norm." While the "black letter" text follows Article 53, sentence 1 of the Vienna Convention, the reporters note:

a. *Jus cogens*. It is commonly accepted that there are some international law rules that are of superior status and cannot be affected by treaty. . . . Similarly, the creation of a new peremptory norm renders void existing treaties that contravene it. . . . The Vienna Convention requires that the norm must be "accepted and recognized by the international community of States as a whole" (Article 53); the international community must accept not only the norm but its peremptory character. For statements that the obligations of member states under the Charter of the United Nations constitute *jus cogens*, see §116 of the previous Restatement: Verdross & Simma, *Universelles Völkerrecht* 83-87 (1976). There is, inevitably, substantial uncertainty as to which other international law norms are peremptory. It has been suggested that norms that create "international crimes" and obligate all states to proceed against violations are also peremptory. Compare Report of the International Law Commission on the work of its twenty-eighth session,

draft art. 19, [1976] II Ybk. Int'l L. Comm'n 95, 121. This might include rules on genocide, slave-trading and slavery, apartheid and other gross violations of human rights, and perhaps colonialism and attacks on diplomats. The United States has not indicated whether it accepts any of these as constituting *jus cogens*.

*b. Adjudication of jus cogens claims.* With such uncertainty prevailing as to the bounds of *jus cogens*, the question of who decides upon such claims becomes critical. *Jus cogens* will ordinarily be invoked by a party as a basis for invalidating its consent to an agreement (or terminating an agreement under §347). It has not been decided whether a domestic court will on its own authority refuse to give effect to an agreement on the ground that it violates a peremptory norm.

The United States agreed to the inclusion of Articles 53 and 64 (§§339 and §347) in the Vienna Convention but insisted that claims of *jus cogens* be subject to adjudication by the International Court of Justice or to arbitration, as provided in Article 66. Such procedures, of course, could not benefit the United States until the Convention is in force for the United States, and only in relation to other parties to the Convention. If the Convention is not applicable, the principles of Articles 53 and 64 (§§339 and 347) are still valid as customary law but there are no safeguards against their abuse. In such circumstances the United States is likely to take a particularly restrictive view of the scope and content of these doctrines, and they can be applied as international law accepted by the United States only with caution.

The Tentative Draft is noteworthy, too, in respects relating to the treaty law of the United States. Unlike the previous *Restatement* (§117), section 304 of the Tentative Draft omits any requirement that an international agreement must deal with "matters of international concern." The Reporters' Note explains:

2. *International agreements and "matters of international concern."* It has sometimes been suggested that a treaty or other international agreement must deal with "a matter of international concern." That suggestion derived from a statement by Charles Evans Hughes. See 23 Proc. Am. Soc'y Int'l L. 194-96 (1929). See previous *Restatement* §117; also *Power Authority v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957), vacated and remanded with directions to dismiss as moot, 355 U.S. 64 (1957). Hughes also used other phrases, referring to treaties as "relating to foreign affairs" and not applying to matters "which did not pertain to our external relations." Hughes's statement may have implied only that an international agreement of the United States must be a bona fide agreement with another state, serving a foreign policy interest or purpose of the United States. That may well be implied in the word "treaty" or "agreement" as used in international law and in the United States Constitution. . . .

There is no principle either in international law or in American Constitutional Law that some subjects are intrinsically "domestic" and not permissible subjects for an international agreement. As to international law it has been authoritatively stated that even a subject that is strictly of domestic concern "ceases to be only within the domestic jurisdiction of the State, [and] enters the domain governed by international

law," if states conclude an international agreement about it. Nationality Decrees in Tunis and Morocco, *Great Britain v. France*, P.C.I.J. Ser. B, No. 4 (1923), p. 26. Under American law, the Supreme Court has upheld agreements on matters which, apart from the agreement, were strictly domestic, indeed were assumed to be within state rather than federal authority. E.g., *Geofroy v. Riggs*, 133 U.S. 258 (1890) (rights of inheritance in land); *Missouri v. Holland*, 252 U.S. 416 (1920) (migratory birds). Early arguments that the United States may not adhere to international human rights agreements because they deal with matters of strictly domestic concern were later abandoned. . . . Apparently no agreement of the United States has been challenged in the courts as not being a bona fide agreement.

On the other hand, the Tentative Draft (§352) reaffirms the position taken in the previous *Restatement* (§163), that the President has the power to suspend or terminate an agreement of the United States, whether in accordance with its terms, or where international law warrants the United States in doing so because of a violation by another party or other supervening events. In this respect the Tentative Draft follows the view of the majority of the judges in the court of appeals, in *Carter v. Goldwater* (617 F.2d 697 (D.C. Cir. 1979), *rev'g* 481 F. Supp. 949 (D.D.C. 1979), *vacated and remanded with directions to dismiss*, 100 S.Ct. 533 (1979)), in which Senator Goldwater and others had challenged the validity of President Carter's action giving notice of termination of the Mutual Defense Treaty of 1954 with the Republic of China (Taiwan). (In the Supreme Court, only Justice Brennan addressed the substantive issue, and upheld the President's power.)

The reporters anticipate that Tentative Draft No. 2, including Part II ("Persons") and part of Part IV ("Jurisdiction"), will be submitted to the Council of the Institute in December 1980 and, subject to the Council's authorization, to the meeting of the Institute in 1981.

LOUIS HENKIN

#### UNCITRAL CONSIDERS WORK PROGRAM FOR NEW INTERNATIONAL ECONOMIC ORDER

In 1978, the United Nations Commission on International Trade Law (UNCITRAL) decided to establish a "Working Group on the New International Economic Order" to review and recommend specific topics "relevant in the context of the development of a new international economic order" that might be added to UNCITRAL's work program.<sup>1</sup> In 1979, the membership of the group was decided upon, and a meeting scheduled for January 14-25, 1980.<sup>2</sup>

<sup>1</sup> Decision at the 208th meeting on June 14, 1978, found in UN Doc. A/33/17, para. 71 (1978).

<sup>2</sup> Decisions of the 226th meeting of June 29, 1979 and 225th meeting of June 27, 1979, found in UN Doc. A/34/17, paras. 100 and 125 (1979). The group consisted of Argentina, Australia,

This development raised the unappealing vision of UNCITRAL's becoming yet another forum for difficult and highly politicized debate. UNCITRAL's particular history and reputation as a competent specialized body capable of important achievements in the field of private international trade law added both gravity and cautious optimism to this concern.<sup>3</sup> As the U.S. representative at the General Assembly's Sixth Committee stated: "Whatever his delegation's misgivings might be about the introduction of that topic into the work of UNCITRAL, he was confident that the new Working Group and UNCITRAL would be able to strip that item of at least some of its unnecessary controversiality."<sup>4</sup>

The Working Group, working from a general survey prepared by the Secretariat,<sup>5</sup> spent its full 2 weeks in New York sorting through various topics of possible "relevance" and "suitability," ranging through general principles of international economic development, commodities, trade, the monetary system, transfer of technology, transnational corporations, and natural resources. It eventually agreed upon a list of six specific topics that could be recommended for possible inclusion in UNCITRAL's work program, concerning commodity agreements, practices in industrial development contracts, transnational corporations, concession agreements, inter-governmental industrial collaboration agreements, and investment.<sup>6</sup>

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Chile, Czechoslovakia, France, the German Democratic Republic, the Federal Republic of Germany, Ghana, India, Indonesia, Japan, Kenya, Mexico, Nigeria, the USSR, the United Kingdom, and the United States. In addition to these 17 member countries, 26 other countries and 9 international organizations participated as observers. The Working Group's report is UN Doc. A/CN.9/176 (1980).

<sup>3</sup> An excellent overview, *The United Nations Commission on International Trade Law: Mission and Methods*, by John Honnold, former chief of UNCITRAL's Secretariat, the UN Trade Law Branch, can be found in 27 AM. J. COMP. L. 201 (1979).

<sup>4</sup> UN Doc. A/C.6/34/SR.25, para. 20 (1979). <sup>5</sup> UN Doc. A/CN.9/171 (1979).

<sup>6</sup> The specific topics listed were:

- (1) Legal aspects of multilateral commodity agreements.
- (2) Study aimed at identifying legal issues arising in the context of foreign investment that might be suitable for consideration by the Commission.
- (3) Study on intergovernmental bilateral agreements on industrial co-operation.
- (4) Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or *contrats produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general.
- (5) Identification of concrete legal problems arising from the activities of transnational corporations, having regard to, in particular, the need for co-ordination of work with other competent bodies in this field.
- (6) Study on concession agreements and other agreements in the field of natural resources taking into account the work carried out by other competent bodies in this field and the need for co-ordination.

UN Doc. A/CN.9/176, para. 31 (1980).

The Working Group also recognized that other topics not included could be regarded as relevant to the development of a new international economic order. The report notes, for ex-

These topics were not so much concrete suggestions as an attempt to narrow the range of possibility by means of generally acceptable parameters. The Working Group agreed at the outset to the general principle that UNCITRAL should remain concerned with trade law rather than trade policy.<sup>7</sup> Consensus on the six specific topics was reached only because the suggested topics were carefully worded and qualified, providing in most cases for further study to determine if there were in fact concrete legal issues in each area suitable and useful for UNCITRAL work. It remained to be seen if this method of bridging the presumed gaps between developed and developing country positions would provide a solid basis for future activity or merely offered the appearance of agreement.

The Working Group's report was considered at UNCITRAL's 13th plenary session, held in New York from July 14 to 25, 1980.<sup>8</sup> At that session, agreement on how to proceed was surprisingly unanimous. The Indian delegate, Mr. Dixit, acting as spokesman for the Group of 77, proposed that UNCITRAL add to its work program the item:

Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or contracts *produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general.

This was a rather broad topic, calling for further discussion on where to begin. Since the NIEO Working Group had also agreed that this item was "of special importance to developing countries and to the work of the Commission,"<sup>9</sup> it had requested a Secretariat background study for the plenary session.<sup>10</sup> UNCITRAL accordingly had a detailed analysis of the work that had already been done in this area to guide its consideration. This report suggested six categories of contract on which work might be useful: research and development, service and maintenance, technical assistance, engineering, supply and construction of large industrial works, and contracts on industrial cooperation.

The speakers were virtually unanimous in supporting contracts for supply and construction of large industrial works as a point of departure; contracts on industrial cooperation also received wide support. There was limited further discussion of whether work in these areas should result in guidelines

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ample, that international commercial arbitration was omitted only because it was already a priority item on UNCITRAL's work program; regulation of the warehousing contract, liability of terminal operators, and the recently concluded Convention on the Carriage of Goods by Sea were also specifically mentioned. *Id.*, paras. 10, 33, and 35.

<sup>7</sup> *Id.*, para. 13.

<sup>8</sup> The major accomplishment of this session was the adoption of the final UNCITRAL Conciliation Rules; the General Assembly is now invited to recommend their use "in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation."

<sup>9</sup> UN Doc. A/CN.9/176, para. 32 (1980).

<sup>10</sup> UN Doc. A/CN.9/191 (1980).



for drawing up contracts, model provisions, model contracts, general conditions, or even international conventions. However, this decision was left for the future, after further study.

The U.S. delegation noted that the category "contracts on industrial co-operation" was a very broad and undefined category covering a variety of contractual and multicontractual, multiparty arrangements. UNCITRAL would need further to refine and narrow this area; contracts for the supply and construction of large industrial works was, in fact, a more specific subcategory of contracts on industrial cooperation on which work might usefully begin. It also pointed out problems with the "model contract" approach, suggesting that model clauses and general conditions, where appropriate, provided more flexible and workable tools which could better accommodate the needs and goals of parties under different conditions. The U.S. delegation commended the apparent positive spirit and accord that characterized the discussion, noting that this was an encouraging sign for the possibility of future constructive work.

There remain, to be sure, difficult and sensitive issues which have yet to be raised or resolved. For example, the extent to which UNCITRAL should take up public law questions is an issue that by consensus has been deferred; the United States and other Western countries strongly expressed the view that UNCITRAL's province is private law. Even within the chosen topic, harmonization, unification, and review of contract practices, controversial and difficult issues may arise. Nonetheless, a major step forward has been made in confirming that UNCITRAL's members do not wish to sacrifice its proven competence, but will continue to work for the solution of the unglamorous but important legal problems of international commerce by the concerted application of impressive and globally comprehensive legal expertise.

The NIEO Working Group, expanded to include all members of UNCITRAL, will next meet, as presently scheduled, before the 1981 plenary session in Vienna, from June 9 to 18. At that meeting one may see perhaps more clearly the course that will be taken: whether the reports of future developments will merit attention for the concrete legal work accomplished or only as a footnote in the "North-South debate."

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#### THE THIRTY-SECOND SESSION OF THE INTERNATIONAL LAW COMMISSION

The 32d session of the International Law Commission met in Geneva from May 5 to July 25, 1980, under the chairmanship of Ambassador Christopher Pinto. The Commission reaffirmed its character as a body of independent experts who do not serve as representatives of governments

\* The views expressed here are those of the author and are not necessarily shared by the U.S. Department of State.

by decisively rejecting the demand of authorities in Afghanistan that former Ambassador Abdul Hakim Tabibi be replaced by another member of Afghan nationality. The only Commission member to support the Afghan demand was Professor Nikolai Ushakov.

The Commission took up seven topics. It completed its first reading of draft articles on succession of states in respect of matters other than treaties, adopting four draft articles and commentaries on state archives. It also completed a first reading of part 1 of its draft articles on state responsibility, and a first reading of the whole of 80 draft articles on the question of treaties concluded between states and international organizations or between two or more international organizations. It adopted its initial draft articles on two topics of relatively recent concentration, the law of the nonnavigational uses of international watercourses and jurisdictional immunities of states and their property. Finally, it considered preliminary reports on international liability for injurious consequences arising out of acts not prohibited by international law, and on the status of the diplomatic courier and bag, as well as on part 2 of its work on the topic of state responsibility.<sup>1</sup>

### *State Responsibility*

At its 32d session, the Commission completed a first reading of part 1 of its draft articles on state responsibility, which addresses the origin of state responsibility, *i.e.*, on what grounds and under what circumstances a state may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. Part 2 will deal with the content, forms, and degrees of international responsibility, that is to say, with determining the consequences that an internationally wrongful act of a state may have under international law. The special rapporteur on the topic appointed at the Commission's 31st session, Professor Willem Riphagen, presented a pithy preliminary report at the 32d session, which set out an analytical framework for subsequent work on part 2.

As to part 1, the Commission at its 32d session had before it two final draft articles submitted by the former special rapporteur on the topic, Roberto Ago, formerly professor at the University of Rome and now Judge of the International Court of Justice, on the circumstances precluding wrongfulness. These articles were designed to complement others adopted in 1979 on other circumstances precluding wrongfulness (namely, Article 29 on consent, Article 30 on countermeasures in respect of an internationally wrongful act, Article 31 on *force majeure* and fortuitous event, and Article 32 on distress). The two articles read as follows:

#### *Article 33*

##### *State of necessity*

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

<sup>1</sup> See the Report of the International Law Commission on its thirty-second session, 35 UN GAOR, Supp. (No. 10), UN Doc. A/35/10 (1980).

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

#### *Article 34*

#### *Self-defense*

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations.

The proposal to provide that a state of necessity may be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with that state's international obligations provoked considerable hesitation in the Commission. It was felt that the doctrine of state of necessity was in bad odor for good reason. But, despite the abuses to which that doctrine had on occasion been subjected, Ago persuaded the Commission—with a masterful and exhaustive report and a penetrating oral exposition—that considerations of a legal principle and state practice required inclusion of a state of necessity among circumstances precluding wrongfulness. For example, he argued, it was not legally wrong for the United Kingdom to bomb the *Torrey Canyon*, a ship flying a foreign flag, as it spewed oil onto the British shoreline, even though this act of force took place outside British territorial waters in time of peace. If the doctrine of state of necessity were not given an explicit place in articles on state responsibility, other articles would be distorted to accommodate what was a felt need of states; it would be unwise to admit through the back door what would better be confronted and constrained at the front. The draft article as refashioned and adopted by the Commission is calculated to impose severe restraints upon invocation of a state of necessity.

The article on self-defense gave rise to no such fundamental doubts: there was ready agreement that, when a state acts in legitimate self-defense, the wrongfulness of that act is precluded. Dispute rather turned on whether, as the former special rapporteur initially proposed, the draft article should specify acts of self-defense in response to armed attack under Article 51 of the United Nations Charter, or whether the article should be more generally

phrased. The Commission as a whole strongly preferred the latter course, as Article 34 shows.

The set of articles on circumstances precluding wrongfulness, especially Article 33, generated concern in the Commission about on which party the burden of a loss incident to breach of an international obligation should fall. The result is draft Article 35:

*Article 35*

*Reservation as to compensation for damage*

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act.

*Treaties Between States and International Organizations*

The Commission completed at its 32d session a set of 80 draft articles on treaties between states and international organizations or between two or more international organizations. They parallel, with appropriate adjustments, comparable clauses of the Vienna Convention on the Law of Treaties. The articles and commentaries adopted by the Commission at its 32d session are those of part V on invalidity, termination, and suspension of the operation of treaties, part VI on miscellaneous provisions, and part VII, on depositaries, notifications, correction, and registration. It also adopted an extensive annex on procedures established in application of Article 66 for judicial settlement, arbitration, and conciliation.

Draft Article 61, on supervening impossibility of performance, reproduces Article 61 of the Vienna Convention. Its commentary notes that the application of Article 61 to treaties to which an international organization is party could give rise to some problems, *e.g.*, those in which financial resources are indispensable to the execution of the treaty and cease to exist.

Draft Article 62, on fundamental change of circumstances, essentially parallels Article 62 of the Vienna Convention. The change introduced by draft Article 62 is designed to take account of the fact that only states possess territory and that only delimitations of territories of states constitute boundaries. Thus, the provision of the Vienna Convention that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty "if the treaty establishes a boundary" was recast to apply to treaties establishing a boundary between at least two states and to which one or more international organizations are parties. The organizations may be parties to such a treaty because it stipulates functions they have to perform, *e.g.*, an organization may be required to guarantee a boundary or perform certain functions in boundary areas. The commentary addresses other problems inherent in this article, such as the role of international organizations in nonterrestrial delimitations, and under what circumstances acts may or may not be imputable to an international organization.

Article 63 provides, in modest adaptation of the comparable article of the Vienna Convention, that the severance of diplomatic or consular relations

between states parties to a treaty between two or more states and one or more international organizations does not affect the legal relations established between those states by the treaty except insofar as the existence of diplomatic or consular relations is indispensable to the application of the treaty. As diplomatic and consular relations exist between states alone, the general rule in Article 63 of the Vienna Convention is applied solely to treaties concluded between two or more states and one or more international organizations. The commentary notes, however, that severance of relations carried on by permanent missions of states to international organizations does not affect the obligations incumbent on the state and on the organization.

The Commission made no change in Article 64 of the Vienna Convention's provision that, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. Articles that follow on procedures with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty (Article 65), and procedures for judicial settlement, arbitration, and conciliation (Article 66) essentially track the Vienna Convention. However, in adapting Article 66 and its annex to the circumstances of international organizations, quite a number of difficulties were confronted. For example, only states can be parties to contentious cases before the International Court of Justice. While space does not permit recounting in detail the Commission's commentary and annex, it should be noted that the Commission placed its emphasis on mandatory recourse to conciliation. In that connection, a point of disagreement is bracketed in the Commission's extensive annex on conciliation, which concerns whether an international organization shall have the right to name conciliators. This right was supported by a large majority of the members of the Commission. But since it could apply only to organizations to which the proposed articles have become applicable, and since the Commission has not yet considered how the articles might become applicable to international organizations, this point was left unresolved to await the comments of governments. It will be dealt with at the Commission's second reading.

Changes from the text of the Vienna Convention in the remaining articles of this draft are marginal, though, as in previous articles, the commentaries prepared by the Commission's special rapporteur, Professor Paul Reuter, have elements of interest.

#### *International Watercourses*

The Commission's work on the topic of the nonnavigational uses of international watercourses had been hindered by disagreement within the Commission and the General Assembly on the meaning of the concept "international watercourse." The Commission moved to surmount this difficulty by the adoption, at its 32d session, of the following "tentative understanding" of what is meant by the term "international watercourse system":

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of

their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system, components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but relative, international character of the watercourse.

Building upon this understanding, the Commission adopted six draft articles of what is designed to be an umbrella or framework treaty that would set forth principles governing the uses of international watercourses. This framework treaty would be complemented by "system agreements" among the states immediately concerned with a particular watercourse that would apply and adjust these principles in accordance with the particular characteristics and needs of the watercourse in question.

The Commission thus adopted Article 1 on the scope of the present articles which provides that they apply "to uses of international watercourse systems and of their waters . . . and to measures of conservation. . . ." Its commentary notes that the term "international watercourse system" or "river system" is supported by a measure of precedent, and that, while not of itself settling differences over the scope of the international watercourse, it is a term that will permit progress on the topic on a basis which is not unduly confining. Article 2 provides that "a State in whose territory part of the waters of an international watercourse system exists is a system State." Article 3 defines a system agreement as noted above, and provides that it shall define the waters to which it applies (a provision that should ease differences over the scope of the international watercourse). "It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof . . . provided that the use by one or more other system States of the waters . . . is not, to an appreciable extent, affected adversely." The proviso is important; otherwise, a few states of a multistate watercourse could appropriate a disproportionate amount of its benefits to the detriment of the right of all system states to share equitably in the use of the waters and of the obligation of all system states not to use their own so as to inflict injury upon others. Article 3 further specifies: "In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements." The Commission's commentary emphasizes that this conditional obligation to negotiate does not oblige system states to conclude an agreement before using the waters of an international watercourse.

Article 4 complements Article 3 by providing that every system state of an international watercourse is entitled to participate in the negotiation of and become a party to any system agreement that applies to that system as a whole. It further provides that a system state whose use of the waters "may

be affected to an appreciable extent" by implementation of a proposed agreement applying only to part of the watercourse is entitled to participate in the agreement's negotiation "to the extent that its use is thereby affected. . . ."

The foregoing provisions may be seen as primarily relating to the structure of the draft articles and their relationship to agreements among riparians. Article 5 sets forth an initial general substantive principle that, to the extent the use of the waters of an international watercourse system in the territory of one system state affects the use of waters in another, the waters are "a shared natural resource." "Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles." The Commission's commentary describes such waters as "the archetype of the shared natural resource." It notes that, when the articles are enlarged, they will give concrete meaning to the parameters of this shared natural resource and provide indications as to how it shall be treated. As it stands, this article would simply require states to use the waters of an international watercourse system as a shared natural resource, with what that implies pursuant to principles such as the equitable use of those waters and *sic utere tuo ut alienum non laedas*.

Finally, the Commission adopted an article stating that the provisions of these articles do not affect treaties in force relating to a particular international watercourse system.

### *Jurisdictional Immunities*

The Commission lacked the time to consider fully a number of draft articles proposed by its special rapporteur, Ambassador Sampong Sucharitkul. It did adopt an initial article, on scope, providing: "The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State." It adopted another article providing:

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.
2. Effect shall be given to State immunity in accordance with the provisions of the present articles.

The draft article provoked controversy because it did not satisfy the contention that there exists a universal and basic principle of state immunity from which exceptions might be carved under certain circumstances (notably, where the otherwise immune state so agrees). A large majority of the Commission was unwilling to embrace such a principle, but preferred to launch its drafting of articles on jurisdictional immunities on a nonprejudicial basis. Thus, the article is designed to state the existence of a general rule of state immunity under contemporary customary rules of international law in relative terms, its qualifications, limits, exceptions, and extent being subject to formulation in the articles that will follow.

STEPHEN M. SCHWEBEL  
*Of the Board of Editors*

## BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

*Droit international public. Tome IV, Les relations internationales.* By Charles Rousseau. Paris: Editions Sirey, 1980. Pp. xiv, 671.

The fourth volume of Rousseau's great treatise will, like its predecessors, be received, read, and relied on with gratitude by the innumerable admirers of the author and his work. Once again, it offers all the great qualities they have learned to know and to appreciate in the earlier volumes. Once again, it takes its place among the indispensable tools of any scientific pursuit in international law, be it learning, teaching, or research.

One may, however, wonder why Rousseau chose the title *International relations*. The author obviously feels the need to clarify such an ambiguous term and in a short introductory note he explains that what is meant is not the study of political phenomena but that of interstate relationships under international law (p. 2). That was only to be expected, but then why use an equivocal title? Moreover, "international relations" thus defined covers practically the whole of international law and not just matters treated in this volume.

Volume IV is divided into three parts which deal respectively with the basic principles governing international relations, with the organs of such relations and, finally, with the spatial framework in which such relations take place.

The first part may perhaps give rise to some doubts. Are there really any basic "principles" of international law—as distinguished from its rules—governing interstate relations? If so, how many and which ones? (The list varies according to authors who choose to adhere to this concept; thus, for instance, Professor Schwarzenberger proposes a list of seven.) Why some rather than others? Is not the whole construction dangerously reminiscent of the "fundamental rights" of states, proclaimed once upon a time by the natural law doctrine?

However that may be, the three "principles" listed by Rousseau, independence, equality, and abstention, do not seem to be of the same order. That of state independence can most readily be admitted, stemming as it does from the very nature of international law; since the latter governs essentially relations between states, it presupposes their existence as individual, delimited, separate, *i.e.*, independent entities. Rousseau deals with this first principle briefly, referring to the extensive, and masterly, developments in volume II (pp. 68–93); only a relatively short discussion of the immunity from jurisdiction and execution is added here, such immunity being considered as a consequence of state independence.

The "principle" of equality, on the other hand, seems highly doubtful both in fact and in law, in the past and in the present, so much so that it was



easily demolished by scholars of such differing outlook as Kelsen and Brierly. Strikingly enough, it is also demolished by Rousseau himself who shows its inexistence throughout history up to the present day, as well as within international organizations (see his scathing comment on the logical monstrosity of the "sovereign equality" of states, unblushingly proclaimed by the UN Charter, p. 31). But if this is so, why elevate this fiction to the rank of a leading principle of international law?

The chapter on the "principle" of abstention discusses in the main two very different things: intervention and the Monroe Doctrine, *i.e.*, one general problem and one particular case. Concerning the first, one is grateful to Rousseau for limiting the notion of intervention to interference in the internal affairs of a state (pp. 38, 41), especially in view of the prevailing confusion in the matter. It may, however, be submitted that the prohibition of such interference does not constitute an autonomous principle of international law but is the logical consequence of state independence. As such, it may, and should, be firmly maintained, however difficult the distinction between lawful and unlawful intervention is in some cases and whatever the appalling violations of the principle are throughout history and in our time.

The Monroe Doctrine is examined at great length with a wealth of information on the origin and evolution of this principle of American foreign policy. As such, it is obviously not universal; nor can it qualify as a rule of international law (pp. 101-03). Its inclusion among the basic principles of international law governing international relations in general is therefore somewhat surprising. The same can be said of the inclusion of the Drago Doctrine among these principles (pp. 109-11).

No such doubts cling to part II, which deals with the organs of international relations. The author first discusses the central organs—Heads of State and Ministers of Foreign Affairs—and then concentrates on "external organs." As so often in Rousseau's treatise, these two chapters on diplomatic and consular law constitute real monographs, including extensive analyses of historical origins and evolution, state practice, judicial decisions, municipal laws, etc. While relying heavily on the 1961 and 1963 Vienna Conventions, the author never loses sight of the customary aspects of the matter.

Rousseau's constant concern for realities of international life (for years we have been indebted to him for his magnificent "Chronique des faits internationaux" in the *Revue générale de droit international public*) reveals its particular importance in this context. He offers the reader a constant confrontation of norms and facts, of the world of the *Sollen* and the world of the *Sein*, thus raising the question of the effectiveness of law. These chapters, bearing on what was until recently the safest and the least controversial part of international law in theory and in practice, make shattering reading today. They list violations of law not only by individuals in conditions that may or may not involve the international responsibility of the receiving state, but indeed by the states themselves: violations of personal inviolability of diplomatic and consular agents (pp. 178-79, 257), violations

of premises (pp. 180–81, 251), violations of means of communication including conversations (pp. 184–86), and violations of the diplomatic bag (p. 185). Completed in 1979, the volume does not include the Tehran case which will go down in history as the first taking of diplomatic hostages by the receiving state, nor the task assigned by Qaddafi to Libyan diplomatic posts to murder recalcitrant Libyan nationals abroad.

Rousseau's description of the "corps diplomatique" and its functions makes particularly sad reading in light of the Tehran case. Indeed, though not mentioned by the Vienna Convention, the diplomatic corps continues to be a *de facto* organ, endowed with two functions: one purely representative, which consists in attending official ceremonies in the receiving state, offering New Year compliments to the Head of State, etc.; and another one that Rousseau considers "une fonction juridique," which consists in defending the rights and privileges of its members whenever necessary by way of collective protests (pp. 152–53, 178). Did the diplomatic corps in Tehran consider the New Year addresses as its only legitimate function?

In part III, called "Le cadre spatial des relations internationales," the reviewer's difficulties really begin. In the preceding volumes Rousseau introduced a distinction between "territory" and "space," trying to limit state territory to mere "land" ("espace terrestre"), to the exclusion of maritime and air spaces, the two latter being qualified as state territory "by law" but not "by nature" (vol. II, pp. 36–37, vol. III, pp. 8–9). This distinction is now developed in the introductory note to part III, the key sentence of which follows: "En dehors de l'espace terrestre réservé à la compétence exclusive et plénière de l'Etat (souveraineté territoriale) il existe des zones spatiales matériellement distinctes du territoire—espaces maritime et aérien—qui, par définition même et en raison de leur nature physique, sont soustraites à tout exercice d'une souveraineté étatique" (p. 267).

This is an astonishing statement. It is respectfully submitted that no part of state territory is such "by nature" but that it is law alone which confers on it that quality. Exactly like maritime or air space, land becomes state territory by virtue of legal norms without which it would be a mere geographical notion. Moreover, the assertion just does not correspond to facts, as Rousseau himself is forced to admit time and again, whether it be in connection with the territorial sea (pp. 360, 362), the air space (p. 609), or the continental shelf (p. 433), all of which *are* part of state territory.

As a result of this distinction, part III covers both spaces actually forming part of state territory and spaces outside territorial sovereignty. A reader, wishing to find an overall view of state territory, will therefore have to "commute" between volume II, covering "land" only and volume IV, which contains discussions of all the other parts of state territory alongside genuinely extraterritorial spaces.

Even conceived in such an unusual way, the contents of part III are not adequately covered by its title which seems to suggest that interstate relations are limited to spaces outside state territory as well as to the territorial sea, the continental shelf, and the air space, to the exclusion of the most significant part of state territory which is land. But this is simply not so. Indeed,

interstate relations can, and in fact do, take place all over the globe, including land. It is on land that "external State organs" function, that treaties are concluded and executed, that unlawful acts are committed, etc. All this makes it very difficult to adhere both to Rousseau's doctrine on this point and to the resulting systematization of the subject matter.

However, on balance, it must be said that the topics included in this part, whatever the criterion of their selection, are treated in Rousseau's own masterly way.

Part III deals successively with maritime space, including the high seas, the internal waters, the territorial sea, the contiguous zone, bays, straits, the continental shelf, the economic zone, and the deep seabed, with inland waters such as rivers, canals, and lakes, and with air space and outer space. As is his habit, the author shows the historical development of each one of these questions, discusses in great detail all their legal aspects, and provides the reader with a wealth of information no less admirable for being usual throughout his work.

The treatment of maritime space may be singled out. Indeed, what could be more difficult than to give a coherent view of the problem at a time of flux and uncertainty? Rousseau finds the best solution in dividing the matter into two parts, the first dealing with the traditional concepts and the second with "new orientations." This second part, covering the extension of states' claims over maritime space adjacent to their territories as well as the protection of the marine environment, shows the most recent developments in the field, including those which occurred during UNCLOS III. While the final results of this conference are still not in, the states' claims to ever-growing extension of their rights and jurisdiction have in most cases been asserted by way of unilateral decisions, a development rightly qualified by the author as a "régression juridique" (p. 366).

Such are, in very broad outlines, the contents of this volume. While the reviewer's reservations bear on matters of doctrine and system on which opinions may vary, here is an unquestionable monument of science and learning, of rigor and clarity, combining respect of detail with a broad vision. To such a monument no review can do full justice. Rousseau's work has to be read, studied, and lived with in order to be fully appreciated.

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*International Tax Avoidance*, 2 volumes. By the Rotterdam Institute for Fiscal Studies. Deventer: Kluwer, 1979. Vol. A: pp. 368. Dfl.90; \$45. Vol. B: pp. 344. Dfl.65; \$42.50.

Volume A, entitled *General and Conceptual Material*, written primarily by M. A. Wisselink and Barry Bracewell-Milnes, contains 11 parts. Part I discusses the methods of tax avoidance under the headings of movement and nonmovement of persons and funds. Part II contains valuable discussion concerning the conceptual framework behind deferral of taxation

of the profits of foreign subsidiaries and antitaxation measures in both the United States and Europe (pp. 58-59). Part III continues and extends the discussion of tax avoidance by focusing on the use of tax havens.

Parts IV and V, which serve as an introduction to Volume B, entitled *Country Reports*, describe national measures taken by governments to eliminate international tax avoidance. In Part IV the collaboration between governments and international organizations is set forth. This part contains an excellent discussion of the work of the League of Nations, the United Nations, and particularly the group of experts on tax treaties between developed and developing countries, the Organization of Economic Cooperation and Development (OECD), the European Economic Community (EEC), and the Nordic Convention, along with a discussion of examples of bilateral measures.

Part VI provides an effective discussion of the role of public international law in defining and eliminating international tax avoidance. However, the role of international organizations in this area has been substantial enough to warrant a book on the subject itself. For instance, the discussion in Part IV does not even mention the work of the Inter-American Tax Committee, the Council of Europe, or the International Fiscal Association.

Parts IX and X continue to redefine the analysis of international tax avoidance by focusing on the application of the law of fiscal abuse to base-companies (holders of legal titles belonging to a business outside the base-countries) and concepts of abuse of tax treaties, such as the specific anti-abuse rule in Article 16 of the U.S. Model Tax Treaty. Part XI contains a useful discussion of the interaction of public international law and national law with respect to the interpretation of tax treaties. Part IX sets forth a fiscal analysis of the concepts and criteria of international tax avoidance and concludes that the determination of international tax avoidance in the end must be decided by objective case-by-case research into the intent and purpose of the statute or tax treaty.

Volume A has two appendixes: the first on creating an *Anstalt*, a *Stiftung*, or a trust in Liechtenstein; and the second on incorporating a Netherlands Antilles Company.

Volume B contains the country reports for Belgium, France, Germany, the Netherlands, the United Kingdom, and the United States. Although the country reports do not have a common outline, they were designed to form a series of appendixes to volume A. The six countries were selected because they exemplify the four principal legislative approaches to the question of international tax avoidance. In group A the law of the Netherlands on international tax avoidance is described as very general and comparatively simple. In group B are Belgium and France, which are described as having special measures against international tax avoidance, ad hoc in character and not intended to be comprehensive in coverage. In group C is the United Kingdom, which is described as having no general anti-avoidance measures and whose courts literally construe tax statutes. In group D are the United States and Germany, both of which, it is claimed, have comprehensive legislation against international tax avoidance. The

classification assigned to these groups of countries is oversimplistic and of dubious validity. The utility of the country reports and volume B lies primarily in their reference to the material in volume A. However, the country reports are integrated with volume A, particularly Parts IV and V and Parts VII and XI.

This two-volume study is a well-documented and well-integrated primer for a lawyer seeking a conceptual framework for investigating the subject of international tax avoidance. As the trend toward increased intergovernmental cooperation to eliminate international tax evasion and avoidance continues, *International Tax Avoidance* will be valuable to persons interested in the subject.

BRUCE ZAGARIS

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*The Legal Regime of Islands in International Law.* By Derek W. Bowett. Dobbs Ferry: Oceana Publications, Inc.; Alphen aan den Rijn: Sijthoff & Noordhoff, 1979. Pp. x, 337. Index. \$30.

This comprehensive and well-documented book was written by an expert, and for experts. The author, a widely respected international lawyer, presents a detailed account of the various legal facets of islands and island groups, drawing heavily on geographical examples, on the treatment of island issues in the Informal Composite Negotiating Text of the law of the sea negotiations, and on the outcomes of two international litigations, the decision of the International Court of Justice in the 1969 *North Sea Continental Shelf* cases, and the award by the court of arbitration in the 1977 *Anglo-French Shelf* case.

The first third of the book is concerned with basic aspects of islands, such as their legal definition, uncertainties over the sovereignty of small, uninhabited islands, the status of artificial islands, and the relation of islands to boundaries in navigable rivers. There is also a chapter on archipelagoes, which stresses the variety of conditions under which claims to the use of archipelagic closing lines might be anticipated.

The greater part of the book treats the effect of islands on the delimitation of maritime boundaries between opposite and adjacent states. Bowett begins with a general discussion of islands and the continental shelf, then proceeds to a detailed account of the 1977 Channel award and its implications for future boundary delimitations. The last three chapters are case studies of islands and delimitation issues in the Aegean Sea, the China Sea, and the Gulf of Venezuela. In these analyses, there is frequent use of the principles which the author sees as being laid down in the 1969 and 1977 decisions.

One of the principal considerations in his analysis is Bowett's concern with the courts' interpretations of "equity." At one point he writes that the court of arbitration has

elevated "special circumstances" from what some perceived to be the status of a limited exception to a general rule [of equidistance] to the status of partnership in a unified "equidistance-special circumstances" rule. . . . What the Court suggests is that [the equidistance] rule will apply only where it achieves an equitable result.

Later, he notes that "[t]he problem is that perceptions of 'equity' are apt to vary from State to State . . . with the result that boundary agreements may become more difficult to reach and recourse to judicial or arbitral settlements may become more frequent."

The text would have profited from the inclusion of a bibliography, since the cross-references in the footnotes are often difficult to follow. Several of the maps are poorly reproduced. These things aside, the book constitutes a unique and valuable addition to the legal writings on maritime jurisdictional topics.

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*The New Humanitarian Law of Armed Conflict.* Edited by Antonio Cassese.  
Naples: Editoriale Scientifica s.r.l., 1979. Pp. xxiv, 502. \$40.

This volume represents one of the first in what will almost certainly be a series of analyses of the laws of war provoked by the signature in December 1977 of two protocols to the Geneva Conventions of 1949 on the protection of war victims. Anyone who wishes to follow the development of this field of law will want to take advantage of this book to see how some of the arguments are beginning to develop, even if he does not wish to go through all of the 17 papers of which it is composed.

Both in the title of this book and in the scope of subjects covered, Professor Cassese has recognized that the new protocols (particularly Protocol I) do not merely add marginally to the 1949 Geneva Conventions, but also revise and extend the "Law of the Hague" sufficiently to be considered a "new humanitarian law of armed conflict." If parts of this new law, such as the protection of medical aircraft, are inadequately reflected in this book, that may say more about the scope of accomplishment of the protocols than about the omissions of Cassese's selection process.

The strongest part of this book is the section in which developments in various parts of the law are analyzed separately. Georges Abi-Saab has contributed an excellent piece on implementation that describes both the central role of the protecting power under the 1949 conventions and the sad history in which we find that there has never been a protecting power in any conflict since 1949. This reviewer thinks Professor Abi-Saab undervalues the accomplishments of Protocol I in this regard, but this is a question of judgment that only time and experience will resolve. Both Professor Röling's comments on criminal responsibility and Professor Bierzanek's analysis of—and attack on—the use of reprisals as a means of law enforcement are full of relevant information and provocative. Much less satisfying

is the paper dealing with wars of national liberation by Professor Salmon, which is bound to leave the reader thoroughly confused about the status of guerrillas under Protocol I. In fact, the provisions concerning guerrillas are among the most significant developments made by the protocol with respect to the law of occupied territory, but dealing with them as part of the liberation war subject is misguided. Cassese's chapter on means of warfare is perhaps overly historical in approach, but is thorough and is certain to fuel debate. This reviewer found many disagreements with Cassese, most notably with his assertion that Article 51 prohibits "non-tactical" nuclear weapons despite the clear and consistent record of the conference showing that it did not intend to deal with nuclear weapons and the formal statements of understanding made by the United States and certain other states.

The three papers on general problems are not very rewarding, and the four papers purporting to analyze the attitudes of various groups of delegations in the 1974-1977 conference should probably have been omitted, as they will only serve to annoy ex-delegates who see their countries' motives and efforts misunderstood and distorted.

Despite its defects, this book will reward the discriminate reader. Four of the papers are in French, the rest in English.

GEORGE H. ALDRICH, *Ambassador*  
*U.S. Department of State*

*The United Nations Operation in the Congo, 1960-1964.* By Georges Abi-Saab. Oxford: Oxford University Press, 1978. Pp. xviii, 206. Index. \$6.95.

This monograph was commissioned by and published under the auspices of the American Society of International Law. It is a step in a search for understanding of the role of law and legal institutions in coping with international conflict. More specifically, in the words of the author, in the particular case of the UN operation in the Congo, it attempts "to trace the role of law as an *input* of decisions and action." "It inquires in what ways and to what extent, if at all, legal considerations, as understood by the decision-maker at the time of the decision, had a bearing on the ensuing decision." The study focuses on four principal decisions, or clusters of decisions: the initial decision to undertake a peacekeeping operation, the decisions over the deployment of the force in Katanga in August 1960, the decisions incidental to the constitutional crisis which broke out in September 1960, and the decisions leading to the ending of the Katanga secession.

Furthermore, the decisions studied are all UN decisions. They are mostly Secretariat decisions taken either exclusively or jointly with other organs, and except for decisions with regard to the ending of the Katanga secession, they were all taken during the tenure of Dag Hammarskjöld. Consequently, to a very large extent, this is a study of the influence of law on the Secretary-General in decisions taken in the discharge of his responsibilities under the Charter.

The author's analysis of the cases is thorough and takes account of the political context in which the decisions are made. His conclusions are drawn with wisdom and understanding. They generally confirm the views to which we are led by the writings of Brian Urquhart and Oscar Schachter. The author concludes that the operation was conceived by Hammarskjöld as an exercise in "social engineering," "with the double purpose of facing up to the immediate crisis, but also of expanding the role of the UN in world affairs." The tension between the pursuit of political aims and the constraining effect of principles was at the basis of the controversies to which the operation gave rise. These controversies took the form of legal controversies over interpretation. The author calls attention to the tactical advantage that the Secretary-General enjoyed by being able to use the "veto" in the Security Council to protect his "interpretations" against being overruled by that organ. What he does not emphasize, the task he undertakes not requiring it, is that this tactical gain did not in the long run contribute to the effectiveness of the Secretary-General's role in dealing with the whole Congo problem or to the strengthening of the role of his office in world affairs and the role of the United Nations.

By limiting his analysis to the influence of law on UN decisions and more particularly decisions of the Secretary-General, the author has left unanswered the much more difficult, and in many respects more fundamental, question of the influence of law on the decisions of member states, particularly the major participants. The exploration of the extent and nature of the influence of international law on the major participants would be a subject even more central to an understanding of how the Congo situation evolved and was finally resolved. This, however, does not detract from the value of Abi-Saab's contribution to our understanding of UN action in the Congo and the role of international law in UN decisions.

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*The Role of the United Nations in International Legislation.* By Hanna Bokor-Szegö. Amsterdam, Oxford, and New York: North-Holland Publishing Co., 1978. Pp. 192. Index. Dfl.60; \$26.75.

This relatively slender book examines the role of international organizations, and particularly the United Nations, in the formation of norms of international law from the viewpoint of an Eastern European scholar. It is Bokor-Szegö's thesis that while the resolutions and proceedings of international organizations are not in themselves a new source of international law, they have had such significant impact on the conventional and customary processes that they not only play an important role in international legislation but have in fact altered the character of these traditional processes.

In a brief introduction the author emphasizes the intensity, frequency, and complexity of international relations today and their institutionalization



which has resulted in the exercise by international organizations of far more influence on those relations and on "the material of international law intended for their legal regulation." Chapter I on the legislative competence of international organizations deals briefly with the scope of activities of the League of Nations and the UN family. Focus, however, is on the powers of the UN General Assembly with respect to promotion of cooperation in the political field, codification of international law, and human rights. With respect to codification, Bokor-Szegö rejects the possibility of a codification endeavor not accompanied by development since, in her view, most customary rules of traditional international law "bear the mark of the era of colonialism" and violate the interests of newly independent states. Here, as in many parts of the book, Western scholars—and the International Law Commission itself—readily agree with the conclusion that codification cannot be separated from progressive development without necessarily accepting the ideological reasons given therefor.

The heart of the discussion is contained in chapters II and III in which Bokor-Szegö deals with the function of international organizations in the development, respectively, of customary rules of international law and of international conventions. After reviewing the formation of customary rules and their application to newly independent states (a particularly interesting discussion), the author examines the participation of international organizations in the development of customary rules. Particular attention is given to the right of self-determination and to reservations to treaties (a subject with which she has dealt at length elsewhere). Bokor-Szegö concludes that while the role of customary law is decreasing, at the same time newly emerging customary rules evolve and become universal more rapidly through the work of international organizations

With respect to their effect on international conventions, General Assembly resolutions are divided into two categories: (a) resolutions of a substantive character influencing the content, *e.g.*, declarations which later find expression in treaty form, and (b) resolutions of a technical character which promote the various stages of the conclusion of treaties (negotiation, signature, ratification). The author concludes that the work of international organizations not only makes the norm-creating process easier and more expedient (*sic*) but may also unfold the universal character of regulation.

This latter point brings us to chapter IV in which the author discusses the content of treaties in the light of "the universal interests of States." While treaties related to the maintenance of international peace and security would be of particular importance, she finds the role of the UN to be very limited because of the power relations prevailing in the world today—which she describes in terms of the "aggressive aspirations of the imperialist States and the efforts made by the socialist States to promote the cause of peace and security." She then evaluates the codification conventions, giving good marks to those in the field of diplomatic and consular relations, poor marks to the 1958–1960 effort on the law of the sea, and a mixed review to the law of treaties which scores well with respect to invalidity for coercion, *jus cogens* and reservations, and fails on universality. Treaties of a

universal interest, she contends, must be open to all states and notes that the "all State formula" was eventually accepted by the United Nations. She fails to point out, however, that the "Vienna formula" has become coextensive with "all States" and that the Secretary-General has not altered his position on referring controversial questions to the General Assembly for its determination.

In the final chapter Bokor-Szegö examines the role of international organizations in the implementation of international treaties, including the extension of their operation to a given state and their application in that state.

This book is an interesting exposition of the subject and exemplifies the more sympathetic appraisal of international organizations now being shown by socialist writers. There are no great surprises and, if divorced from polemic language, it presents many views which could readily be accepted by Western scholars.

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*China, the United Nations and World Order.* By Samuel S. Kim. Princeton: Princeton University Press, 1979. Pp. xviii, 581. Index. \$12.50.

In this book Kim studies the views of the People's Republic of China (PRC) on key global issues and problems in the United Nations as well as in the context of world order. The term "world order" is derived from the World Order Models Project of the Institute for World Order, aimed at (pp. 4-5): (1) the minimization of collective violence; (2) the maximization of social and economic well-being; (3) the realization of fundamental human rights and conditions of political justice; and (4) the maintenance of ecological balance and harmony.

Accordingly, the author deliberately eschews a "value-free research," which, in his judgment, "would be neither desirable nor relevant" (p. 5). Having thus discarded the "value-free," objective standard from the outset, he examines China through his "world-order" looking glass—in fact, two-fifths of his 500-page text is devoted to this subject.

The volume begins appropriately with a description of the traditional Chinese and Maoist images of world order, followed by an examination of the PRC's role between 1971 and 1977 in the General Assembly, the Security Council, the "new international economic order," and four specialized agencies. It concludes with an evaluation of China's attitudes toward international legal order as well as world order. The author's overall observation on the PRC's conduct in the United Nations may be summed up as follows (p. 500): "In short, China has played the diplomatic game by the established rules, rather than attempting to replace or repudiate them."

Despite the wealth of data assembled by the author, a number of methodological problems detract from the quality of the book. For example, though stressing the importance of measuring China's "words" with "deeds" (p. 8), the author relies principally on the following sources: statements by Chinese and other delegates as recorded in UN documents, official policy or editorial pronouncements in the PRC's publications, and personal interviews with officials of and delegates to the UN system. "Discrepancies in the above sources," states the author, "have been resolved by examining the PRC's actual behavior [*sic*] as revealed through her voting and consultative behavior" (pp. 10–11). One may legitimately ask whether all of these sources are not by nature "words," rather than "deeds."

This lack of balance is reflected also in the list of interviewees (pp. 503–08)—what the author calls his "live" sources. Its selection shows an overwhelming bias in favor of Western diplomats (principally American) and UN officials (most of them of Western citizenships), to the near total exclusion of Third World and Soviet-bloc diplomats.<sup>1</sup> In view of the PRC's close interactions with the Group of 77, the neglect of Third World diplomats as "live" sources is hard to justify. Moreover, one wonders about the value of the many interviews with UN officials given their customary reluctance to criticize any member state, even on an anonymous basis. The author himself admits: "Those who make themselves available for interviews are not always the most ideal sources of information on a particular problem" (p. 9n).

The PRC's interest in the field of public health—bringing primary health care delivery services to the rural poor through the "bare-foot doctors" and an elaborate referral system, among others—is well known. Consequently, its active involvement in WHO was to be presumed and indeed was reflected by its nomination of one of its nationals to be an assistant director general of WHO shortly after its entry into that organization—in sharp contrast to its practice in other specialized agencies. The role it has played in adapting the Chinese public health system to the needs and conditions of the developing countries in WHO, as well as in its bilateral programs, would certainly be of general interest. And yet for some inexplicable reason, WHO was not selected as one of the four agencies discussed in chapter 7—which leaves a serious gap in a book of this nature.

Notwithstanding these omissions or imbalances, this volume is a welcome addition to the literature on China and the United Nations and is indispensable for those interested in the PRC's role in the immediate "post-entry" period.

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<sup>1</sup> Thus, of the 110 interviews conducted mostly in early 1977, 83 were with UN officials; 15 with US officials; 3 with Japanese officials; 2 each with French and UK officials; and one each with Austrian, Indian, Philippine, and nongovernmental organization officials.

*The United States, The United Nations, and Human Rights. The Eleanor Roosevelt and Jimmy Carter Eras.* By A. Glenn Mower, Jr. (Studies in Human Rights, Number 4). Westport: Greenwood Press, 1979. Pp. xii, 215. Index. \$17.50.

Mower's book is divided into two parts: "The Eleanor Roosevelt Era" and "The Jimmy Carter Era." Despite this focus, with its historical assessment of the early role of Mrs. Roosevelt at the United Nations, and with a less explicit examination of the involvement of President Carter, the author skillfully analyzes the role played by the United States in the human rights field between early 1946 and 1979. The authoritative quality of the author's conclusions is buttressed by the probing aspects of his research. His reliance on secondary sources is effectively supplemented through interviews and exchanges with individuals who were closely associated with Mrs. Roosevelt and with the management of the human rights policies of the Carter administration. His methodology provides keen insights and credible conclusions.

Mrs. Roosevelt is depicted as possessing a firm personal commitment to human rights but as being uncertain initially of her role as the U.S. representative on the UN Commission on Human Rights. With suitable guidance from the Department of State, and with her inherent concern for the dignity of the individual, she contributed materially to the writing of the Universal Declaration of Human Rights. She was also heavily engaged in the establishment of a UN system for the promotion and protection of such rights. Her major contribution was the building of the view that throughout the world individuals might claim as a matter of right an entitlement to human dignity. Thus, in the historic sense her contribution to the acceptance of this proposition was probably even more important than the language incorporated in the Universal Declaration and the formalization of the basic elements of a system for the promotion and protection of human rights. She is sympathetically presented as sensing a worldwide preoccupation with the perfection of the status of human beings and as both a private and public spokesperson for this outlook.

The author does not provide the same kind of detailed assessment of why President Carter as an individual possesses a driving commitment to the cause of human rights. But it is clear that Carter may be credited with pursuing a course that had been previously marked out by Mrs. Roosevelt rather than the passive official commitment that the United States had adopted following the Truman administration.

In his assessment of the Carter policy the author devotes five chapters to key questions and excellent analyses of the policies affected in the advancement of human rights. These chapters are entitled: "With What Rights Should the United States be Concerned?"; "When Should the United States Act in Defense of Human Rights?"; "What Kind of Action Should be Taken?"; "How Should United States Action be Taken?"; and "How is Policy Made and Implemented?"

Following these chapters the author raises the further question of

President Carter's accomplishments and the durability of the present emphasis. It seems clear from the record, despite the increasingly verbal complaints of those who seek to denigrate the Carter efforts, that the human rights policy of the Carter administration has endeavored to motivate persons of good and ill will to take a stand concerning human rights. The author is reluctant to predict the survivability of the Carter focus, taking into account the impact of the frequently unpredictable domestic and international political circumstances and forces. Yet, he properly ends with an affirmative and, in my judgment, a correct appraisal. He states: "Being the kind of country that it is and exposed as it is to all the currents and demands of international life, the United States can hardly ignore this human rights imperative in its foreign policy" (p. 194). This is a sound book. It makes a substantial contribution to an understanding of human rights and the politics of the movement.

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*Neue Entwicklungen im öffentlichen Recht: Beiträge zum Verhältnis von Bürger und Staat aus Völkerrecht, Verfassungsrecht und Verwaltungsrecht.* Edited by Thomas Berberich *et al.* on behalf of the Alexander von Humboldt Foundation, Bonn-Bad Godesberg. Stuttgart: Verlag W. Kohlhammer GmbH, 1979. Pp. xxxvii, 487.

The prestigious West German Alexander von Humboldt Foundation regularly sponsors international symposia that bring together specialists from around the world who have previously conducted scholarly research in the Federal Republic of Germany on Foundation-supported programs. Each symposium focuses upon a specialized professional area and allows German scholars to interact with their counterparts worldwide. The present volume contains the work of the fifth annual symposium (the second that has focused exclusively on the field of law). This symposium, under the theme "New Developments in Public Law," probed the relationship of citizen and state in selected areas of law.

International law scholars will be primarily interested in section 1 of this volume, which presents papers and discussion on traditional international legal themes. Sections 2 and 3 however, which treat constitutional law and administrative law respectively, also touch a wide range of issues related to aspects of modern international law, *e.g.*, sovereignty, jurisdiction, comparative law, basic rights, and environmental law. An increasingly interdependent world insures that few legal matters these days are of purely national concern.

The international law section includes the contributions of scholars from West Germany, Japan, South Korea, Israel, Yugoslavia, Greece, and Italy. Three basic themes are examined: (a) human rights and the right of national self-determination; (b) interstate cooperation and individual state

sovereignty; and (c) European integration and national constitutions. Participants examine the protection of human rights on a worldwide plane and in the context of philosophical aspects of state sovereignty. The theme of interstate cooperation prompted a provocative discussion of international terrorism from a comparative perspective and of terrorism and extradition. Finally, the German and Italian constitutions are discussed in the context of European integration. Although not reprinted, the introductory report to the international law section comments on two additional contributions made at the symposium, one reviewing the legal situation of divided peoples (e.g., the Koreans) in respect to international law, and the other reviewing certain aspects of the Greek Constitution and European integration.

This collection of scholarly papers is of high quality, although, as is to be expected, some unevenness surfaces in the attempt to integrate contributions from so many differing political and legal backgrounds. One addition that would have strengthened the collection would have been an index. The Alexander von Humboldt Foundation is to be commended for sponsoring this kind of cultural exchange in a specialized professional area. The field of international law is certainly enriched by the foundation's efforts.

FOREST L. GRIEVES  
*University of Montana*

*The U.S.S.R. and Global Interdependence. Alternative Futures.* By Walter C. Clemens, Jr. Washington: American Enterprise Institute for Public Policy Research, 1978. Pp. x, 113. Index. \$3.25.

For centuries, governments have had to face the question of how to achieve the proper balance between independence and security. The decisionmaking processes involved in this quest are complex at best and that of the Soviet Union is certainly no exception. The author has taken this intricate subject and, in quite a short work, has defined the basic aims of Soviet foreign policy, the means by which the Soviets seek to achieve these goals, the factors which influence the means, and ultimately, how the USSR is likely to choose in the future between interdependence and security.

To begin, Clemens sets forth the five basic concerns of post-Stalin foreign policy. They are the legitimacy of the CPSU, national security, Soviet influence over Eastern Europe and Outer Mongolia, industrialization and economic improvement, and Soviet dominance over international communism and the Third World. According to Clemens, the Government has chosen a mixture of "competing tendencies" as the means by which to achieve its goals. Détente and trade are often the most significant, followed by ever-fluctuating doses of forward strategy in the Third World, globalism, and autarky. The strength of each particular tendency is dependent upon changing attitudes and conditions or "trends" within Soviet society. He also

makes the all too often understressed point that today's policies are still tied to the Russian philosophies of Slavophilism and Westernism.

Clemens sees the future as a continuation of this present "mixed model" with such issues as Western economic stability, Soviet economic development, oil and natural gas supplies, the human rights question, and development of the Eastern bloc affecting the strengths of the various tendencies. As for the general direction in which these issues are likely to move the Soviets, he maintains that a break in relations at present would be troublesome to both the USSR and the Eastern bloc (less so to the West); however, it is conceivable that they are heading toward such interwoven economic and social development with the West that a rift could result in unacceptable consequences. The implications here for international law are obvious: increased interdependence brings with it the need for new treaties and other related international legislation in addition to a renewed interest in international organizations. He further points out that forward-thinking nations should be able to realize that the solutions to current and future global problems are going to require a concerted effort on their part. The most effective way to handle this is to cooperate willingly now, especially where the Third World is concerned. If the Soviet Union is interested in joining, so much the better; but care should be taken not to leave the solutions dependent upon Soviet cooperation. The recent developments in Afghanistan, Yugoslavia, and Iran should provide an interesting test of this thesis.

MARY D. McVEY  
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*Soviet Yearbook of International Law*, 1977. Moscow: Izdatel'stvo "Nauka," 1979. Pp. 416. 4 rubles, 50 kopeks.

Remolding international law to fit Soviet needs has been the evident Soviet aim for decades. In this annual volume G. V. Ignatenko states quite clearly the task of Soviet scholars to be "evaluation of the conditions, directions and methods of using the principles and norms of democratic international law in the interests of a revolutionary transformation of the world" (p. 36). His leading article is followed by his colleagues' suggestions of methodology. Once again world government is denounced by the noted Ukrainian, I. I. Lukashuk, (p. 144). He calls for "coordinated activities of sovereign states" to arrive at collective decisions. This means following consensus procedures now quite common in the UN committees, and they are described by I. G. Fominov (p. 246).

For Ignatenko the purpose of remodeling is to create "a dialectical unity of stability and mobility" as law is pushed forward to incorporate qualitatively new principles and norms. His colleague G. K. Dmitrieva declares that the new principles must and do reflect a class morality containing elements common to all mankind (p. 147). For D. I. Feldman these principles cannot but reflect fundamental changes from tradition caused by

three great historical influences: the Russian Revolution, the crisis of colonialism, and the scientific and technological revolution (p. 92).

Writers in the 1977 volume have seized the occasion of the 60th anniversary of the revolution and the promulgation of a new USSR Constitution to restate positions that Ignatenko declares "new from the beginning." Perhaps he would have been more accurate in writing "almost the beginning," for historians will not forget the repudiation of international law in 1917 and the reversal of position only when the German Imperial Army made it evident that nothing but acceptance of a peace treaty would halt it.

Throughout the current volume authors are anxious to transform norms, but they seem wary of their enforcement by the world community. There is constant reference to the need to respect sovereignty of states, as with Lukashuk. Some take the form of carefully argued briefs, as with the noted E. T. Usenko's plea for recognition that when a Soviet judge applies a norm established by treaty, he is only applying municipal law. The treaty norm has been transformed by ratification into municipal law and becomes a *lex specialis* of municipal law and not an overriding international law. Thus a judge who refuses to apply the special norm is violating not the treaty but the municipal norm which requires him to enforce the norm established by the treaty. If a subsequent law nullifies or changes the treaty, the judge must apply it, for Soviet law is paramount for him. Yet, as most international lawyers would argue, Usenko is prepared to accept the rule that the international obligation remains to other parties to the treaty until its provisions on abrogation are applied.

Usenko's arguments are not new, but their restatement at this time indicates once again that Soviet jurists and their statesmen will not tie Soviet hands by international bonds. Perhaps this explains Judge Morozov's dissent in the Iranian hostages ICJ judgment of May 24, 1980, when he accepted the rule of law on immunity of diplomats, but he opposed the sanction of reparations.

As in the 1976 volume, the Final Act of Helsinki excites comment. Y. A. Grigelionis concludes that although the Final Act is not a treaty, it is an international political document that creates a "paramount political obligation" with international law significance insofar as its provisions restate the aims and principles of the UN Charter. He finds that the 1977 USSR Constitution has already incorporated the Helsinki principles in its text. If this is so, study of the new Constitution will help to indicate what part of the Final Act is law for the Soviet party, and what part is aspiration.

With each volume the level of English proficiency in the translated abstracts has risen. With the 1977 volume perfection has been reached and congratulations are in order. Regrettably, the translations do not cover the valuable specialized brief reports by newcomers to the *Yearbook*, nor the summation of the Soviet Society's annual meeting. Also regrettable is the fact that these summaries are too brief to permit assessment of the event. Only a few of the papers reach the front of the volume. The reader learns that Gregory I. Tunkin, the Society's president and world-renowned scholar, made a speech on the fundamental problems of the Soviet science



of international law, but it is not made available to the persons who were not present.

As with previous volumes, the *Soviet Yearbook* has more importance to diplomats than most yearbooks in other lands because it presents clues as to what Soviet diplomacy will be arguing in months to come. It is not just a collection of thoughts by scholars in ivory towers.

JOHN N. HAZARD  
*Board of Editors*

*The Canadian Yearbook of International Law. Volume XVI, 1978.* Edited by C. B. Bourne. Vancouver, B.C.: The University of British Columbia Press, 1979. Pp. 447. Index. \$22.

As regular readers of the *Yearbook* have come to expect, the present volume again offers an excellent and provocative collection of studies on a wide range of issues in international law.

The author of the first of the seven articles in this collection examines the "Scottish tradition" in international law. In reviewing the work of Scottish scholars he traces the development and subsequent loss of a Scottish identity. While individual contributions have been extraordinary and brilliant, the author concludes that Scottish jurists have not yet had a lasting influence on the literature of international law. But as he also notes, "as long as the proposal for Scottish independence remains a live issue in British politics, it is not entirely academic to consider what a Scottish approach to international law would look like" (p. 43).

The second article offers a thoughtful comparison of regional and universal norms concerning individual rights (pointing out for example the chasm separating the developed and developing worlds in their understanding of what constitutes "basic" rights) and the third examines the derogation of human rights in emergency situations. This latter study concludes ominously that there is little to stop a determined government from limiting human rights if it believes itself to be in an emergency situation.

The next article reviews the bilateral accords governing foreign fishing in Canadian waters and includes useful maps showing the limits of Canadian fishing zones on the East and West Coast. The article is also a commentary on the Canadian contribution to international fishery law.

The status of agents on special mission in customary international law provides the focus of the fifth study. Modern diplomatic practices have involved the increasing use of such techniques as summit meetings, high-level talks, and "shuttle diplomacy" rather than the traditional channels of permanent diplomatic missions. The author concludes, following a review of state practice and the opinions of jurists, that special diplomatic agents generally receive all of the immunities usually accorded diplomats. This status, however, is widely regarded as being based on comity and appears to have no foundation in customary law.

The author of a valuable study examining the legal status of agreements

concluded by component units of federal states with foreign entities notes that there is minimum controversy concerning Swiss cantons and German *Länder*, but there is substantial debate on the status of agreements made by Canadian provinces and American states.

The final article is the first part of a study on the choice-of-law methods in the private international law of contract. Part two will appear in next year's volume. Dividing or condensing lengthy articles presents an awkward editorial dilemma. Selfish readers are likely to argue for more frequently appearing volumes of this high-quality *Yearbook*.

This volume's Notes and Comments section reviews such topics as the International Joint Commission, Canadian-European Community relations, the Permanent Court of Arbitration, and Jessup mooting competition as a teaching vehicle. There are also the regular sections on Canadian practice in international law and on book reviews.

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## BRIEFER NOTICES

*La guerre et le droit.* By Marie-Françoise Furet, Jean-Claude Martinez, and Henri Dorandeu. (Paris: Editions A. Pedone, 1979. Pp. 335. Bibliography.) The Geneva Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) has brought about more attention to the law of armed conflicts than any other event since the Hague Peace Conferences of 1899 and 1907. It also occasioned the present book which does not, however, confine itself to the issues of the conference. The first of its two parts deals with the traditional law of war, the second with humanitarian law. In the first part we find sections on the commencement and the end of war, belligerents and neutrals, armed forces and *franc-tireurs*, military and nonmilitary objects, and lawful and unlawful weapons. The second part discusses civilians and combatants, noninternational armed conflicts, internal disturbances and tensions, the protection of civilian objects, the dissemination and execution of humanitarian rules, and the sanctions in case of their violation.

The volume is neither an introduction to the law of armed conflicts nor a comprehensive treatise. Rather it has the character of a series of critical essays on some of the basic topics in this field of law with particular reference to the recent Geneva Conference. One of its principal aims is to place the law of armed conflicts in the context of social and technological change. The authors discuss, for instance, the disappearance of declarations of war, the substitutes for treaties of peace, the decline of the law of neutrality, the extension of the concept of military objects, the consequences of decolonization and of economic underdevelopment on humanitarian law, and the problems of guerrilla warfare and of wars of national liberation.

The approach chosen by the authors is best shown by the titles given to the two parts of the book, expressed as questions. The first part is entitled

"Men at War: Is the Law of War Out-Lived?" ("Les hommes en guerre: le droit de la guerre est-il dépassé?"). The second part bears the title "Man in War: Is Humanitarian Law Illusory?" ("L'homme dans la guerre: le droit humanitaire est-il illusoire?"). Both titles indicate that the authors primarily stress the difficulties and weaknesses of the existing law. In their conclusion they give an affirmative answer to the two questions; but they emphasize that the necessity of the law of armed conflicts is not called into question. As they say, war as a social phenomenon can hardly be disciplined by legal means. Although the reader may generally agree with the authors, the positive aspects of the law of armed conflicts are perhaps not sufficiently appreciated. On the whole, however, the book is an able and perceptive attempt to fathom some of the crucial problems of international law.

DIETRICH SCHINDLER  
*University of Zurich*

*The Dragon and the Eagle. A Study of U.S.-China Relations in Civil Air Transport.* By Jack C. Young. Occasional Papers/Reprints Series in Contemporary Asian Studies, Number 3—1979(24). (Baltimore: University of Maryland School of Law, 1979. Pp. 65. \$3.) As of this writing (October, 1980), more than 8 years after President Nixon's first visit to China and over a year since establishment of full diplomatic relations, there is still no regularly scheduled airline service by a U.S. airline into China or by a Chinese airline into the United States. An agreement between the two Governments to permit such services, however, was signed September 17, 1980, and establishment of service is imminent.

The book under review considers questions of international law and American foreign policy inherent in obtaining such an agreement without disrupting existing U.S.-Taiwan airline service. The survey of the problems, though brief, is adequate and clearly expounded, although much of it is now dated since the book was published shortly before full diplomatic recognition was announced in December 1978.

The book also deals with the need of the PRC to import and maintain civil aircraft, and the resulting conflict with Chinese Communist ideology of self-reliance. In this connection, there is a tracing of the history of American private interests in Chinese airlines between 1928 and 1948; of a Soviet-Chinese "joint stock airline" in 1950-54; of the abrupt withdrawal in 1960 of Soviet technical advisers; and of recent aircraft purchases carefully scattered, to avoid overdependence, among British, American, and Soviet models, together with an agreement with Rolls Royce to establish the manufacture of aircraft engines in China.

The author concludes that the United States should "avoid traditional ways and means" with respect to both the agreement for mutual airline services and the sales of aircraft and accompanying technology to China. Though only 65 pages long, the book is based on much useful information, as well as careful documentation, including numerous Chinese sources. It would serve as a good introduction to the subject of Chinese-American civil aviation relations.

WILLIAM E. O'CONNOR  
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*Grundsätze und Ziele der internationalen Raumordnung in Bezug auf Österreich.* By Herbert Miehsler. (Vienna: Österreichische Raumordnungskonferenz, 1977. Pp. 126. Summary in English, pp. 123-26.) The aim of this expert opinion is to examine the principles and goals of transfrontier regional planning (defined as "the comprehensive process for the creation or preservation of optimal circumstances for man's living conditions relating to space through goal-oriented measures of public administration relating to space," pp. 16, 124 ff.) originating in the international arena, which are binding or at least have a certain degree of authority for Austria.

Since systematic literature on this subject matter is relatively scarce, despite its rapidly growing importance, and since Miehsler treats not only the Austrian picture but also the theoretical aspects of international regional planning, his study will be of interest to a wider audience than its title might suggest. Its most important part from the practitioner's viewpoint, however, will be the list and description of all the international sources of principles and goals of transfrontier regional planning relevant to Austria, organized in five groups: bilateral treaties (no less than 82), multilateral treaties, international organs and organizations as standard-setting institutions, the acts of these institutions and, finally, informal regional understandings between organs of different states. These materials demonstrate fascinatingly how tight the texture of such international obligations and guidelines has already become, in order to preserve some amity in the heart of Europe.

BRUNO SIMMA  
*University of Munich*

*Il Primato del Diritto Comunitario e i Giudici Italiani.* By the Centro nazionale di prevenzione e difesa sociale. (Milan: Franco Angeli Editore, 1978. Pp. 377.) This volume owes its genesis to an apparent conflict between the Court of Justice of the European Communities and the Italian Constitutional Court on the power and duty of the Italian judge to "disapply" Italian statutes that conflict with Community law. Although both Courts agree that Community regulations must ultimately prevail over domestic legislation (at least if they do not violate constitutional guarantees of civil liberties) the Italian Constitutional Court insists<sup>1</sup> that the Italian judge must apply national statutes until they are formally repealed or annulled by the Constitutional Court. Conversely, the Court of Justice has adamantly held<sup>2</sup> that the Italian judge is bound to apply Community law despite the apparent existence of conflicting domestic legislation. The holding of the Italian Constitutional Court is predicated upon its constitutional monopoly over the invalidation of statutes enshrined in Article 134 of the Italian Constitution and its unwillingness to restrict the applicability of that norm by resort to Article 11 of the Constitution which provides for the transfer of legislative powers to international entities such as the European Communities. Conversely, the Court of Justice holds that the participation in

<sup>1</sup> Frontini e altri c. Ministero delle Finanze, Judgment of Dec. 27, 1973 Nr. 183; Soc. I.c.I.c. c. Ministero del commercio estero, Judgment of Oct. 30, 1975 Nr. 232.

<sup>2</sup> SpA. Simmenthal c. l'Amministrazione delle finanze dello Stato, Judgment of March 9, 1978, [1979] ECR 777, Case 92/78, and subsequent judgments, especially Hauer v. Land Rheinland-Pfalz, Judgment of December 13, 1979, Case 44/79 (not yet officially reported).

the European Communities excludes the retention of inconsistent constitutional limitations. The resulting dilemma for the Italian judges prompted the Centro nazionale to collect the opinions of 24 prominent Italian jurists,<sup>3</sup> assessing the strength of the clash between the two courts and suggesting possible solutions. The different essays are critically summarized in an introduction written by two other law professors and the entire work is prefaced by the present Italian advocate general at the Court of Justice. The work which in last analysis deals with a crisis of confidence reflects the concern of the Italian legal profession with the progress of integration without sacrifice of basic features of the Italian legal system. It furnishes valuable insights into possible constitutional obstacles to a smooth course of that process.<sup>4</sup>

STEFAN A. RIESENFELD  
Board of Editors

*Soviet Intervention in Czechoslovakia, 1968. Anatomy of a Decision.* By Jiri Valenta. (Baltimore: The Johns Hopkins University Press, 1979. Pp. xii, 208. Index. \$12.95.) This is an imaginative, thoughtful, and careful case study, an original and substantive contribution to the ongoing research on Soviet decisionmaking. Given the proverbial dearth of data on the subject, the author does analytical wonders with the limited information—though gathered from many different sources—that he painstakingly brings to bear on the issue of Soviet invasion. The author's major argument is further fortified by connecting links to situational contexts, historical antecedents, and external developments on several levels. He confirms this reviewer's impression that the Soviet decision to intervene in Czechoslovakia was a lengthy and complex process. Even to the Soviet leaders, the decision to invade was unthinkable until it was made; then it became inevitable. It is possible that with time, we will learn more. I doubt, however, that new information will seriously undermine the conclusion of this study.

The author employs the bureaucratic political paradigm as his conceptual tool. He adapts the model to the Soviet context with some important modifications, given the difference between Soviet politics and the Western pluralistic model for which the concept was originally developed.

The author chooses an important case on which to focus his study of the Soviet decision to invade. And viewing that decision through the bureaucratic politics model lenses, he asks the pertinent questions he wishes to answer: Who were the central decisionmakers? What were the roles of their allies and coalitions? Why did they decide to intervene? On the basis of what information and what perceptions? And in the course of the study the author answers these questions carefully, one by one and jointly, to this reader's satisfaction. (And when he does not have the pertinent answer, he says so.)

Soviet occupation of Afghanistan underlined for me many parts of Valenta's book. I returned to it, read it again, and have gained better

<sup>3</sup> The collaborators consist of 2 former members of the Court of Justice, 1 member of the Court of Cassation, 1 advocate general at that Court, the chief prosecutor at the Appellate Court of Turin, and 19 professors of international law, international organization or public law.

<sup>4</sup> See also Panebianco, *Europäische Integration und italienische Verfassungsordnung*, 40 ZaöRV 76 (1980).

understanding of this new use of Soviet intervention. I recommend his book to others, for the same reason.

JAN F. TRISKA  
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*The Status and Protection of Aliens in Taiwan, Republic of China.* By Hsin-sun Liu. (Taipei: Asia & the World Forum, 1978. Pp. 169. \$2.25.) Despite the existence of a large alien community of more than 15,000 people in Taiwan, Republic of China (ROC), there has been no comprehensive and systematic study of their legal status in Taiwan. This book by Hsin-sun Liu is an attempt to fill this gap. It covers all major problems an alien in Taiwan or a prospective visitor to Taiwan may encounter: the ROC's policy toward admission, exclusion and extradition of aliens (pp. 27-51), protection of personal security of aliens (pp. 53-81), right of aliens to acquire and utilize property in Taiwan (pp. 83-103), right to work (pp. 105-12), access to economic activities (pp. 113-37), and access to Chinese courts (pp. 139-52).

Among these 15,000 aliens in the ROC, at least one-third are Americans. While this book was written before the United States terminated diplomatic relations with the ROC on January 1, 1979, almost all the analysis contained in the book remains valid as the United States and the ROC have agreed to maintain all existing treaties or agreements<sup>1</sup> between them, including the 1946 Treaty of Friendship, Commerce and Navigation.<sup>2</sup> However, one small part of the book dealing with the status of U.S. forces in Taiwan is now out of date as all U.S. forces withdrew from Taiwan on April 30, 1979, pursuant to a condition put forth by the PRC and accepted by the United States in establishing diplomatic relations with the PRC.<sup>3</sup>

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#### CORRECTION

The *Journal* regrets the misspelling of Robert A. Friedlander's name on the contents page of the July 1980 issue.

#### BOOKS RECEIVED\*

##### *Public International Law (General)*

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*Polish Yearbook of International Law*, Vol. IX, 1977-1978. Wrocław: Polish Academy of Sciences, 1980. Pp. 335.

<sup>1</sup> Section 4(c) of the Taiwan Relations Act of 1979, 93 Stat. 14, provides: "For all purposes . . . the Congress approves the continuation in force of all treaties and other international agreements . . . entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979. . . ."

<sup>2</sup> 63 Stat. 1299, TIAS No. 1871, 25 UNTS 69.

<sup>3</sup> See President Carter's statement of December 15, 1978, 79 DEP'T STATE BULL. 26 (1979).

\* Mention here neither assures nor precludes later review.

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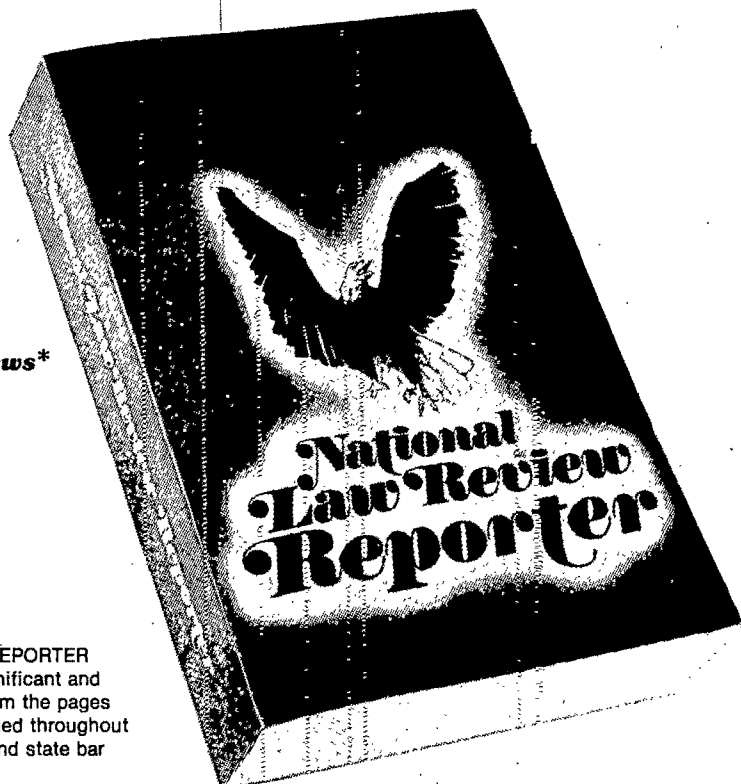
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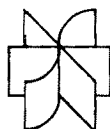
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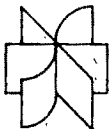
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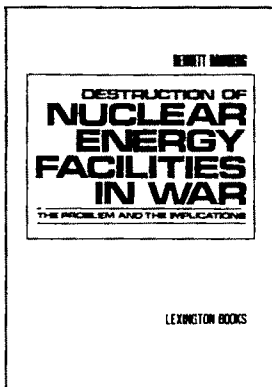
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